





# THE CIVIL COURT MANUAL

(IMPERIAL ACTS)

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## PREFACE

Since the publication of the Sixth edition enactments of great importance, such as The Motor Vehicles Act IV of 1939, the Indian Income-tax (Amendment) Act VII of 1939, The Trade Marks Act (V of 1940), The Arbitration Act (X of 1940), The Excess Profits Tax Act (XV of 1940) have been passed. So far as the Indian Companies Act, the Indian Insurance Act, The Indian Income-tax Act and the Excess Profits Tax Act are concerned, numerous Amending Acts have been added to the Statute book in quick succession. These have been incorporated in this edition.

As usual, the demand for a new edition was persistent and orders were registered far in advance. We have therefore ventured to bring out the seventh edition, despite the abnormal increase in the prices of all Printing materials owing to the present war conditions.

It occurred to us that, in view of the numerous enactments which have now been added and the consequent increase in the bulk, it would be easier to handle the publication if it is published in three volumes. The first volume contains alphabetically the Acts from A to C. The remaining Acts will be distributed evenly between the other two volumes.

All Acts of any importance published up to the end of March 1942 have been incorporated. Subsequent Acts passed in 1942 up to the date of publication have also been included in the second and third volumes. The case-law has been brought up to the end of February, 1942.

The Provincial Amendments of the Court-Fees Act have been put in the form of an Appendix to the first volume, and those relating to the Stamp Act will be added at the end of the third volume.





# ALPHABETICAL LIST

## OF

### ACTS INCORPORATED IN THIS VOLUME

	PAGE
Government of India (Adaptation of Acts of Parliament) Order, 1937..	1
„ (Adaptation of Indian Laws) Order, 1937 ..	2
„ (Adaptation of Indian Laws) Supplementary Order, 1937 ..	5
Orissa Laws Regulation (I of 1936) ..	6
Orissa Consolidation of Appeals Regulation (III of 1936) ..	13
Government of India (Federal Court) Order, 1937 ..	13
„ (High Court Judges) Order, 1937 ..	20
Acting Judges Act (XVI of 1867) ..	28
Administrator-Generals' Act (III of 1913) ..	29
Agricultural Produce Cess Act (XXVII of 1940) ..	48
Agricultural Produce (Grading and Marking) Act (I of 1937) ..	50
Agriculturists' Loans Act (XII of 1884) ..	52
Aircraft Act (XXII of 1934) ..	53
Anand Marriage Act (VII of 1909) ..	60
Ancient Monuments Preservation Act (VII of 1904) ..	60
Apprentices Act (XIX of 1850) ..	69
Arbitration Act (X of 1940) ..	77
Arbitration (Protocol Convention) Act (VI of 1937) ..	143
Arya Marriage Validation Act (XIX of 1937) ..	148
Bankers' Books Evidence Act (XVIII of 1891) ..	149
Bar Councils Act (XXXVIII of 1926) ..	152
Berar Laws Act (IV of 1941) ..	171
Bills of Lading Act (IX of 1856) ..	175
Births, Deaths and Marriages Registration Act (VI of 1886) ..	177
Bronze Coin (Legal Tender) Act (XXII of 1918) ..	187
Cantonments Act (II of 1924) ..	188
Cantonments (House Accommodation) Act (VI of 1923) ..	286
Carriage by Air Act (XX of 1934) ..	299
Carriage of Goods by Sea Act (XXVI of 1925) ..	306
Carriers Act (III of 1865) ..	311
Caste Disabilities Removal Act (XXI of 1850) ..	317
Census Act (XXIV of 1939) ..	320
Central Board of Revenue Act (IV of 1924) ..	324
Charitable Endowments Act (VI of 1890) ..	325
Charitable and Religious Trusts Act (XIV of 1920) ..	329



	PAGE
Child Marriage Restraint Act (XIX of 1929)	335
Children (Pledging of Labour) Act (II of 1933)	347
Christian Marriage Act (XV of 1872)	349
Civil Procedure Code (V of 1908)	376
Coinage Act (III of 1906)	1530
Colonial Courts of Admiralty (India) Act (XVI of 1891)	1537
Indian and Colonial Divorce Jurisdiction Act, 1926, 16 and 17, Geo. V, C. 40	1538
Rules under	1543
Commercial Documents Evidence Act (XXX of 1939)	1546
Companies Act (VII of 1913)	1548
Companies (Foreign Interests) Act (XX of 1918)	1814
Contempt of Courts Act (XII of 1926)	1815
Contract Act (IX of 1872)	1827
Conveyance of Land Act (XXXI of 1854)	1994
Co-operative Societies Act (II of 1912)	1997
Copyright Act (III of 1914)	2019
Copyright Act (Applicable to British India) Act, 1911	2027
Court-Fees Act (VII of 1870)	2051
Court-Fees (Amendment) Act (VII of 1910)	2142
Crown Grants Act (XV of 1895)	2142
Currency Act (IV of 1927)	2144
Cutchi Memons Act (X of 1938)	2144
APPENDIX	
Assam Court-Fees (Amendment) Act (II of 1922)	2146
Bengal " " (IV of 1922)	2151
" " (Amendment No 2), 1922	2156
Bengal Court-Fees (Second Amendment) (XI of 1935)	2161
Bihar and Orissa Court-Fees (Amendment) Act (II of 1922)	2163
Bihar Court-Fees (Amendment) Act (XVII of 1939)	2167
Bombay Finance Act (II of 1932)	2167
Central Provinces Court-Fees (Amendment) Act (XVI of 1935)	2176
Madras Court-Fees (Amendment) Act (V of 1922)	2180
Punjab Court-Fees (Amendment) Act (VII of 1922)	2192
" " (IV of 1939)	2196
U. P. Court-Fees (Amendment) Act (III of 1932)	2197
" " " (III of 1933)	2202
" " " (II of 1936)	2216
" " " (XIX of 1938)	2205
U. P. Stamp (Amendment) Act (XVIII of 1938)	2214
U. P. Court-Fees (Amendment) Act	2221
Madras Hindu Religious Endowments Act (II of 1927)	2190
Madras City Civil Court Act (VII of 1892)	2191



# CHRONOLOGICAL LIST OF ACTS INCORPORATED IN THIS VOLUME

---

		PAGE
XIX of 1850	.. Apprentices Act ..	69
XXI of 1850	.. Caste Disabilities Removal Act ..	317
XXXI of 1854	.. Conveyance of Land Act ..	1994
IX of 1856	.. Bills of Lading Act ..	175
III of 1865	.. Carriers Act ..	311
XVI of 1867	.. Acting Judges Act ..	28
VII of 1870	.. Court-Fees Act ..	2051
IX of 1872	.. Contract Act ..	1827
XV of 1872	.. Christian Marriage Act ..	349
XII of 1884	.. Agricultural Loans Act ..	52
VI of 1886	.. Births, Deaths and Marriages Registration Act ..	177
VI of 1890	.. Charitable Endowments Act ..	325
XVI of 1891	.. Colonial Courts of Admiralty (India) Act ..	1537
XVIII of 1891	.. Bankers' Books Evidence Act ..	149
VII of 1892	.. Madras City Civil Court Act ..	2191
XV of 1895	.. Crown Grants Act ..	2142
VII of 1904	.. Ancient Monuments Preservation Act ..	60
III of 1906	.. Coinage Act ..	1530
V of 1908	.. Civil Procedure Code ..	376
VII of 1909	.. Anand Marriage Act ..	60
VII of 1910	.. Court-Fees (Amendment) Act ..	2142
1911	.. Copyright Act applicable to British India ..	2027
II of 1912	.. Co-operative Societies Act ..	1997
III of 1913	.. Administrator-General's Act ..	29
VII of 1913	.. Companies Act ..	1548
III of 1914	.. Copyright Act ..	2019
XX of 1918	.. Companies (Foreign Interests) Act ..	1814
XXII of 1918	.. Bronze Coin (Legal Tender) Act ..	187
XIV of 1920	.. Charitable and Religious Trusts Act ..	329
II of 1922	.. Assam Court-Fees (Amendment) Act ..	2146
IV of 1922	.. Bengal Court-Fees (Amendment) Act ..	2151
1922	.. Bengal Court-Fees (Amendment No. II) Act ..	2156
II of 1922	.. Bihar and Orissa Court-Fees (Amendment) Act ..	2163
V of 1922	.. Madras Court-Fees (Amendment) Act ..	2180
VII of 1922	.. Punjab Court-Fees (Amendment) Act ..	2192
VI of 1923	.. Cantonments (House Accommodation) Act ..	286



		PAGE
II of 1924	.. Cantonments Act	188
IV of 1924	.. Central Board of Revenue Act	324
XXVI of 1925	.. Carriage of Goods by Sea Act	306
(1926) 16 & 17 Geo. V, c. 40	Indian and Colonial Divorce Jurisdiction Act	1538
"	.. Rules under Colonial Jurisdiction Act,	1543
XII of 1926	.. Contempt of Courts Act	1815
XXXVIII of 1926	.. Bar Councils Act	152
II of 1927	.. Madras Hindu Religious Endowments Act.	2190
IV of 1927	.. Currency Act	2144
XIX of 1929	.. Child Marriage Restraint Act	335
II of 1932	.. Bombay Finance Act	2167
III of 1932	.. U. P. Court-Fees (Amendment) Act	2197
II of 1933	.. Children (Pledging of Labour) Act	347
III of 1933	.. U. P. Court-Fees (Amendment) Act	2202
XXII of 1934	.. Aircraft Act	53
XX of 1934	.. Carriage by Air Act	299
XI of 1935	.. Bengal Court-Fees (Second Amendment) Act	2161
XVI of 1935	.. C.P. Court-Fees (Amendment) Act	2176
I of 1936	.. Orissa Laws Regulation	6
II of 1936	.. U. P. Court-Fees (Amendment) Act	2216
III of 1936	.. Orissa Consolidation of Appeals Regulation.	13
1937	.. Government of India (Adaptation of Acts of Parliament), Order	1
1937	.. Government of India (Adaptation of Indian Laws ) Order	2
1937	.. Government of India (Adaptation of Indian Laws) Supplementary Order	5
1937	.. Government of India (Federal Court) Order.	13
1937	.. Government of India (High Court Judges) Order	20
I of 1937	.. Agricultural Produce (Grading and Marking) Act	50
VI of 1937	.. Arbitration (Protocol Convention) Act	143
XIX of 1937	.. Arya Marriage Validation Act	148
X of 1938	.. Cutchi Memons Act	2144
XVIII of 1938	.. U. P. Stamp (Amendment) Act	2214
XIX of 1938	.. U. P. Court-Fees (Amendment) Act	2205
IV of 1939	.. Punjab Court-Fees (Amendment) Act	2196
XVII of 1939	.. Bihar Court-Fees (Amendment) Act	2167
XXIV of 1939	.. Census Act	320
XXX of 1939	.. Commercial Documents Evidence Act	1546
X of 1940	.. Arbitration Act	77
XXVII of 1940	.. Agricultural Produce Cess Act	48
IV of 1941	.. Berar Laws Act	171
IX of 1941	.. U. P. Court-Fees (Amendment) Act	2221



# THE CIVIL COURT MANUAL (IMPERIAL ACTS)

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THE GOVERNMENT OF INDIA (ADAPTATION OF ACTS  
OF PARLIAMENT) ORDER, 1937.

AT THE COURT AT BUCKINGHAM PALACE

*The 18th day of March, 1937.*

*Present:—*THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS by sub-section (5) of section three hundred and eleven of the Government of India Act, 1935 (hereafter in the recitals to this Order referred to as "the Act") it is provided that any Act of Parliament containing references to India or any part thereof, to countries other than or situate outside India or other than or situate outside British India, to His Majesty's dominions, to a British possession, to the Secretary of State in Council, to the Governor-General in Council, to a Governor in Council or to Legislatures, courts or authorities in, or to matters relating to the government or administration of, India, or British India, shall have effect subject to such adaptations and modifications as His Majesty in Council may direct, being adaptations and modifications which appear to His Majesty in Council to be necessary or expedient in consequence of the provisions of the Act or of the Government of Burma Act, 1935:

AND WHEREAS by sub-section (2) of section one hundred and seventy-eight of the Act it is provided that all enactments relating to any such loans, guarantees and other financial obligations of the Secretary of State in Council as are referred to in sub-section (1) of that section shall in relation to those loans, guarantees and obligations continue to have effect with certain substitutions and with such other modifications and such adaptations as His Majesty in Council may deem necessary:

AND WHEREAS under section three hundred and twenty of the Act His Majesty by Order in Council has appointed the first day of April, nineteen hundred and thirty-seven, as the date on which the provisions of the Act, other than the provisions of Part II thereof, are, subject to any exceptions mentioned in the Order, to come into force:

AND WHEREAS a draft of this Order has been laid before Parliament in accordance with the provisions of sub-section (1) of section three hundred and nine of the Act and an address has been presented to His Majesty by both Houses of Parliament praying that an Order may be made in the terms of this Order:



NOW, THEREFORE, His Majesty, in the exercise of the said powers and of all other powers enabling him in that behalf, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:—

1. This Order may be cited as THE GOVERNMENT OF INDIA (ADAPTATION OF ACTS OF PARLIAMENT) ORDER, 1937, and shall come into operation on the first day of April, nineteen hundred and thirty-seven.

2. The Acts of Parliament referred to in the Schedule to this Order shall have effect subject to the adaptations and modifications specified in the said Schedule.

3. In any Act of Parliament passed before the commencement of this Order and not referred to in the Schedule thereto references to the revenues of India shall be construed, in relation to the period after the establishment of the Federation of India, as references to the revenues of the Federation and, in relation to the period between the commencement of Part III of the Government of India Act, 1935, and the establishment of the Federation, as references to the revenues of the Governor-General in Council.

4. The provisions of this order which adapt or modify any Act by transferring functions to another authority shall not render invalid any order, bye-law, rule or regulation duly made, or anything duly done, before the commencement of this Order and any such order, bye-law, rule, regulation or thing may be revoked, varied or undone in like manner, to the like extent and in the like circumstances as orders, bye-laws, rules, regulations or things made or done by the authority to which the functions are transferred.

5. Nothing in the Aden Colony Order, 1936, shall be construed as requiring that references in Acts of Parliament to India or British India shall continue to be construed as including references to Aden.

## THE SCHEDULE.

### PART I.

*[Omitted as the relevant amendments have been carried out in their appropriate places].*

## THE GOVERNMENT OF INDIA (ADAPTATION OF INDIAN LAWS) ORDER, 1937.

*N.B.—The Acts and Regulations contained in these volumes are to be taken as subject to the amendments made by the Government of India (Adaptation of Indian Laws) Order, 1937.*

AT THE COURT AT BUCKINGHAM PALACE.

*The 18th day of March, 1937.*

*Present:—THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.*

WHEREAS by section two hundred and ninety-three of the Government of India Act, 1935 (hereafter in the recitals to this Order referred to as "the Act"), His Majesty is empowered by Order in Council to provide that as from such date as may be specified in the order any law in force in British India or in any part of British India shall, until repealed or amended by a competent legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of the Act:



AND WHEREAS a draft of this Order has been laid before Parliament in accordance with the provisions of sub-section (1) of section three hundred and nine of the Act and an address has been presented to His Majesty by both Houses of Parliament praying that an Order may be made in the terms of this Order:

NOW, THEREFORE, His Majesty, in the exercise of the said powers and of all other powers enabling him in that behalf, is pleased by and with the advice of His Privy Council to order, and it is hereby ordered as follows:—

1. This Order may be cited as THE GOVERNMENT OF INDIA (ADAPTATION OF INDIAN LAWS) ORDER, 1937, and shall come into operation on the first day of April, nineteen hundred and thirty-seven.

2. (1) In this Order the expression "Indian law" means a law as defined in section two hundred and ninety three of the Act.

(2) The Interpretation Act, 1889, applies for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.

3. The Indian Laws mentioned in the Schedules to this Order shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to the adaptations and modifications directed by those Schedules to be made therein or, if it is so directed, shall cease to have effect.

4. (1) Whenever an expression mentioned in the first column of the table hereinunder printed occurs (otherwise than in a title or preamble or in a citation or description of an enactment) in a Central or Provincial Act or Regulation, whether an Act or Regulation mentioned in the Schedules to this Order or not, then, unless that expression is by this Order expressly directed to be otherwise adapted or modified, or to stand unmodified, or to be omitted, there shall be substituted therefor the expression set opposite to it in column two of the said table.

*Table of General Adaptations.*

(1)

(2)

Governor-General of India in Council: Governor-General of India: Governor-General in Council: Government of India.

Governor in Council: Governor (except in the expression "Governor's Province"): Lieutenant Governor in Council: Lieutenant Governor: Chief Commissioner (except in the expression "Chief Commissioner's Province"): Local Government: Local Administration.

Gazette of India: Local official gazette: local gazette: any other expression denoting a gazette in which official notices of a government are published, not being the gazette of a district or other sub-division of a Province.

Official Gazette.

Advocate High Court

Jammu & Kashmir

Any reference to the Governor (or Lieutenant Governor) of a named Province in Council shall be treated for the purposes of this paragraph as if it were a reference to the Governor (or Lieutenant Governor) in Council of that Province.

(2) A direction in the Schedules to this Order that a specified Indian law or section or portion of an Indian law shall stand unmodified shall be construed merely as a direction that it is not to be modified or adapted in accordance with the foregoing provisions of this paragraph.



5. (1) Where this Order requires that in any specified Indian law, or in any section or other portion of an Indian law, certain words shall be substituted for certain other words or that certain words shall be omitted, that substitution or omission, as the case may be, shall, except where it is otherwise expressly provided, be made wherever the words referred to occur in that law, or, as the case may be, in that section or portion.

(2) Where this Order requires that in any Indian law a plural noun shall be substituted for a singular noun or *vice versa*, or a masculine noun for a neuter noun or *vice versa*, there shall be made also in any verb or pronoun in the sentence in question such consequential amendment as the rules of grammar may require.

6. (1) The following provisions shall have effect where any Indian law which under this Order is to be adapted or modified has before the commencement of this Order been amended, either generally or in relation to any particular area, by the insertion or omission of words, or the substitution of words for other words:—

(a) Effect shall first be given in the amending law to any adaptation or modification required by paragraphs three and five of this Order to be made therein;

(b) the original law shall then be amended, either generally or, as the case may be, in its application to the particular area, so as to give effect to the directions contained in the amending law or, where any adaptation or modification has fallen to be made under sub-paragraph (a), in that law as so adapted or modified; and

(c) all adaptations or modifications required by this Order to be made in the original law shall then be made in that law as so amended, except so far as in the case of any particular area they may be inapplicable.

(2) In this paragraph references to the amendment of a law by the insertion or omission of words or the substitution of words do not include references to an amendment which is effected merely by directing that certain words shall be construed in a particular manner.

7. Subject to the foregoing provisions of this Order, any reference by whatever form of words in any Indian law in force immediately before the commencement of this Order to an authority competent at the date of the passing of that law to exercise any powers or authorities, or discharge any functions, in any part of British India shall, where a corresponding new authority has been constituted by or under any Part of the Government of India Act, 1935, for the time being in force, have effect until duly repealed or amended as if it were a reference to that new authority.

8. In any Indian law in force immediately before the commencement of this Order any reference by name or description to any territory shall, unless the contrary intention appears or unless it has been, or is by this Order, otherwise expressly provided, be construed as a reference to the territory which bore that name or answered to that description at the date when the enactment containing that name or description came into operation:

Provided that in the application of any enactment to Madras, Bombay, Bihar, or the Central Provinces, references in that enactment to Madras, Bombay, Bihar or the Central Provinces, as the case may be, shall be construed as exclusive of so much of those Provinces respectively as was separated therefrom on the constitution of the Provinces of Orissa and Sind.

9. The provisions of this Order which adapt or modify Indian laws so as to alter the manner in which, the authority by which, or the law under or in

#### NOTES.

Rules 9 and 10.—Where by a notification

the Agent, East India Railway, has been appointed as the agent of the Secretary of



accordance with which, any powers are exercisable, shall not render invalid any notification, order, commitment, attachment, bye-law, rule or regulation duly made or issued, or anything duly done, before the commencement of this Order; and any such notification, order, commitment, attachment, bye-law, rule, regulation or thing may be revoked, varied or undone in the like manner, to the like extent and in the like circumstances as if it had been made, issued or done after the commencement of this Order by the competent authority and under and in accordance with the provisions then applicable to such a case.

10. Save as provided by this Order, all powers which under any law in force in British India, or in any part of British India, were immediately before the commencement of Part III of the Government of India Act, 1935, vested in, or exercisable by, any person or authority shall continue to be so vested or exercisable until other provision is made by some legislature or authority empowered to regulate the matter in question.

11. Nothing in this Order shall affect the previous operation of, or anything duly done or suffered under, any Indian law, or any right, privilege, obligation or liability already acquired, accrued or incurred under any such law, or any penalty, forfeiture or punishment incurred in respect of any offence already committed against any such law.

12. For the avoidance of doubt it is hereby declared that—

(a) nothing in this Order transferring or assigning any functions to the Central Government shall be construed as excluding those functions from the operation of section one hundred and twenty-three or section one hundred and twenty-four of the Government of India Act, 1935;

(b) the transfer by this Order to a Provincial Government of any jurisdiction therefore exercisable by the Local Government of the Province shall not be construed as excluding that jurisdiction from the operation of sub-section (2) of section two hundred and ninety-six of the said Act;

(c) nothing in this Order shall affect the provisions of any Order in Council for the time being in force made under section one hundred and fifty-eight, section one hundred and fifty-nine or section one hundred and sixty of the said Act (which empower Orders to be made regulating the relations of India and Burma as to their monetary systems, relief from double taxation, customs, and ancillary and related matters), or under any corresponding provisions in the Government of Burma Act, 1935; and

(d) no repeal effected by this Order shall affect the operation of subparagraph (2) of paragraph fifteen of the Government of India (Commencement and Transitory Provisions) Order, 1936.

[Schedule omitted as the amendments have been carried out in the Main Acts.]

## THE GOVERNMENT OF INDIA (ADAPTATION OF INDIAN LAWS) SUPPLEMENTARY ORDER, 1937.

AT THE COURT AT BUCKINGHAM PALACE.

[29th July, 1937.]

*Present:*—THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS by section two hundred and ninety-three of the Government of India Act, 1935 (hereafter in the recitals to this Order referred to as "the Act"),

### NOTES.

State to receive processes in respect of cases concerning the East India Railway and where after the Government of India Act, 1935, no Crown pleader has been appointed, then by virtue of Rr. 9 and 10 of the Government of India (Adaptation of Indian Laws) Order,

the Agent, East India Railway, continues to be the Agent of the Secretary of State and service of notice on him in cases concerning the East India Railway is proper service. I.L.R. (1939) All. 392=184 I.C. 948=1939 A.W.R. (H.C.) 216=1939 A.L.J. 154=A.I.R. 1939 All. 277.



His Majesty is empowered by Order in Council to provide that as from such date as may be specified in the Order any law in force in British India or in any part of British India shall, until repealed or amended by a competent legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of the Act:

AND WHEREAS in exercise of the said powers an Order in Council called the Government of India (Adaptation of Indian Laws) Order, 1937 (hereafter in this Order referred to as "the Principal order") has been made:

AND WHEREAS by sub-section (2) of section three hundred and nine of the Act His Majesty in Council is empowered to vary any Order in Council previously made under the Act:

AND WHEREAS a draft of this Order has been laid before Parliament in accordance with the provisions of sub-section (1) of section three hundred and nine of the Act and an address has been presented to His Majesty by both Houses of Parliament praying that an Order may be made in the terms of this Order:

NOW, THEREFORE, His Majesty, in the exercise of the said powers, and of all other powers enabling him in that behalf, is pleased by and with the advice of His Privy Council to order, and it is hereby ordered, as follows:—

1. This Order may be cited as THE GOVERNMENT OF INDIA (ADAPTATION OF INDIAN LAWS) SUPPLEMENTARY ORDER, 1937.

2. The Schedules to the Principal Order shall be modified as directed in the Schedule to this Order, and shall have effect, and be deemed always to have had effect, as so modified.

#### THE SCHEDULE.

*Modifications of Schedule I to the Principal Order.*

*[Omitted as the amendments have been carried out in the Main Acts.]*

### THE ORISSA LAWS REGULATION (I OF 1936)

*Fort St. George, the 7th April, 1936.*

*New Delhi, the 1st April, 1936.*

No. 143|36-P.—WHEREAS by the Government of India (Constitution of Orissa) Order, 1936, His Majesty has been pleased to direct that the provisions of section 71 of the Government of India Act (except sub-section (4) thereof) hereinafter called "the said section", shall apply to the whole of Orissa;

AND WHEREAS the Local Government of Orissa has proposed to the Governor-General in Council drafts of the following Regulations, together with the reasons for proposing the same;

AND WHEREAS the Governor-General in Council has taken the said drafts and reasons into consideration and has approved the drafts and the same have received the assent of the Governor-General on the first day of April, 1936.

In pursuance of the direction contained in sub-section (2) of the said section, the said Regulations are published in the Gazette of India.

#### REGULATION No. I OF 1936.

*A Regulation to declare the law in force in the Province of Orissa.*

WHEREAS it is expedient to declare the law in force in the Province of Orissa; It is hereby enacted as follows:—



Short title, extent and commencement.

1. (1) This Regulation may be called THE ORISSA LAWS REGULATION, 1936.

(2) It extends to the whole of the Province of Orissa except the districts of Angul and the Khondmals and the tracts of country specified in section 2 of the Ganjam and Vizagapatam Act, 1839.

(3) It shall come into force on the 1st day of April, 1936.

Definition.

2. In this Regulation the expression "areas transferred to Orissa" means areas transferred to the Province of Orissa by the Government of India (Constitution of Orissa) Order, 1936.

*Cesser of the Madras District Police Act, 1859, and extension of the Police Act, 1861.*

Cesser of the Madras District Police Act, 1859, and extension of the Police Act, 1861.

3. (1) The Madras District Police Act, 1859, shall cease to have effect and the Police Act, 1861, shall take effect in the areas transferred to Orissa from the Presidency of Madras.

(2) All appointments, rules and orders made, powers and duties conferred or imposed and all other things done under the Madras District Police Act, 1859, shall be deemed, so far as may be, to have been respectively made, conferred, imposed or done under the Police Act, 1861.

Cesser of the Madras Civil Courts Act, 1873, and the Central Provinces Courts Act, 1917, and extension of the Bengal, Agra and Assam Civil Courts Act, 1887.

4. (1) The Madras Civil Courts Act, 1873, and the Central Provinces Courts Act, 1917, shall cease to extend and the Bengal, Agra and Assam Civil Courts Act, 1887, shall extend to the areas transferred to Orissa from the Presidency of Madras and the Central Provinces.

(2) All Courts constituted, appointments, rules and orders made, jurisdiction and powers conferred and other things done under the Madras Civil Courts Act, 1873, or the Central Provinces Courts Act, 1917, shall, so far as may be, be deemed to have been respectively constituted, made, conferred or done under the Bengal, Agra and Assam Civil Courts Act, 1887.

Cesser of the Central Provinces Local Self-Government Act, 1920, and extension of the Central Provinces Local Self-Government Act, 1883.

5. (1) The Central Provinces Local Self-Government Act, 1920, shall cease to extend and the Central Provinces Local Self-Government Act, 1883, is hereby extended to the areas transferred to Orissa from the Central Provinces.

(2) All notifications, orders, schemes, rules, forms and by-laws issued, made or prescribed under the Central Provinces Local Self-Government Act, 1883, are hereby extended so far as they are applicable, to the areas transferred to Orissa from the Central Provinces.

(3) (a) The areas transferred to Orissa from the Central Provinces shall, for the purposes of the Central Provinces Local Self-Government Act, 1883, be deemed to be part of the district of Sambalpur and to be under the control and administration of the Sambalpur District Council.

(b) The Provincial Government may nominate not more than three persons to be members of the Sambalpur District Council to represent the aforesaid areas, and the persons so nominated shall, notwithstanding anything contained in the Central Provinces Local Self-Government Act, 1883, or the rules made thereunder, be deemed to be members of the Sambalpur District Council, and shall hold office as such members until representatives of the said areas are elected, in accordance with the Central Provinces Local Self-Government Act, 1883, and the rules made thereunder.



Repeal of section 3 of the Madras Deputy Collectors Act, 1914.

6. Section 3 of the Madras Deputy Collectors Act, 1914, is hereby repealed.

7. Subject to the provisions of paragraphs 16 and 17 of the Government of India (Constitution of Orissa) Order, 1936, all enactments other than enactments repealed by this Regulation made by any authority in British India and all notifications, orders, schemes, rules, forms and bye-laws issued, made or prescribed under such enactments, which were, immediately before the 1st day of April, 1936, in force in any of the areas comprised in the Province of Orissa, shall, in their application to such areas, be construed as if references therein by whatever form of words to the authorities, territory or gazettes mentioned in column 1 of the First Schedule were references to the authorities, territories or gazettes respectively mentioned or referred to opposite thereto in column 2 of the said Schedule.

8. Nothing in any law in force in the Province of Orissa which requires that the draft of any notification, order, scheme, rule, form or bye-law shall before being made by the Provincial Government be laid on the Table of, or be approved by, <sup>1</sup>[the Chamber or Chambers of a Provincial Legislature] or which requires that any objections or suggestions made in any manner whatsoever by <sup>1</sup>[such Chamber or Chambers] with respect to any such draft shall be considered by the Provincial Government or which confers on <sup>1</sup>[a Chamber or the Chambers of a Provincial Legislature] the power to make any modifications in any such draft, shall apply to any notification, order, scheme, rule, form or bye-law made or issued by the Government of Orissa.

Certain provisions of law to be inapplicable to notifications, orders, etc.

that the draft of any notification, order, scheme, rule, form or bye-law shall before being made by the Provincial Government be laid on the Table of, or be approved by, <sup>1</sup>[the Chamber or Chambers of a Provincial Legislature] or which requires that any objections or suggestions made in any manner whatsoever by <sup>1</sup>[such Chamber or Chambers] with respect to any such draft shall be considered by the Provincial Government or which confers on <sup>1</sup>[a Chamber or the Chambers of a Provincial Legislature] the power to make any modifications in any such draft, shall apply to any notification, order, scheme, rule, form or bye-law made or issued by the Government of Orissa.

9. The enactments specified in the Second Schedule are hereby repealed.

Repeal of certain enactments.

10. The enactments specified in the Third Schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

Amendments of certain enactments.

11. The enactments specified in the Fourth Schedule are hereby extended to the areas specified in the fourth column thereof.

Extension of the application of certain enactments.

12. All notifications, orders, schemes, rules, forms and bye-laws issued, made or prescribed under any of the enactments mentioned in column 3 of the Fourth Schedule, are hereby extended so far as the said notifications, orders, schemes, rules, forms and bye-laws are applicable, to the areas respectively mentioned against such enactment in column 4 of the said schedule.

Extension of applications, notifications, orders, etc.

13. Without prejudice to any provisions made in this behalf by or under the Government of India (Constitution of Orissa) Order, 1936, revenue proceedings pending immediately before the 1st day of April, 1936 (including cases where an appeal lies or will lie from a decision made or to be made) or in respect of any of the areas transferred to Orissa shall, unless the <sup>1</sup>[Provincial Government] otherwise directs in any case, be continued and disposed of as if the said Order had not been made.

Disposal of pending revenue proceedings.

14. Save as otherwise provided by this Regulation, the repeal by this Regulation of any enactment shall not affect any Act or Regulation in which such enactment has been applied,

Savings.

LEG. REF.

<sup>1</sup>Substituted by A. O., 1937.



incorporated or referred to, and this Regulation shall not affect the validity or invalidity, effect or consequences of anything already done or suffered, or any right, title, obligation or liability already acquired, accrued or incurred; or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand or any indemnity already granted, or the proof of any past act or thing, nor shall this Regulation affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised or derived by, in or from any enactment hereby repealed.

Nor shall the repeal by this Regulation of any enactment revive or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure, or other matter or thing not now existing or in force.

<sup>1</sup>[15. Reference in this Regulation, by whatever form of words, to any Provisions as to modifications made under S. 293 of the Government of India Act, 1935, Indian law in force immediately before the first day of April, 1936, shall, after the commencement of Part III of the Government of India Act, 1935, be construed as references to that law as adapted or modified under section 293 of that Act.]

#### FIRST SCHEDULE.

(See S. 7.)

##### *Construction of enactments.*

1. (a) The <sup>2</sup>[Local or Provincial Government] or the <sup>2</sup>[Local or Provincial Government] of Madras or the <sup>2</sup>[Local or Provincial Government] of Bihar and Orissa or except in connection with any revenue matter the <sup>2</sup>[Local or Provincial Government] of the Central Provinces.

(b) The Governor or the Governor of Madras or the Governor of Bihar and Orissa or the Governor of Central Provinces. <sup>3</sup>[\* \*]

2. All officers and official bodies not mentioned in the foregoing clauses (except the Treasurer of Charitable Endowments) whose authority extended (whether exclusively or not) immediately before the commencement of the Government of India (Constitution of Orissa) Order, 1936, over the territories or any part of the territories mentioned in the First Schedule to that order as well as over other territories.

3. (a) The Presidency of Madras.

(b) The Province of Behar and Orissa.

(c) The Central Provinces.

4. The Official Gazette or the Official Gazette of the Government of Madras, or the Official Gazette of the Government of Bihar and Orissa, or the Official Gazette of the Government of the Central Provinces, or the District Gazette published in the districts of Ganjam and Vizagapatam.

<sup>2</sup>[1. (a) The Provincial Government of Orissa.

(b) The Governor of Orissa.]

2. The same officers or official bodies or such other officers or official bodies as the Governor of Orissa may by notification in the Official Gazette under paragraph 17 of the Government of India (Constitution of Orissa) Order, 1936, direct.

3. (a) The areas specified from the Presidency of Madras and forming part of the Province of Orissa.

(b) The areas separated from the Province of Bihar and Orissa and forming part of the Province of Orissa.

(c) The areas separated from the Central Provinces and forming part of the Province of Orissa.

4. The Official Gazette of the Government of Orissa.

LEG. REF.  
<sup>1</sup> Inserted by A.O., 1937.

<sup>2</sup> Substituted by A.O., 1937.

<sup>3</sup> Omitted by A.O., 1937.



## SECOND SCHEDULE.

(See S. 9.)

## Enactments repealed.

Year. (1)	Number. (2)	Subject or short title. (3)
PART I.—BENGAL REGULATION.		
1812	XVIII	The Bengal Leases and Land Revenue Regulation, 1812.
PART II.—MADRAS REGULATIONS.		
1802	XIX	The Indian Civil Service (Madras) Loans Prohibition Regulation, 1802.
1819	II	The Madras State Prisoners Regulation, 1819.
1831	V	The Madras Stamp Penalties Regulation, 1831.
PART III.—ACT OF THE GOVERNOR-GENERAL IN COUNCIL.		
1912	II	The Co-operative Societies Act, 1912.
PART IV.—BENGAL ACTS.		
1864	VII	The Salt Act, 1864.
1873	I	The Bengal Salt Act, 1873.
1880	VI	The Bengal Drainage Act, 1880.
1895	III	The Land Records Maintenance Act, 1895.
PART V.—BIHAR AND ORISSA ACTS.		
1916	II	The Bihar and Orissa Medical Act, 1916.
1922	V	The Bihar and Orissa Private Irrigation Works Act, 1922.
1922	VI	The Bihar and Orissa Minor Irrigation Works Act, 1922.
PART VI.—MADRAS ACTS.		
1888	I	The Local Authorities Loans Act, 1888.
1914	IV	The Madras Medical Registration Act, 1914.
1920	IV	The Madras Children Act, 1920.
1923	V	The Madras State Aid to Industries Act, 1922.
1926	V	The Madras Borstal Schools Act, 1925.
1929	XI	The Madras Services Commission Act, 1929.
1931	V	The Madras Government Roads Traffic Control Act, 1931.
1934	X	The Madras Co-operative Land Mortgage Banks Act, 1934.
PART VII.—CENTRAL PROVINCES ACTS.		
1915	II	The Central Provinces Excise Act, 1915.
1916	I	The Central Provinces Medical Registration Act, 1916.
1916	II	The Central Provinces Land Alienation Act, 1916.
1920	III	The Central Provinces Primary Education Act, 1920.
1922	I	The Local Authorities Loans (Central Provinces Amendment) Act, 1922.
1922	II	The Central Provinces Municipalities Act, 1922.
1922	III	The High School Education Act, 1922.
1923	V	The Nagpur University Act, 1923.
1928	IX	The Central Provinces Borstal Act, 1928.
1928	X	The Central Provinces Children Act, 1928.
1929	I	The Opium (Central Provinces Amendment) Act, 1929.
1930	VII	The Co-operative Societies (Central Provinces Amendment) Act, 1930.
1932	I	The Central Provinces Motor Vehicles Taxation Act, 1932.
1933	IX	The Central Provinces Local Fund Audit Act, 1933.
1933	XII	The Central Provinces State Aid to Industries Act, 1933.

## THIRD SCHEDULE.

(See S. 10.).

## Enactments amended.

Year. (1)	Number. (2)	Subject or short title. (3)	Amendments. (4)
PART I.—BIHAR AND ORISSA ACTS.			
1925	II	The Bihar and Orissa Local Fund Audit Act, 1925.	In sub-section (1) of section 10 after the words "recoverable from him" the following shall be inserted, namely:—"as an arrear of land revenue under section 94 of the Central Provinces Land Revenue Act, 1881, or"



Year. (1)	Number. (2)	Subject or short title. (3)	Amendments. (4)
1930	II	The Bihar and Orissa Motor Vehicles Taxation Act, 1930.	After section 13 the following shall be inserted, namely:—“13-A. Notwithstanding anything contained in this Act a tax paid in respect of any motor vehicle under the Madras Motor Vehicles Taxation Act, 1931, in respect of which a licence has been granted under sub-cl. (1) of cl. (a) of sub-sec. (3) of section 5 of the Madras Motor Vehicles Taxation Act, 1931, by a licensing Officer appointed for the whole or any part of the areas transferred to Orissa from the Presidency of Madras shall be valid throughout the whole of Orissa and shall be deemed, so far as may be, to have been paid under this Act.”

## PART II.—MADRAS ACTS.

1926	III	The Madras Nurses and Midwives Act, 1926.	<p>1. In cl. (a) of section 2, for the word “Madras” the word “Orissa” shall be substituted.</p> <p>2. For section 3, the following shall be substituted, namely:—</p> <p>“3. (1) A Council shall be established and called the Orissa Nurses and Midwives Council, and such Council shall be a body corporate and have perpetual succession and a common seal, and shall by the said name sue and be sued.</p> <p>(2) The said Council shall consist of five members to be nominated by the Provincial Government.</p> <p>(3) The term of office of a member shall continue for so long as the Provincial Government may in the case of each member direct.</p> <p>(4) The name of every member nominated under this section shall be published by the Provincial Government in the Orissa Gazette.</p> <p>(5) No act of the Council or of its officers shall be deemed to be invalid by reason only that the number of members of the Council was, at the time of the performance of such act, less than five”</p> <p>3. S. 4 shall be omitted.</p> <p>4. For sub-section (2) of section 8, the following shall be substituted, namely:—</p> <p>“(2) Such appeal shall be heard by a Tribunal of three persons appointed by the Governor”</p> <p>5. In sub-section (2) of section 11,—(i), cl. (a) shall be omitted, and (ii) for cl. (e) the following shall be substituted, namely:—</p>
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Year. (1)	Number. (2)	Subject or short title. (3)	Amendments. (4)
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## PART II.—MADRAS ACTS.—(Contd.)

1931	III	The Madras Motor Vehicles Taxation Act, 1931.	“(e) regulating the procedure of the Tribunal appointed under sub-section (2) of section 8” 6. In section 15 the words a “Presidency Magistrate or” shall be omitted. After section 7 the following section shall be inserted, namely:— “8. Notwithstanding anything contained in this Act, a tax paid in respect of any motor vehicle for which a receipt has been granted under section 11 of the Bihar and Orissa Motor Vehicles Taxations Act, 1930, by a taxing officer appointed under that Act for the whole or any part of the areas transferred to Orissa from the Province of Bihar and Orissa or transferred to Orissa from the Central Provinces shall be valid throughout the whole of Orissa and shall be deemed, so far as may be, to have been paid under this Act.”
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## FOURTH SCHEDULE.

(See S. 11.)

*Enactments the application of which is extended.*

Year. (1)	Number. (2)	Subject or short title. (3)	Areas to which extended. (4)
PART I.—BENGAL REGULATIONS.			
1793	XXXVIII	The Indian Civil Service (Bengal) Loans Prohibition Regulation, 1793.	The areas transferred to Orissa from the Presidency of Madras and the Central Provinces.
1818	III	The Bengal State Prisoners Regulation, 1818.	The areas transferred to Orissa from the Presidency of Madras.
1823	VII	The Indian Civil Service (Bengal) Loans Prohibitions Regulation, 1823.	The areas transferred to Orissa from the Presidency of Madras and the Central Provinces.
PART II.—BIHAR AND ORISSA ACTS.			
1915	II	The Bihar and Orissa Excise Act, 1915.	The areas transferred to Orissa from the Central Provinces.
1922	VII	The Bihar and Orissa Municipal Act, 1922.	The areas transferred to Orissa from the Central Provinces.
1923	VI	The Bihar and Orissa State Aid to Industries Act, 1923.	The areas transferred to Orissa from the Presidency of Madras and the Central Provinces.
1924	III	The Bihar and Orissa Aerial Ropeways Act, 1924.	The areas transferred to Orissa from the Presidency of Madras and the Central Provinces.
1925	II	The Bihar and Orissa Local Fund Audit Act, 1925.	The areas transferred to Orissa from the Central Provinces.
1926	III	The Bihar and Orissa Highways Act, 1926.	The areas transferred to Orissa from the Presidency of Madras and the Central Provinces.
1930	II	The Bihar and Orissa Motor Vehicles Taxation Act, 1930.	The areas transferred to Orissa from the Central Provinces.
1933	I	The Bihar and Orissa Public Safety Act, 1933.	The areas transferred to Orissa from the Presidency of Madras and the Central Provinces.
1935	VI	The Bihar and Orissa Co-operative Societies Act, 1935.	The areas transferred to Orissa from the Central Provinces.



**THE ORISSA CONSOLIDATION OF APPEALS REG. (III OF 1936).**

*A Regulation to provide for the consolidation of certain appellate and revisional powers in the Province of Orissa.*

WHEREAS it is expedient to provide for the consolidation of certain appellate and revisional powers in the Province of Orissa; It is hereby enacted as follows:—

Short title, application and commencement. 1. (1) This Regulation may be called **THE ORISSA CONSOLIDATION OF APPEALS REGULATION, 1936.**

(2) It applies to the Province of Orissa.

(3) It shall come into force on the 1st day of April, 1936.

2. Where appellate or revisional powers which were immediately, before the coming into force of the Government of India (Constitution of Orissa) Order, 1936 vested in separate Courts or authorities have, by reason of any direction issued under the provisions of the said Order, or by reason of any Regulation issued under section 71 of the Government of India Act, become vested in the Revenue Commissioner for Orissa,

Consolidation of appeals when separate appellate powers are vested in Revenue Commissioner.

(a) the appellate or revisional powers which are so vested in the said Revenue Commissioner shall be deemed to be consolidated, and

(b) the period of limitation for an appeal or application for revision to the Revenue Commissioner shall be the longest period within which an appeal or application for revision could have been made to any of the Courts or authorities whose powers are so consolidated, if such powers had not been consolidated.

**HOME DEPARTMENT.****JUDICIAL.**

*New Delhi, the 1st April, 1936.*

No. F. 210/36 Judicial.—In the exercise of the powers conferred by paragraph 20 of the Government of India (Constitution of Orissa) Order, 1936, the Governor-General in Council is pleased to direct as follows:—

1. Every proceeding pending on the appointed day before any Court, other than a High Court in, or in respect of, any area transferred by the said Order to Orissa shall be continued, as if the said Order had not been made.

2. Any appeal or application for revision in respect of any proceeding so pending or of any decision made before the appointed day in any such Court in or in respect of any such area shall lie in the Court which has appellate or revisional jurisdiction as the case may be over the Court which would have jurisdiction to try such proceeding if the proceeding were instituted after the appointed day:

Provided that, where the proceeding relates to any property situate partly within and partly without any area transferred by the said Order to Orissa, any appeal or application for revision shall lie as if the said Order had not been made.

**THE GOVERNMENT OF INDIA (FEDERAL COURT) ORDER, 1937.**

AT THE COURT AT BUCKINGHAM PALACE.

[29th July, 1937.]

PRESENT:

**THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.**

WHEREAS by sub-section (1) of section two hundred of the Government of India Act, 1935 (hereafter in this Order referred to as "the Act") provision



is made for the establishment of a Federal Court consisting of a Chief Justice of India and such number of other Judges as His Majesty may deem necessary, so, however, that (except in the circumstances mentioned in the said sub-section) the number of those other Judges shall not exceed six:

AND WHEREAS by section two hundred and one of the Act the Judges of the Federal Court are to be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling upon appointment, and to such rights in respect of leave and pensions, as may from time to time be fixed by His Majesty in Council:

AND WHEREAS by virtue of the powers vested in him by sub-section (3) of section three hundred and twenty of the Act His Majesty in Council has made provision as to the dates on which certain sections of Chapter I of Part IX of the Act (being the chapter which contains the provisions of the Act with respect to the Federal Court) shall come into force, but no such provision has yet been made with respect to section two hundred and fifteen of the Act:

AND WHEREAS a draft of this Order has been laid before Parliament in accordance with the provisions of sub-section (1) of section three hundred and nine of the Act and an Address has been presented to His Majesty by both Houses of Parliament praying that an Order may be made in the terms of this Order:

NOW, THEREFORE, His Majesty, in the exercise of the said powers and of all other powers enabling him in that behalf, is pleased by and with the advice of his Privy Council to order, and it is hereby ordered as follows:—

*Introductory.*

1. (1) This Order may be cited as "THE GOVERNMENT OF INDIA (FEDERAL COURT) ORDER, 1937."

(2) Paragraph three of this Order shall take effect forthwith, but, save as aforesaid, the provisions of this Order shall come into operation on the first day of October, nineteen hundred and thirty-seven.

2. (1) In this Order, except where it is otherwise expressly provided or the context otherwise requires—

"Chief Justice" means the Chief Justice of India, but does not include an acting Chief Justice;

"acting Chief Justice" means a Judge appointed under section two hundred and two of the Act to perform the duties of the Chief Justice of India;

"Judge" means a Judge of the Federal Court and includes the Chief Justice, an acting Chief Justice and <sup>1</sup>[in this paragraph and in paragraphs 5, 17, 18, 22 and 23 but not otherwise], an acting Judge;

"Puisne Judge" includes an acting Chief Justice [but not]<sup>2</sup> an acting puisne Judge;

"High Court" means a Court which is a High Court for the purposes of the Act;

"Chartered High Court" means a High Court other than a Chief Court or a Judicial Commissioner's Court;

"actual service" includes—

(a) time spent by a Judge on duty as Judge, or in the performance of such other functions as he may at the request of the Governor-General undertake to discharge;

(b) vacations; and

(c) joining time on transfer from a High Court to the Federal Court;

"service for pension" includes—

(a) actual service;

(b) joining time taken on return from leave out of India;

"service as a Judge in India" means such service rendered either in the Federal Court only or in that Court and in one or more of the High Courts, and

LEG. REF.

<sup>1</sup> Inserted by Federal Court (Amend.) Order, 1940.

<sup>2</sup> Substituted for the word "and" by Federal Court (Amend.) Order, 1940.



"Judge in India" and "service for pension as a Judge in India" shall be construed accordingly;

"term-time" means any part of the year not included in a vacation;

"vacation" means a vacation fixed by or under Rules of Court made with the approval of the Governor-General in his discretion under section two hundred and fourteen of the Act.

(2) The Interpretation Act, 1889, applies for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.

3. The provisions of section two hundred and fifteen of the Act (which relates to ancillary powers of the Federal Court) shall come into force on the making of this Order.

*Expenses for Equipment and Voyage.*

4. There shall be paid to a Judge who was permanently resident in Europe at the date of his appointment an allowance of five hundred pounds for expenses in respect of equipment and travelling on appointment.

*Salaries.*

5. There shall be paid to a Judge in respect of time spent on actual service salary at that one of the following rates which is appropriate to him, that is to say—

Chief Justice, or acting Chief Justice	Rs. 7,000 per month;
Any other Judge, [* * *] <sup>1</sup>	Rs. 5,500 per month;

Provided that, if a Judge at the time of his appointment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Crown in India, his salary in respect of service in the Federal Court shall be reduced by the amount of that pension.

*Leave and Vacation.*

6. Leave may be granted to a Judge during term-time in the following circumstances:—

(a) on medical certificate, for a period not exceeding six months, or for two or more periods not exceeding in the aggregate six months during the whole period of his service as Judge;

(b) for a period not exceeding six months, and not more than once during the whole period of his service as a Judge, otherwise than on medical certificate.

7. There shall be payable to a Judge in lieu of salary—

(a) in respect of any period of leave, an allowance at the rate of one thousand one hundred and ten rupees a month if resident in Asia during his leave, and at the rate of one hundred and eleven pounds a month if resident outside Asia;

(b) in respect of joining time on his return from leave out of India, an allowance at the rate of one thousand one hundred and ten rupees a month.

8. Extraordinary leave not exceeding six months in duration may be granted during term-time not more than once during the period of a Judge's service as such in excess of any leave permissible under paragraph six of this Order, but no salary or allowances shall be payable in respect of the period of such leave.

9. (1) If a Judge overstays his leave or any vacation, he shall receive no salary in respect of the period of his absence in excess of the leave granted to him or beyond the end of the vacation, as the case may be:

Provided that, if such absence is due to circumstances beyond his control, the period thereof may be treated as leave entitling him to such allowances as are mentioned in paragraph seven of this Order, but no account shall be taken of that period for the purposes of paragraph six of this Order.

LEG. REF.

<sup>1</sup> The words "or an acting Judge" omitted by Federal Court (Amend.) Order, 1940.



(2) Nothing in this Order shall be construed as requiring a Judge to rejoin on the expiration of a period of leave when that period expires immediately before the commencement of a vacation, nor as authorising any acting Chief Justice or acting Judge to continue to hold his acting appointment during a vacation.

10. The power to grant, refuse, revoke or curtail leave shall be vested in the Governor-General exercising his individual judgment, after consultation with the Chief Justice.

#### *Passages.*

11. (1) A Judge who is a member of the Indian Civil Service shall have such rights in respect of passages for himself and his wife and children, if any, as under the rules of that Service he would have had if he had not been appointed a Judge, his services as a Judge in India being treated as service for the purpose of determining those rights.

(2) Any other Judge whose domicile at the date of his first appointment as a Judge in India was elsewhere than in Asia shall have such rights in respect of passages for himself and his wife and children, if any, as under the rules for the time being applicable to persons who became members of the Indian Civil Service on that date, he would have had if he had become a member thereof on that date and if his service as a Judge in India were treated as service therein for the purpose of determining those rights:

Provided that—

(i) if he has received an allowance for equipment and voyage on appointment as a Judge in India, he shall not be entitled to a passage (whether for himself, or his wife or children) until the completion of five years, nor to a second passage until the completion of ten years, total service as a Judge in India; and

(ii) if he dies while serving as a Judge, his wife and children shall not be entitled to any concession in respect of passages in addition to the gratuity for which provision is made in this Order.

#### *Pensions.*

12. (1) Subject to the provisions of this Order, a pension shall be payable in accordance with the provisions thereof to a Judge of the Federal Court on his retirement if, but only if,—

(a) he has completed not less than seven years' service for pension as a Judge in India; or

(b) he has completed not less than three years' service for pension as a Judge of the Federal Court and has attained the age of sixty-five years; or

(c) he has completed not less than three years' service for pension as a Judge of the Federal Court and his retirement is medically certified to be necessitated by ill-health; or

(d) he is a member of the Indian Civil Service who under the rules of that Service is entitled to retire with a pension.

(2) The Secretary of State may for special reasons direct that any period not exceeding three months shall be added to a Judge's service for pension, and any such period so added shall count for pension purposes—

(a) in the case of a Judge who has served in the Federal Court as Chief Justice only, as service as Chief Justice; and

(b) in the case of any other Judge of the Federal Court, as service as a puisne Judge.

13. Subject to the subsequent provisions of this Order, the pension payable thereunder to a Judge who on his retirement is entitled to a pension shall be calculated—



(a) in the case of a Chief Justice, other than a Chief Justice who is so entitled only by virtue of being a member of the Indian Civil Service, and in the case of a puisne Judge who is not a member of the Indian Civil Service, in accordance with the rules in Part I of the First Schedule to this Order;

(b) in the case of a Chief Justice who is so entitled only by virtue of being a member of the Indian Civil Service and in the case of a puisne Judge who is a member of the Indian Civil Service, in accordance with the rules in Part II of the said Schedule.

14. The pension payable to a Judge to whom paragraph twenty-seven (provision as to existing Judges) of the Government of India (High Court Judges) Order, 1937, applied before the date of his appointment to the Federal Court shall in no case be less than the pension which would have been payable to him under the rules to which he was subject immediately before that date if his service, if any, as Chief Justice of the Federal Court had been service as Chief Justice of the Calcutta High Court and his service, if any, as a puisne Judge of the Federal Court had been service as Chief Justice of one or more of the Chartered High Courts, other than those at Calcutta or Nagpur.

15. (1) The provisions of this paragraph shall apply in relation to a Judge who is a member of a civil service of the Crown in India.

(2) If any such Judge is entitled to a pension under the foregoing provisions of this Order he shall elect to receive either that pension or such pension as is referred to in the next succeeding sub-paragraph.

(3) If any such Judge is not entitled to a pension under the foregoing provisions of this Order, or, being entitled to such a pension, elects not to receive that pension, the pension payable to him shall be—

(a) the pension for which he would have been eligible under the rules of his civil service if he had not been appointed a Judge in India, his service as a Judge in India being treated as service for the purpose of calculating that pension; and

(b) if he is not a member of the Indian Civil Service, a special additional pension of five hundred rupees per annum in respect of each completed year of service for pension as a Judge in India, but not in any case exceeding two thousand five hundred rupees per annum.

16. If at the time of his appointment to the Federal Court a Judge is in receipt of a pension in respect of previous service as a Judge of a High Court the pension payable to him under this Order shall be an additional pension for service in the Federal Court equal to the difference between his original pension and the pension to which he would have been entitled under this Order if his service in the Federal Court had been rendered in continuation of the previous service for which his original pension was granted.

17. There shall be paid to the legal personal representatives of any Judge who dies while in possession of his office and who was at the time of his first appointment as a Judge in India permanently resident in Europe—

(a) if the death occurred more than six months after the date of his assumption of office as a Judge in India a sum equal to six months' salary in addition to any salary due to the Judge at the date of his death; or

(b) if the death occurred within six months after his assumption of office as a Judge in India or during his voyage to India for the purpose of first assuming office as such, such sum as with any amount received by or due to the Judge on account of salary will make up the amount of one year's salary.

18. The rules for the time being in force with respect to the grant of extraordinary pensions and gratuities and privileges in regard to special disability leave and passages to, or in respect of, members of the Indian Civil Service who



may suffer injury or die as a result of violence shall apply in relation to a Judge, whether a member of a civil service or not, subject, however, to the modification that references in those rules to tables of injury gratuities and pensions and of family gratuities and pensions shall be construed as references to the tables in the Second Schedule to this Order.

19. Pensions expressed in sterling only shall, if paid in India, be converted at such rate of exchange as the Secretary of State may from time to time prescribe:

Provided that nothing in this paragraph shall affect any specific privilege in respect of the conversion of sterling pensions which was conferred by any Rules previously in force on persons who on the 1st February, 1921, were members of a civil service of the Crown in India.

20. The Civil Pensions (Commutation) Rules applicable to persons appointed by the Secretary of State shall with any necessary modifications apply to Judges of the Federal Court.

21. Save as may be otherwise expressly provided in the relevant rules relating to the grant of extraordinary pensions and gratuities, the authority competent to grant pension to a Judge under the provisions of this Order shall be the Governor-General, exercising his individual judgment.

#### *Travelling Allowances.*

22. A Judge shall receive such reasonable allowances to reimburse him for expenses incurred in travelling on duty in India and shall be afforded such reasonable facilities in connection with travelling as the Governor-General may from time to time prescribe exercising his individual judgment.

#### *Subsidiary.*

23. Subject to the provisions of this Order and of any other Order in Council made under the Act, the conditions of service of a Judge shall be determined by the rules for the time being applicable to an officer of non-Asiatic domicile or, as the case may be, of Asiatic domicile, appointed by the Secretary of State to a civil service of the Crown in India and holding the rank of Secretary to the Government of India:

Provided that nothing in this paragraph shall have effect so as to give to a Judge who is member of a civil service of the Crown in India less favourable terms in respect of any of his conditions of service than those to which he would be entitled as a member of his civil service if he had not been appointed a Judge, his service as a Judge in India being treated as service for the purpose of determining those terms.

#### *Repeal and Saving.*

24. Subject as hereinafter provided, paragraphs two and four to ten of the Government of India (Federal Court) Order, 1936, shall cease to have effect:

Provided that in relation to the first Chief Justice of India this Order shall have effect as if for the provisions of paragraphs twelve to seventeen thereof there were substituted the provisions of paragraphs five and six of the said Order of 1936.

### FIRST SCHEDULE.

#### (Paragraph 13.)

### PENSIONS OF JUDGES.

#### PART I.

1. The Judges to whom the provisions of this Part of this Schedule apply are a Chief Justice, not being a Chief Justice who is entitled to a pension only by virtue of being a member of the Indian Civil Service, and a puisne Judge who is not a member of the Indian Civil Service.

2. The pension payable to a Chief Justice who has completed seven years' service for pension as a Judge in India shall be an amount equal to the sum of the following amounts, that is to say—



(i) an amount equal to the pension which would have been payable to him in accordance with the scale and rules in Part I of the Third Schedule to the Government of India (High Court Judges) Order, 1937; if his service as Chief Justice of the Federal Court had been rendered as Chief Justice of the Calcutta High Court, and his service, if any, as a puisne Judge of the Federal Court had been rendered as Chief Justice in any one or more of the Chartered High Courts other than those at Calcutta and Nagpur;

(ii) an additional amount of £15 for each completed year of service as Chief Justice of the Federal Court until he has become entitled to a pension of £1,800, and thereafter an additional amount of £90 for each completed year of such service:

Provided that the aggregate amount of his pension shall in no case exceed £2,000 per annum.

3. The pension payable to a puisne Judge to whom this Part of this Schedule applies and who has completed seven years' service for pension as a Judge in India shall be an amount equal to the pension which would have been payable to him in accordance with the scale and rules in Part I of the Third Schedule to the Government of India (High Court Judges) Order, 1937, if his service as Judge of the Federal Court had been rendered as Chief Justice in any one or more of the Chartered High Courts other than those at Calcutta and Nagpur.

4. The pension payable to a Judge (whether a Chief Justice or a puisne Judge) to whom this Part of this Schedule applies, and who has completed three years' service for pension in the Federal Court, but less than seven years' service for pension as a Judge in India shall be—

(i) for each completed year of service as Chief Justice of the Federal Court, £140,

(ii) for each completed year of service as a puisne Judge of the Federal Court, £105:

Provided that a Judge who has rendered service for pension both as Chief Justice of the Federal Court and also as a puisne Judge of that Court may claim that any period of service for pension less than a completed year rendered by him as Chief Justice shall be treated for the purposes of this sub-paragraph as service for pension rendered by him as a puisne Judge.

5. If a puisne Judge of the Federal Court who has served as acting Chief Justice thereof is subsequently appointed Chief Justice, his service as acting Chief Justice shall, for the purposes of paragraphs two and four of this Part of this Schedule, be treated as service as Chief Justice.

6. For the purpose of calculating, under paragraphs two and three of this Part of this Schedule, the pension which would have been payable in accordance with the scale and rules in Part I of the Third Schedule to the Government of India (High Court Judges) Order, 1937, the period during which a Judge of a Chartered High Court who is appointed Chief Justice or a puisne Judge of the Federal Court performed in an acting capacity the duties of a Chief Justice of a Chartered High Court shall count as though he had been subsequently appointed to be Chief Justice of that High Court.

## PART II.

1. The Judges to whom the provisions of this Part of this Schedule apply are a puisne Judge of the Federal Court who is a member of the Indian Civil Service, and a Chief Justice of the Court who is entitled to a pension only by virtue of being a member of the Indian Civil Service.

2. The pension payable to any such Judge shall be—

(a) the pension to which he is entitled under the ordinary rules of the Indian Civil Service his service as a Judge in India being treated as service therein, and

(b) an additional pension of £105 for each completed year of service for pension in the Federal Court:

Provided that—

(i) his aggregate pension shall not exceed £1,500;

(ii) his aggregate pension shall not be less than the pension to which he would have been entitled under the Government of India (High Court Judges) Order, 1937, if his service in the Federal Court had been rendered as Chief Justice in one or more of the Chartered High Courts, other than those at Calcutta and Nagpur.

## SECOND SCHEDULE.

(Paragraph 18.)

### INJURY GRATUITIES AND PENSIONS.

Officer.	Gratuity Rs. £	Annual Pension Rs.	Annual Pension. £	Annual Pension. Rs. £
The Chief Justice of India or acting Chief Justice or a Judge or acting Judge of the Federal Court .. .. .	27,000	2,025	5,400	405 4,700
				352



## FAMILY GRATUITIES AND PENSIONS.

## A.—WIDOWS.

Officer.	Gratuity.	Annual Pension.
	Rs. £	Rs. £
The Chief Justice of India or acting Chief Justice or a Judge or acting Judge of the Federal Court ..	17,000 1,275	5,000 375

## B.—CHILDREN.

	Annual Child's Pension.
	Rs. £
If Child is motherless .. .. .	550 41
If Child is not motherless .. .. .	320 24

## THE GOVERNMENT OF INDIA (HIGH COURT JUDGES) ORDER, 1937.

[As amended by the Government of India (High Court Judges, Amendment) Orders, 1937, 1939, and 1940].

AT THE COURT AT BUCKINGHAM PALACE,

The 18th day of March, 1937.

*Present*:—THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS by sub-section (1) of section two hundred and twenty of the Government of India Act, 1935 (hereafter in this Order referred to as "the Act") it is provided that the Judges appointed by His Majesty to any High Court in British India, together with any additional Judges appointed by the Governor-General under sub-section (3) of section two hundred and twenty-two of the Act, shall at no time exceed in number such maximum number as His Majesty in Council may fix in relation to that Court:

And whereas by section two hundred and twenty-one of the Act it is provided that the Judges of the several High Courts shall be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling upon appointment, and to such rights in respect of leave and pensions, as may from time to time be fixed by His Majesty in Council:

And whereas a draft of this Order has been laid before Parliament in accordance with the provisions of sub-section (1) of section three hundred and nine of the Act, and an address has been presented to His Majesty by both Houses of Parliament praying that an Order may be made in the terms of this Order:

Now, therefore, His Majesty, in exercise of the said powers and of all other powers enabling him in that behalf, is pleased by and with the advice of His Privy Council to order, and it is hereby ordered, as follows:—

### Introductory.

1. This Order may be cited as "The Government of India (High Court Judges) Order, 1937", and shall come into operation on the first day of April, nineteen hundred and thirty-seven.

2.—(1) In this Order, except where it is otherwise expressly provided or the context otherwise requires—

"High Court" means a Court which is a High Court for the purposes of the Act;

"Chartered High Court" means a High Court other than a Chief Court or a Judicial Commissioner's Court;

"Chief Justice" includes a Chief Judge and a Judicial Commissioner;

<sup>1</sup>["Judge" includes a Chief Justice, an acting Chief Justice, an acting Judge and an additional Judge].

LEG. REF.

<sup>1</sup> Substituted by Government of India

(High Court Judges) (Amendment) Order, 1937.



"acting Chief Justice" means a Judge appointed under sub-section (1) of section two hundred and twenty-two of the Act to perform the duties of a Chief Justice;

"acting Judge" means a person appointed under sub-section (2) of the said section to act as a Judge;

"additional Judge" means a person appointed under sub-section (3) of the said section to act as an additional Judge;

"actual service" includes—

(i) time spent by a Judge on duty as Judge, or in the performance of such other functions as he may be directed by the Governor-General or the Governor to discharge;

(ii) vacations, excluding any time during which the Judge is absent on leave;

<sup>1</sup>[(iii) joining time on transfer from one High Court to another or from the Federal Court to a High Court;

and, except in Rule 5, also includes—

(iv) time spent by a Judge on duty as an acting puisne Judge of the Federal Court; and

(v) joining time on transfer from a High Court to the Federal Court;]

"service for pension" includes—

(i) actual service;

(ii) one month or the amount actually taken, whichever is less, of each period of leave on full allowances;

(iii) joining time on return from leave out of India;

(2) In the calculation of service for the purposes of this Order previous service at any date or dates as acting Judge or additional Judge <sup>2</sup>[and service as an acting Judge of the Federal Court] shall be reckoned as service as Judge; but, save as expressly provided, previous service as acting Chief Justice shall not be reckoned as service as Chief Justice.

(3) Any period of leave taken by a Judge before the commencement of this Order under the rules then applicable to him as an acting Judge or additional Judge shall for the purposes of this Order be treated as if it were leave taken by him under this Order.

(4) The Interpretation Act, 1889, applies for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.

#### *Maximum Number of Judges.*

3. The maximum number of Judges in each High Court shall be as specified in the First Schedule to this Order.

#### *Expenses for Equipment and Voyage.*

4. There shall be paid to a Judge who was permanently resident in Europe at the date of his appointment an allowance of five hundred pounds for expenses in respect of equipment and travelling on appointment.

#### *Salaries.*

5. There shall be paid to a Judge in respect of time spent on actual service salary at the rate specified in the Second Schedule to this Order.

#### *Leave.*

6. Subject to the provisions of this Order, leave granted to a Judge may be at his option either—

(a) leave on full allowances; or

(b) leave on half allowances; or

(c) leave partly on full allowances and partly on half allowances.

LEG. REF.

<sup>1</sup> Subs. by Govt. of India (H. C. Judges) (Amendment Order, 1940.

<sup>2</sup> Inserted by Government of India (High Court Judges) (Amendment) Order, 1940.



7.—(1) A leave account in terms of leave on half allowances shall be kept for each Judge and in that account there shall be credited to him one-fourth of the time spent by him on actual service, and be debited to him all leave with allowances taken by him.

(2) For the purposes of this paragraph and of sub-paragraph (1) of the next succeeding paragraph, any period of leave on full allowances shall be reckoned as double that period of leave on half allowances.

8.—(1) The aggregate amount of leave granted to a Judge during his whole period of service as such shall not exceed in terms of leave on half allowances three years.

(2) The aggregate amount of leave on full allowances granted to a Judge during his whole period of service as such shall not exceed one twenty-fourth of the period spent by him on actual service.

(3) The maximum period of leave granted at any one time shall be, in the case of leave on full allowances, five months, and, in the case of leave with allowances of any kind, sixteen months.

9. Subject to the provisions of sub-paragraph (1) of the preceding paragraph, leave on half allowances may be granted to a Judge in excess of the amount at his credit—

(i) on medical certificate; or

(ii) for not more than six months and not more than once during the whole period of his service as a Judge, otherwise than on medical certificate.

10.—(1) The monthly rate of leave allowance payable to a Judge while on leave on full allowances shall be for the first month of such leave a rate equal to the monthly rate of his salary, and thereafter two thousand two hundred and twenty rupees if resident in Asia during his leave, and two hundred and twenty-two pounds if resident outside Asia.

(2) The monthly rate of leave allowance payable to a Judge while on leave on half allowances shall be one thousand one hundred and ten rupees if resident in Asia during his leave, and one hundred and eleven pounds if resident outside Asia.

11. There shall be payable to a Judge in respect of joining time on his return from leave out of India an allowance at the rate of one thousand one hundred and ten rupees a month in lieu of salary.

12. Extraordinary leave not exceeding six months in duration may be granted not more than once during the period of a Judge's service as such in excess of any leave permissible under the foregoing provisions of this Order, but no salary or allowances shall be payable during or in respect of such leave.

13.—(1) A Judge may be allowed to combine vacation on full salary with leave, if—

(a) where the vacation consists of one continuous period, the leave is taken either at the commencement or at the end of the vacation but not at both;

(b) where the vacation is divided into two separate periods, the leave is taken for the interval, or part of the interval, between the two periods of that vacation, or for the interval, or part of the interval, between the second period of that vacation and the commencement of the next ensuing vacation.

(2) Permission to combine vacation with leave shall not be granted under this paragraph if it will be necessary to appoint an acting Judge during the period of the vacation.

14. If a Judge overstays his leave on any vacation, whether combined with leave or not, he shall receive no salary for the period of his absence in excess of the leave granted to him or beyond the end of the vacation, as the case may be:

Provided that, if such absence is due to circumstances beyond his control, the period thereof may be treated as leave and be debited to his leave account.



15. The power to grant, refuse, revoke or curtail leave shall be vested in the Governor of the Province in which the principal seat of the High Court is situate, exercising his individual judgment, after consultation with the Chief Justice.

#### *Passages.*

16.—(1) A Judge who is a member of the Indian Civil Service shall have such rights in respect of passages for himself and his wife and children, if any, as under the rules of that Service he would have had if he had not been appointed a Judge, his service as Judge being treated as service for the purpose of determining those rights.

(2) Any other Judge whose domicile at the date of his appointment was elsewhere than in Asia shall have such rights in respect of passages for himself and his wife and children, if any, as, under the rules for the time being applicable to persons who became members of the Indian Civil Service on that date, he would have had if he had become a member thereof on that date and if his service as Judge were treated as service therein for the purpose of determining those rights:

Provided that

(i) if he has received an allowance for equipment and voyage on appointment he shall not be entitled to a passage (whether for himself, or his wife or children) until the completion of five years, nor to a second passage until the completion of ten years, total service as a Judge; and

(ii) if he dies while serving as a Judge, his wife and children shall not be entitled to any concession in respect of passages in addition to the gratuity for which provision is made in this Order.

#### *Pensions.*

17.—(1) Subject to the provisions of this Order, a pension shall be payable to a Judge on his retirement if, but only if, either—

(a) he has completed not less than 12 years' service for pension; or

(b) he has completed not less than 7 years' service for pension and has attained the age of sixty; or

(c) he has completed not less than 7 years' service for pension and his retirement is medically certified to be necessitated by ill-health.

(2) The Secretary of State may for special reasons direct that any period not exceeding three months shall be added to a Judge's service for pension:

Provided that a period so added shall be disregarded in calculating any additional pension under Part I or Part II of the Third Schedule to this Order.

18.—(1) Subject to the provisions of this Order, the pension payable to a Judge who on his retirement is entitled to a pension shall be calculated—

(a) in the case of a Chief Justice or Judge who is not a member of the Indian Civil Service, or of a Chief Justice of a Chartered High Court who is a member of the Indian Civil Service, in accordance with the scale and rules in Part I of the Third Schedule to this Order.

(b) in the case of a Judge who is a member of the Indian Civil Service and is not a Chief Justice of a Chartered High Court, in accordance with the scale and rules in Part II of the said Schedule.

19.—(1) The provisions of this paragraph shall apply in relation to a Judge who is a member of a civil service of the Crown in India.

(2) If any such Judge is eligible for a pension under paragraphs 17 and 18 of this Order he shall elect to receive either that pension or such pension as is referred to in the next succeeding sub-paragraph.

(3) If any such Judge is not eligible for a pension under paragraphs 17 and 18 of this Order or, being eligible for such a pension elects not to receive that pension, the pension payable to him shall be—



(a) the pension for which he would have been eligible under the rules of his civil service if he had not been appointed a Judge, his service as a Judge being treated as service for the purpose of calculating that pension; and

(b) if he is not a member of the Indian Civil Service, a special additional pension of five hundred rupees per annum in respect of each completed year of service for pension in any one or more of the High Courts, <sup>1</sup>[or as acting Judge of the Federal Court], but not in any case exceeding two thousand five hundred rupees per annum.

(4) The pension payable to any such Judge part of whose service includes service as a Chief Justice shall in no case be less than the pension for which he would have been eligible if all his service for pension had been service rendered otherwise than as Chief Justice.

20. The rules for the time being in force with respect to the grant of extraordinary pensions and gratuities and privileges in regard to special disability leave and passages to, or in respect of, members of the Indian Civil Service who may suffer injury or die as a result of violence shall apply in relation to a Judge, whether a member of a civil service or not, subject, however, to the modification that references in those rules to tables of injury gratuities and pensions and of family gratuities and pensions, shall be construed as references to the tables in the Fourth Schedule to this Order.

21. Pensions expressed in sterling only shall, if paid in India, be converted at such rate of exchange as the Secretary of State may from time to time prescribe:

Provided that nothing in this paragraph shall affect any specific privilege in respect of the conversion of sterling pensions which was conferred by any Rules previously in force on persons who on the 1st February, 1921, were members of a civil service of the Crown in India.

22. The Civil Pensions (Commutation) Rules applicable to persons appointed by the Secretary of State shall with any necessary modifications apply to Judges.

23. There shall be paid to the legal personal representatives of any Judge who dies while in possession of his office and who was at the time of his appointment permanently resident in Europe.

(a) if the death occurred more than six months after the date of his assumption of office a sum equal to six months' salary in addition to any salary due to the Judge at the date of his death; or

(b) if the death occurred within six months after his assumption of office or during his voyage to India for the purpose of first assuming office, such sum as with any amount received by or due to the Judge on account of salary will make up the amount of one year's salary.

24. Save as may be otherwise expressly provided in the relevant rules relating to the grant of extraordinary pensions and gratuities, the authority competent to grant pension to a Judge under the provisions of this Order shall be the Governor of the Province in which the High Court is situated, exercising his individual judgment.

#### *Travelling Allowances.*

25. A Judge shall receive such reasonable allowances to reimburse him for expenses incurred in travelling on duty in India and such reasonable facilities in connexion with travelling as the Governor of the Province in which the principal seat of the High Court is situated may from time to time in his individual judgment prescribe.

#### *Subsidiary Conditions of Service.*

26. Subject to the provisions of this Order and of any other Order in Council made under the Act, the conditions of service of a Judge shall be deter-



mined by the rules for the time being applicable to an officer of non-Asiatic domicile or, as the case may be, of Asiatic domicile appointed by the Secretary of State to a civil service of the Crown in India and holding the rank of Secretary to the Government of the Province in which the principal seat of the High Court is situated:

Provided that nothing in this paragraph shall have effect so as to give to a Judge who is a member of a civil service of the Crown in India less favourable terms in respect of any of his conditions of service than those to which he would be entitled as a member of his civil service if he had not been appointed a Judge, his service as Judge being treated as service for the purpose of determining those terms.

*Provisions as to existing Judges.*

27. (1) The foregoing provisions of this Order (other than paragraph three) shall not apply in relation to a Judge who—

(a) was serving as a Judge in India at the commencement of this Order; or

(b) was serving as a Judge in Burma at that date and is subsequently appointed to be a Judge in India.

(2) The conditions of service of any such Judge as aforesaid shall continue to be governed by the rules to which he was subject immediately before the commencement of this Order and, for the purposes of those rules, service by any such Judge as a Judge in Burma, whether before or after the said date, and leave taken by him during such service, shall be treated as service rendered in India and as leave taken during service so rendered.

(3) For the purposes of this paragraph a person who was serving as Acting Judge or additional Judge at the commencement of this Order shall be deemed to have been serving as a Judge at that date if, but only if, his service as such Acting Judge or additional Judge continued without interruption until his subsequent permanent appointment as Judge.

FIRST SCHEDULE.

(Paragraph 3.)

NUMBER OF JUDGES.

The maximum number of Judges in the several High Courts shall be as shown in the following table. <sup>1</sup>[In each case the number is exclusive of the Chief Justice, but includes any additional Judges].

<i>Court.</i>	<i>Maximum number.</i>
The High Court at Madras	15 Judges.
The High Court at Bombay	13 "
The High Court at Calcutta	19 "
The High Court at Allahabad	12 "
The High Court at Lahore	15 "
The High Court at Patna	11 "
The High Court at Nagpur	7 "
The Chief Court of Oudh	5 "
<sup>2</sup> [The Chief Court of Sind]	5]
The Court of the Judicial Commissioner of the North-West Frontier Province	2 "

LEG. REF.

<sup>1</sup> Substituted by the Government of India (High Court Judges) (Amendment) Order, 1937.

<sup>2</sup> Substituted by High Court Judges (Amend.) Order, 1940.

N.B.—As from the date of the establishment of the Chief Court of Sind—In the first Schedule, for the words "the Court of the Judicial Commissioner of Sind" there shall be substituted the words "the Chief Court of Sind" by the Govt. of India (High Court Judges) (Amendment) Order, 1940.

C. C. M.—4

In the Second Schedule for the words "Judicial Commissioner of Sind" where those words first occur there shall be substituted the words "Chief Judge of the Chief Court of Sind", and for the words "Judge of the Court of the Judicial Commissioner of Sind or of the North-West Frontier Province" in both places where those words occur, there shall be substituted the words "Judge of the Chief Court of Sind or of the Court of the Judicial Commissioner of the North-West Frontier Province". (*Ibid.*)



## SECOND SCHEDULE.

(Paragraph 5.)

## SALARIES OF JUDGES.

<i>Rank of Judge.</i>	<i>Salary per annum</i>
	Rs.
Chief Justice of the High Court at Calcutta ..	72,000
Chief Justice of the High Courts at Madras, Bombay, Allahabad, Patna and Lahore ..	60,000
Chief Justice of the High Court at Nagpur ..	50,000
Judge of the High Courts at Calcutta, Madras, Bombay, Allahabad, Patna and Lahore; Chief Judge of the Chief Court of Oudh ..	48,000
Judge of the Chief Court of Oudh; <sup>1</sup> [Chief Judge of the Chief Court of Sind] ..	42,000
Judge of the High Court at Nagpur ..	40,000
Judicial Commissioner of the North-West Frontier Province ..	39,000
<sup>1</sup> [Judge of the Chief Court of Sind or of the Court of the Judicial Commissioner of the North-West Frontier Province] ..	36,000

In this Schedule "Chief Justice", "Chief Judge" and "Judicial Commissioner" include respectively an acting Chief Justice, an acting Chief Judge and an acting Judicial Commissioner, <sup>1</sup>[and "Judge" includes an acting or an additional Judge].

<sup>2</sup>[A <sup>3</sup>(Judge of the Chief Court of Sind or of the Court of the Judicial Commissioner of the North-West Frontier Province) who was at the time of his first appointment to service under the Crown in India domiciled elsewhere than in Asia, or who but for his appointment as such Judge would be entitled under the rules applicable to him as a member of the Indian Civil Service to draw overseas pay in sterling, shall, in addition to the salary prescribed above, be entitled to draw overseas pay of £13 6s. 8d. a month, and his salary for the purposes of paragraph 10 (1) of this Order shall be increased by the amount of his overseas pay.]

## THIRD SCHEDULE.

(Paragraph 18.)

## PENSIONS OF JUDGES.

## PART I.

1. The provisions of this Part of this Schedule apply to a Chief Justice or Judge who is not a member of the Indian Civil Service and also to a Judge who is a member of that Service and is Chief Justice of a Chartered High Court.

2. The pension payable to such a Judge who has completed twelve years' service for pension, including not less than six years' service as Chief Justice of one or more of the Chartered High Courts, other than Nagpur, shall, if six years or more of his service as Chief Justice has been rendered in the High Court at Calcutta be eighteen hundred pounds per annum and, in any other case, fifteen hundred pounds per annum.

3. Subject as aforesaid, the pension payable to a Judge to whom the provisions of this Part of this Schedule apply shall be the basic pension for which provision is made in the next succeeding paragraph increased by the additional pension, if any, to which he is entitled under the subsequent provisions of this Part of this Schedule.

4. The basic pension to which such a Judge shall be entitled shall be—  
(a) for the first seven completed years of service for pension, £375 per annum; and  
(b) for each subsequent completed year, a further sum of £75 per annum:  
Provided that his basic pension shall in no case exceed £750 per annum.

5. For the purpose of calculating additional pensions, service as a Judge shall be classified as follows:—

Grade I.—Service as Chief Justice in the High Court at Calcutta:

Grade II.—Service as Chief Justice in any Chartered High Court, other than those at Calcutta and Nagpur:

Grade III.—Service as Chief Justice in the High Court at Nagpur:

Grade IV.—Service as a puisne Judge in any Chartered High Court, other than that at Nagpur: and

## LEG. REF.

<sup>1</sup> Substituted by the Government of India (High Court Judges) (Amendment) Order, 1937.

<sup>2</sup> Inserted by Government of India (High Court Judges) (Amendment) Order, 1939.

N.B.—This Order shall be deemed to have had effect from the second day of July, nineteen hundred and thirty-eight.

<sup>3</sup> Substituted by Government of India (High Court Judges) (Amendment) Order, 1940.



Grade V.—Service as a puisne Judge in the High Court at Nagpur and any service in the Chief Court of Oudh.

6. For each completed year of service for pension in any grade mentioned in the last preceding paragraph the Judge shall be entitled to the additional pension specified in relation to that grade in the second column of the Table hereunder printed:

Provided that the aggregate amount of his basic and additional pensions shall not exceed the amount specified in the third column of the said table in relation to the highest grade in which he has rendered service for not less than one completed year.

TABLE.

Service.				Additional pension per annum.	Maximum aggregate pension.
				£	£
Grade I	..	..	..	75	1,800
Grade II	..	..	..	55	1,500
Grade III	..	..	..	40	1,250
Grade IV	..	..	..	35	1,200
Grade V	..	..	..	20	1,000

7. A Judge who has rendered service for pension in two or more grades may claim that any period of service less than a completed year rendered by him in one grade, or any portion of any such period, shall be treated for the purposes of the last preceding paragraph as service rendered by him in a lower grade.

8. If a Judge who has served as acting Chief Justice of a Chartered High Court is subsequently appointed Chief Justice of that Court or of any other Chartered High Court, his service as an acting Chief Justice shall for the purposes of this Part of this Schedule be treated as service as Chief Justice of the Court in which the acting service was rendered:

Provided that service as acting Chief Justice of the High Court at Calcutta shall be treated as service as Chief Justice of the Court of which the Judge was at the date of his retirement Chief Justice.

<sup>1</sup>[9. For the purposes of this Part of this Schedule service as an acting Judge of the Federal Court shall be treated as though it were service rendered as Chief Justice (or, for the purposes of paragraph 8 as acting Chief Justice) of any Chartered High Court other than those at Calcutta and Nagpur.]

## PART II.

1. The provisions of this Part of this Schedule apply to a Judge who is a member of the Indian Civil Service and is not a Chief Justice of a Chartered High Court.

2. The pension payable to such a Judge shall be—

(a) the pension to which he is entitled under the ordinary rules of the Indian Civil Service, his service as Judge being treated as service therein; and

(b) the additional pension, if any, to which he is entitled under either of the two next succeeding paragraphs.

3. If his service for pension includes service for not less than seven completed years in any one or more of the Chartered High Courts, <sup>1</sup>["(other than that at Nagpur) or as an acting Judge of the Federal Court, or partly in any one or more of the said Chartered High Courts and partly as an acting Judge of the Federal Court], he shall be entitled to an additional pension in accordance with the following scale:—

	Per annum.
	£
for 7 completed years of service in one or more of those Courts ..	100
for 8 completed years of service in one or more of those Courts ..	120
for 9 completed years of service in one or more of those Courts ..	140
for 10 completed years of service in one or more of those Courts ..	160
for 11 completed years of service in one or more of those Courts ..	180
for 12, or more, completed years of service in one or more of those Courts ..	200

4. If his service for pension includes service for not less than seven completed years in any one or more of the High Courts and some part of that service, but less than seven completed years, has been rendered in one or more of the Courts mentioned in the preceding paragraph, he shall be entitled to an additional pension of £15 per annum in respect of each completed year of service rendered in one or more of the Courts so mentioned.

LEG. REF.

<sup>1</sup> Inserted and substituted respectively by

Government of India (High Court Judges)  
(Amendment) Order, 1940.



FOURTH SCHEDULE.  
(Paragraph 20.)  
INJURY GRATUITIES AND PENSIONS.

Officer.	Gratuity.		Annual pension Higher scale		Annual pension Lower scale.	
	Rs.	£	Rs.	£	R s.	£
Chief Justice or Acting Chief Justice of the High Court at Madras, Bombay, Calcutta, Allahabad, Lahore, Patna or Nagpur.	27,000	2,025	5,400	405	4' 7 00	352
Judge, or Acting or Additional Judge of a High Court, other than a Chief Justice or Acting Chief Justice of the Courts mentioned above.	15,000	1,125	4,700	352	4,000	300

FAMILY GRATUITIES AND PENSIONS.  
*A.—Widows.*

Officer.	Gratuity.		Annual pension.	
	Rs.	£	Rs.	£
Chief Justice or Acting Chief Justice of the High Court at Madras, Bombay, Calcutta, Allahabad, Lahore, Patna or Nagpur.	17,000	1,275	5,000	375
Judge or Acting or Additional Judge of a High Court, other than a Chief Justice or Acting Chief Justice of the Courts mentioned above.	13,400	1,012	4,000	300

*B.—Children.*

	Annual Child's Pension.	
	Rs.	£
If Child is motherless.	550	41
If Child is not motherless	320	24

THE ACTING JUDGES' ACT (XVI OF 1867).<sup>1</sup>

[1st March, 1867.]

*An Act to authorize the making of acting appointments to certain  
Judicial Offices.*

WHEREAS the Governor-General of India in Council or the Local Government, as the case may be, is empowered by diverse enactments to appoint the Judges of certain Courts in

Preamble. British India: And whereas it has been doubted whether he or it is empowered

LEG. REF.

<sup>1</sup> Short title, "The Acting Judges' Act, 1867". See the Indian Short Titles Act (XIV of 1897). The bill which was passed on the 1st March, 1867, and published as Act XVI of 1867, was introduced and passed at one sitting. See the Proceedings in Council published in *Gazette of India*, 1867, Sup-

plement, p. 180. This Act has been declared, by notification under S. 3 (a) of the Scheduled Districts Act (XIV of 1874), to be in force in the following Scheduled Districts, namely:—The Districts Hazaribagh, Lohardaga and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum—see *Gazette of India*, 1881, Pt. I, p. 504.



to appoint persons to act temporarily as such Judges, and it is expedient to remove such doubts; it is hereby enacted as follows:—

1. In every case in which the <sup>1</sup>[Central Government], or the <sup>1</sup>[Provincial Government], as the case may be, has power under any Act or Regulation to appoint a Judge of any Court in British India, such power shall be taken to include the power to appoint any person capable of being appointed a permanent Judge of such Court, to act as Judge of the same Court for such time as the <sup>1</sup>[Central Government] or the <sup>1</sup>[Provincial Government], as the case may be, shall direct. Every person so appointed to act temporarily as a Judge of any such Court shall have the powers and perform the duties which he would have had and been liable to perform in case he had been duly appointed a permanent Judge of the same Court.

Certain enactments to be construed as if they contained a clause like section 1 of this Act.

2. Every such Act and Regulation shall be construed as if it contained a special clause to the purport or effect of the first section of this Act.

### THE ADMINISTRATOR-GENERAL'S ACT (III OF 1913).

PREFATORY NOTE.—The jurisdiction of the Court to compel due administration of the estate of deceased persons has existed from a very early period. It seems to have been of gradual growth, and founded rather on the necessity of supplying the defects of the Courts of common law and the ecclesiastical Courts, than on execution of trusts cognizable in equity alone. (Ency. of Laws of England, Vol. I, p. 176.)

In ancient times, when a man died without making any disposition of such of his goods as were testable, it is said that the king, who is *parens patriae*, and has the supreme care to provide for all his subjects, used to seize the goods of the intestate, to the intent that they should be preserved and disposed for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and if not, those of his blood. This prerogative the king continued to exercise for some time by his own Ministers of Justice, and probably in the County Court, where matters of all kinds were determined, and it was granted as a franchise to many lords of manors, and others, who had, until the passing of the Court of Probate Act, a prescriptive right to grant administration to their intestate tenants and suitors in their own Courts Baron and other Courts. Afterwards the Crown, in favour of the Church, invested the prelates with this branch of the prerogative; for it was said, none could be found more fit to have such care and charge of the transitory goods of the deceased than the Ordinary, who all his life had the cure and charge of his soul. (*Williams on Executors*, 11th Edn., 312, 313.)

The flagrant abuses of this power by the Ecclesiastical Courts occasioned the Legislature to interpose, in order to prevent the Ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependents and therefore, S. 31 Edw. III, St. 1, was passed.

The term "administration" applied broadly denotes the management of an estate by a person appointed by authority of law to take charge thereof in place of the proper owner. (*Amo. Cyc.*, Vol. 1,—*Title, Administration*.)

Referring to the origin of the office of Administrator-General in British India, Mr. Kenny in his book on Administration Practice in British India says:—"The office of the Administrator-General in this country grew out of the Mercantile and Trading Community of Bengal, whose interest were safeguarded by the Charter establishing the Supreme Court of Judicature at Fort William in Bengal, dated the 26th March, 1774. Its functions have been developed, and regulated on lines which experience have shown to be necessary; and it is an illustration of the adoption, and modification, to suit local circumstances of those principles which underlie the law of trusts, and the law affecting the administration of the estates, of deceased persons."

The earliest office out of which the office of the Administrator-General was developed is that of the Ecclesiastical Registrar in Bengal. The first parliamentary statute which dealt with the powers of Ecclesiastical Registrar in Bengal and the other provinces to obtain administration to estates was 39 and 40, Geo. III, Cap. 79. In order to understand the position of the Registrar under this statute, attention may be directed to S. 21 of the Act which reads as follows:—"And whereas great inconveniences have arisen from the practice of granting Letters of Administration by the said Supreme Court of Judicature at Fort William aforesaid in cases where the next-of-kin or any of the creditors of the deceased do not apply for the same, to persons calling themselves friends of the deceased. Be

<sup>1</sup> Substituted by A.O., 1937.



it therefore further enacted that from and after the first day of March which will be in the year of our Lord one thousand eight hundred and one, whenever, any British subject shall die intestate within either of the presidencies of Fort William, Fort Saint George or Bombay, or the territories subordinate to either of the said Presidencies or to become subordinate thereto, and on return of the citation to be issued from the proper Ecclesiastical Court, no next-of-kin or creditors shall appear and make out their claim to the administration of the effect of the intestate deceased to the satisfaction of the said Court, it shall and may be lawful for the Registrar of such Court, and he is hereby required and directed to grant such letters of administration and colligenda as to such Court shall seem meet, by virtue whereof such Registrar shall collect the assets of the deceased and shall bring them for safe custody into such Court and account for them regularly in like manner as is now by law provided in cases where assets are vested in the hands of any officer of the Court under or by virtue of the equitable jurisdiction of any such Court."

It was not long before it became necessary to further develop the law on the subject. To this end Stat. 55, Geo. III, Cap. 84, was enacted.

The Registrar, under the old Act, had not by any means such a monopoly of administration of estates as was at one time considered to be the case: but private administrators were not by any means subject to similar restrictions in regard to the question of the method of keeping and filing their accounts, etc. The precautions, however, above referred to prove to be quite inadequate.

Gross irregularities and abuses were discovered in respect of estates under the charge of certain persons who held the office of Ecclesiastical Registrar, with the result that an order was passed by the Supreme Court on the 8th March, 1848, appointing a Committee to enquire into the working of that office. The Committee so appointed, duly enquired into the working of the office, and presented their report on the 29th January, 1849. Among other things it proved the Registrars had abused their powers; that they had employed the monies in their hands in trade and that heavy losses had been incurred.

The Government of India, in view of the disclosures above alluded to considered it advisable to take steps to protect the interests of the beneficiaries and next-of-kin of persons dying intestate as well as those who left wills, and after some consideration it was resolved that a public official should be appointed, who would protect the property of persons dying in cases where no steps were taken by the next-of-kin (if any) or where the next-of-kin were resident out of British India. It was also considered advisable to give such official power to deal with the estates of persons who had left wills where either the beneficiaries under the will were resident out of British India, or where they, or the executors named, took no steps to protect the estate. After carefully considering the position of matters the Government of India passed Act VII of 1849, which may be termed the first Administrator-General's Act in British India.

The next was Act II of 1850 (passed on 11th January, 1850) by which the Act of 1849 was extended to Madras and Bombay. It was provided that the rate of commission charged was not to be the same; that the Administrator-General of these two provinces were not to cease to hold the office of Ecclesiastical Registrar; and by section 4 of the Act, the Administrator-General was strictly prohibited from trading, etc. This Act remained in force until the year 1855, when a further Act was passed (Act VIII of 1855), which repealed both the lost-mentioned Acts.

This Act (VIII of 1855) remained in force until the year 1867, when Act XXVI of 1867 was passed as a repealing and re-enacting Code relating to the subject.

Act II of 1874, which was the Act in force, until it was repealed and re-enacted by the present Act was presented to the Legislative Council on the 27th January, 1874. It recited that having regard to the fact of certain amendments, and also to the fact that the Act of 1867 had already been amended by Act XIX of 1867 and Act V of 1870, it was thought advisable to repeal the then existing Acts and re-enact them, so as to have the law conveniently within the compass of one Act. The Act again came up for discussion on 10th February, 1874, when it was discussed and finally received the assent of the Governor-General.

In 1913 it was thought expedient to consolidate Act II of 1874 and its several amending enactments, and also to make certain amendments in the law relating to the powers and duties of the Administrator-General, and this was effected by the Act which is now in force, Act III of 1913. (See Preface to Kinney's Administration Practice in India; Statement of Objects and Reasons; Report of Select Committee and Proceedings in Council.)

## CONTENTS.

PART I.	SECTIONS.	PART II.
PRELIMINARY.		THE OFFICE OF ADMINISTRATOR-GENERAL.
1. Short title, extent and commencement.		3. Appointment of Administrators-General.
2. Interpretation clause.		



## SECTIONS.

4. Appointment and powers of Deputy Administrators-General.

5. Administrator-General to be a corporation sole to have perpetual succession and official seal, and to sue and be sued in his corporate name.

## PART III.

## RIGHTS, POWERS, DUTIES AND LIABILITIES OF THE ADMINISTRATOR-GENERAL.

(a) *Grants of Letters of Administration and Probate.*

6. As regards Administrator-General High Court to be deemed a Court of competent jurisdiction for the purpose of granting probate or letters of administration.

7. Administrator-General entitled to letters of administration, unless granted to next-of-kin.

8. Administrator-General entitled to letters of administration in preference to creditor, non-universal legatee or friend.

9. When Administrator-General is to administer estates of persons other than exempted persons.

10. Power to direct Administrator-General to apply for administration.

11. Power to direct Administrator-General to collect and hold assets until right of succession or administration is determined.

12. Grant of probate or letters of administration to person appearing in the course of proceedings taken by Administrator-General under sections 9, 10 and 11.

13. Grant of administration to Administrator-General in certain cases.

14. Administrator-General not precluded from applying for letters within one month after death.

(b) *Estates of Persons subject to the Army Act, or the Air Force Act.*

15. Act not to affect Regimental Debts Act, 1893.

16. Letters of administration not necessary in respect of small estates administered by Administrator-General in accordance with the Regimental Debts Act, 1893.

17. Power to grant Administrator-General letters limited to purpose of dealing with assets in accordance with the Regimental Debts Act, 1893.

(c) *Revocation of Grants.*

18. Re-call of Administrator-General's administration, and grant of probate, etc., to executor or next-of-kin.

19. Cost of obtaining administration, etc., may, on revocation, be ordered to be paid to Administrator-General out of assets.

20. After revocation, letters granted to Administrator-General to be deemed as to him to have been voidable only.

21. Payments made by Administrator-General prior to revocation.

(d) *General.*

22. Administrator-General's petition for grant of letters of administration.

23. Name in which probates or letters to be granted.

24. Effect of probate or letters granted to Administrator-General.

## SECTIONS.

25. Transfer by private executor or administrator of interest under probate or letters.

26. Distribution of assets.

27. Appointment of Official Trustee as trustee of assets after completion of administration.

28. Power for High Court to give directions regarding administration of estate.

29. No security nor oath to be required from Administrator-General.

Manner in which petitions to be verified by Administrator-General and his Deputy.

Entry of Administrator-General not to constitute notice of a trust.

30. Power to examine on oath.

(e) *Grant of Certificates.*

31. In what case Administrator-General may grant certificate.

32. Grant of certificate to creditors and power to take charge of certain estates.

33. Administrator-General not bound to grant certificate unless satisfied of claimant's title, etc.

34. Effect of certificate.

35. Revocation of certificate.

36. Surrender of revoked certificate.

37. Administrator-General not bound to take out administration on account of assets for which he has granted certificate.

38. Transfer of certain assets from British India to executor or administrator in country of domicile for distribution.

(f) *Liability.*

39. Liability of Government.

40. Creditors' suits against Administrator-General.

41. Notice of suit not required in certain cases.

## PART IV.

## FEES.

42. Fees.

43. Disposal of fees.

## PART V.

## AUDIT OF THE ADMINISTRATOR-GENERAL'S ACCOUNTS.

44. Audit of Administrator-General's Accounts.

45. Auditors to examine accounts and report to Government.

46. Power of auditors to summon and examine witnesses and to call for documents.

47. Costs of audit, etc.

## PART VI.

## MISCELLANEOUS.

48. General powers of administration.

49. Power of person beneficially interested to inspect Administrator-General's accounts, etc., and take copies.

50. Power to make rules.

51. False evidence.

52. Assets unclaimed for twelve years to be transferred to Government.

53. Mode of proceeding by claimant to recover principal money so transferred.

54. District Judge in certain cases to take charge of property of deceased persons, and to report to Administrator-General.



## SECTIONS.

55. Succession Act and Companies Act not to affect Administrator-General and saving of provisions of Presidency Police Acts as to petty estates.

56. Order of Court to be equivalent to decree.

57. Provision for administration by Consular Officer in case of death in certain cir-

## SECTIONS.

cumstances of foreign subject.

58. [*Repealed.*]

59. Saving of provisions of Indian Registration Act, 1908.

59-A. Saving.

60. [*Repealed.*]

THE SCHEDULE.—[*Repealed.*]

THE ADMINISTRATOR-GENERAL'S ACT (III OF 1913).<sup>1</sup>

[27th February, 1913.]

## EFFECT OF LEGISLATION.

Year.	No.	Short Title.	How repealed or otherwise affected by Legislation.
1913	III	The Administrator-General's Act, 1913.	Repealed in part, V of 1917; XIX of 1927. Amended, X of 1914; XXI of 1922; XXXII of 1926; X of 1927.

*An Act to consolidate and amend the law relating to the office and duties of Administrator-General.*

WHEREAS it is expedient to consolidate and amend the law relating to the office and duties of Administrator-General; it is hereby enacted as follows:—

## PART I.

## PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE ADMINISTRATOR-GENERAL'S ACT, 1913.

(2) It extends to the whole of British India, including the Sonthal Parganas and British Baluchistan, and applies also to all <sup>2</sup>[British subjects in Indian States].

(3) It shall come into force on such date<sup>3</sup> as the <sup>2</sup>[Central Government] may, by notification in the <sup>2</sup>[Official Gazette], direct.

Interpretation clause.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "assets" means all the property, movable and immovable, of a deceased person, which is chargeable with and applicable to, the payment of his debts and legacies, or available for distribution among his heirs and next-of-kin:

(2) "exempted person" means an Indian Christian, a Hindu, Muhammadan, Parsi or Buddhist, or a person exempted under section 332 of the Indian Succession Act, 1865,<sup>4</sup> from the operation of that Act:

(3) <sup>2</sup>["Government" or "the Government" means, in relation to any Province, the Provincial Government, and in relation to British subjects in Indian States, the Central Government:]

(4) "Indian Christian" means a Native of India who is or in good faith claims to be of unmixed Asiatic descent, and who professes any form of the Christian religion:

(5) "Letters of Administration" includes any letters of administration whether general or with a copy of the will annexed, or limited in time or otherwise:

## LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons, see *Gazette of India*, 1912, Pt. V, p. 188; for Report of Select Committee, see *ibid.*, 1913, Pt. V, p. 3; and for Proceedings in Council, see *ibid.*, 1912, Pt. VI, p. 697 and *ibid.*, 1913, Pt. VI, pp. 14, 28 and 64.

<sup>2</sup> Substituted by A.O., 1937.

<sup>3</sup> The 1st April, 1914, see Gen. R. and O.,

Vol. IV, p. 406.

<sup>4</sup> See now the Indian Succession Act (XXXXIX of 1925), section 3.

## NOTES.

SEC. 2 (1): "Assets," meaning of "Assets" may consist of both movable and immovable properties. Shops are "assets", See 51 M.L.J. 334; 25 Cal. 65 (73).



(6) "next-of-kin" includes a widower or widow of a deceased person, or any other person who by law would be entitled to letters of administration in preference to a creditor or legatee of the deceased:

(7) <sup>1</sup>[\* \* \* \*].

(8) "Prescribed" means prescribed by rules under this Act:

(9) to (11) <sup>1</sup>[\* \* \* \*].

<sup>2</sup>[(12) 'High Court' means—

(a) in relation to Bengal, Assam and the Andaman and Nicobar islands, the High Court at Calcutta;

(b) in relation to Madras and Coorg, the High Court at Madras;

(c) in relation to Bombay and British Baluchistan, the High Court at Bombay;

(d) in relation to the United Provinces and Ajmer-Merwara, the High Court at Allahabad;

(e) in relation to the Punjab and Delhi, the High Court at Lahore;

(f) in relation to the Provinces of Bihar and Orissa, the High Court at Patna;

(g) in relation to the Central Provinces and Berar, the High Court at Nagpur;

(h) in relation to Sind, the Judicial Commissioner's Court;

(i) in relation to the North-West Frontier Province, the Judicial Commissioner's Court; and

(j) in relation to British subjects in any Indian State, that one of the aforesaid Courts which the Central Government may from time to time notify in this behalf.

(13) 'Division' means the Province or State or group of States for which an Administrator-General has been appointed under this Act.]

## PART II.

### THE OFFICE OF ADMINISTRATOR-GENERAL.

3. (1) <sup>3</sup>[The Provincial Government for each Province, and the Central Government for British subjects, in any Indian State or group of Indian States, shall appoint an Administrator-General:

Provided that nothing herein contained shall be deemed to bar the appointment of the same person as Administrator-General for two or more divisions.]

(2) No person shall be appointed to the office of Administrator-General <sup>4</sup>[\* \* \*] who is not—

(a) a Barrister; or

(b) an Advocate, Attorney, or Vakil enrolled by a High Court; or

(c) a person holding the office of Deputy Administrator-General at the commencement of this Act.

<sup>4</sup>[(d) \* \* \* In the case of a Province other than Bengal, Madras or Bombay, a person already in the service of the Crown.]

(3) <sup>4</sup>[\* \* \* \*]

### LEG. REF.

<sup>1</sup> Sub-sections (7), (9), (10) and (11) omitted by Order in Council, 1937.

<sup>2</sup> Sub-sections (12) and (13) inserted by Order in Council, 1937.

<sup>3</sup> Sub-section (1) substituted by Order in C. C. M.—5

Council.

<sup>4</sup> Some words in sub-section (2) and the whole of sub-section (3) omitted and sub-section (2), clause (d) inserted by Order in Council, 1937.



4. The Government may appoint a Deputy or Deputies to assist the Administrator-General; and any Deputy so appointed shall, subject to the control of the Government and the general or special orders of the Administrator-General, be competent to discharge any of the duties and to exercise any of the powers of the Administrator-General, and when discharging such duties or exercising such powers shall have the same privileges and be subject to the same liabilities as the Administrator-General.

Appointment and powers of Deputy Administrators-General.

Administrator-General to be a corporation sole, to have perpetual succession and official seal, and to sue and be sued in his corporate name.

5. The Administrator-General shall be a corporation sole by the name of the Administrator-General of the <sup>1</sup>[Division] for which he is appointed and, as such Administrator-General, shall have perpetual succession and an official seal, and may sue and be sued in his corporate name.

### PART III.

## RIGHTS, POWERS, DUTIES AND LIABILITIES OF THE ADMINISTRATOR-GENERAL.

### (a) Grants of Letters of Administration and Probate.

As regards Administrator-General, High Court <sup>2</sup>[\* \*] to be deemed a Court of competent jurisdiction for the purpose of granting probate or letters of administration.

6. So far as regards the Administrator-General of any <sup>1</sup>[Division] the High Court <sup>2</sup>[\* \* \*] shall be deemed to be a Court of competent jurisdiction for the purpose of granting probate or letters of administration under any law for the time being in force wheresoever within the <sup>1</sup>[Division] the estate to be administered is situate.

Administrator-General entitled to letters of administration, unless granted to next-of-kin.

7. Any letters of administration, which are granted after the commencement of this Act by the High Court <sup>2</sup>[\* \* \*] shall be granted to the Administrator-General of the <sup>1</sup>[Division] unless they are granted to the next-of-kin of the deceased.

Administrator-General entitled to letters of administration in preference to creditor, non-universal legatee or friend.

8. The Administrator-General of the <sup>1</sup>[Division] shall be deemed by all the Courts in the <sup>1</sup>[Division] to have a right to letters of administration other than letters *pendente lite* in preference to that of—

(a) a creditor; or

(b) a legatee other than an universal legatee; or

(c) a friend of the deceased.

When Administrator-General is to administer estates of persons other than exempted persons.

9. If any person, not being an exempted person, has died leaving within any <sup>1</sup>[Division] assets exceeding the value of <sup>3</sup>[two thousand] rupees

and if no person to whom any Court would have jurisdiction to commit administration of such assets has, within one month after his death, applied in

### LEG. REF.

<sup>1</sup> Substituted by Order in Council, 1937.

<sup>2</sup> Omitted by Order in Council, 1937.

<sup>3</sup> Substituted for the words "one thousand" by Act XXXII of 1926.

### NOTES.

SECS. 6, 7 AND 8.—As to who are next-of-kin, see Succession Act (XXXIX of 1925), section 24. Administrator-General can be granted letters of administration to estate of illegitimate persons. 1 M.H.C. 171; 11

Beng.L.R. App. 6. On these sections, see also 4 C. 770. Calcutta High Court cannot grant letters to attorney of executor of deceased in respect of assets in Punjab. Such letters can be granted to Administrator-General in Bengal. 1 B.L.R. (O.C.) 3. As to power of Court in case of a deadlock in administration, see 1934 Lah. 331.

SEC. 9.—Effect of the section as to administration of estates of less than Rs. 1,000 in value. See 1 Boul. 622. See also 6 I.C. 905=12 Bom.L.R. 471.



such <sup>1</sup>[Division] for probate of his will, or for letters of administration of his estate,

the Administrator-General of the <sup>1</sup>[Division] in which such assets are shall, subject to any rules made by the Government, within a reasonable time after he has had notice of the death of such person, and of his having left such assets, take such proceedings as may be necessary to obtain from the High Court <sup>2</sup>[\* \* \*] letters of administration of the estate of such person.

10. Whenever any person has died leaving assets within the local limits of the ordinary original civil jurisdiction of the High Court at a Presidency-town, the Court, on being satisfied that danger is to be apprehended of misappropriation, deterioration or waste of such assets unless letters of administration of the estate of such person are granted, may upon the application of the Administrator-General or of any person interested in such assets or in the due administration thereof make an order, upon such terms as to indemnifying the Administrator-General against costs and other expenses as the Court thinks fit, directing the Administrator-General to apply for letters of administration of the estate of such person:

Provided that in the case of an application being made under this section for letters of administration of the estate of an exempted person, the Court may refuse to grant letters of administration, if it is satisfied that such grant is unnecessary for the protection of the assets; and in such case the Court shall make such order as to the costs of the application as it thinks fit.

11. (1) Whenever any person has died leaving assets within the local limits of the ordinary original civil jurisdiction of any of the said High Courts, and such Court is satisfied that there is no person immediately available, who is legally entitled to the succession to such assets, or that danger is to be apprehended of misappropriation, deterioration or waste of such assets, before it can be determined who may be legally entitled to the succession thereto, or whether the Administrator-General is entitled to letters of administration of the estate of such deceased person,

the Court may, upon the application of the Administrator-General or of any person interested in such assets, or in the due administration thereof, forthwith direct the Administrator-General to collect and take possession of such assets, and to hold, deposit, realize, sell or invest the same according to the

#### LEG. REF.

<sup>1</sup> Substituted by Order in Council, 1937.

<sup>2</sup> Omitted by *ibid.*

#### NOTES.

SEC. 10.—Possession not to be taken by Administrator-General without previous order of Court. 10 C.W.N. 241. As to when the title of the Administrator-General accrues generally and as to the circumstances in which title of Administrator-General relates back to date of death of deceased, see 8 B.H.C. (O.C.) 140. As to when Administrator-General can be directed to apply for administration, see 1 M.H.C. 234. (Mere possibility of debts being barred by limitation, not always sufficient ground—case under old Act.)

Sec. 11.—“Succession” in section 11 should not be read as meaning intestate suc-

cession only. 56 I.C. 431=24 C.W.N. 326.

WHO CAN APPLY.—Direction to collect assets can be given under this section to Administrator-General, not to a legal representative. 21 Bom. 102; nor to a creditor or debtor to estate. See 1 M.H.C.R. 234. Where an Administrator-General is appointed executor of a will he can obtain an order to take possession of the assets under section 11 before applying for probate, 56 I.C. 431=24 C.W.N. 326; but he cannot take possession without orders of Court previously obtained. 10 C.W.N. 241. Pending grant of letters of administration, the Administrator-General cannot make payment to prejudice of estate. 11 C.W.N. 193. As to right of Administrator-General to reimburse himself for costs, see 10 Bom. 350. On this section, see also 23 Bom. 428; 8 Bom. 140.



directions of the Court, and in default of any such directions according to the provisions of this Act so far as the same are applicable to such assets.

(2) Any order of the Court made under the provisions of this section shall entitle the Administrator-General,

(a) to maintain any suit or proceeding for the recovery of such assets, and

(b) if he thinks fit, to apply for letters of administration of the estate of such deceased person, and

(c) to retain out of the assets of the estate any fees chargeable under rules made under this Act, and to reimburse himself for all payments made by him in respect of such assets which a private administrator might lawfully have made.

Grant of probate or letters of administration to person appearing in the course of proceedings taken by Administrator-General under Ss. 9, 10 and 11.

12. If, in the course of proceeding to obtain letters of administration under the provisions of section 9, section 10 or section 11, any person appears and establishes his claim—

(a) to probate of the will of the deceased; or

(b) to letters of administration as next-of-kin of the deceased, and gives such security as may be required of him by law,

the Court shall grant probate of the will or letters of administration accordingly, and shall award to the Administrator-General the cost of any proceedings taken by him, under those sections to be paid out of the estate as part of the testamentary or intestate expenses thereof.

13. If, in the course of proceedings to obtain letters of administration under the provisions of section 9, section 10 or section 11, no person appears and establishes his claim to probate of a will, or to a grant of letters of administration as next-of-kin of the deceased, within such

Grant of administration to Administrator-General in certain cases.

period as to the Court seems reasonable,

or if a person who has established his claim to a grant of letters of administration as next-of-kin of the deceased fails to give such security as may be required of him by law,

the Court may grant letters of administration to the Administrator-General.

Administrator - General not precluded from applying for letters within one month after death.

14. Nothing in this Act shall be deemed to preclude the Administrator-General from applying to the Court for letters of administration in any case within the period of one month from the death of the deceased.

(b) *Estates of Persons subject to the Army Act<sup>1</sup> [or the Air Force Act]*

Act not to affect Regimental Debts Act, 1893.

15. Nothing in this Act shall be deemed to affect the provisions of the Regimental Debts Act, 1893.

16. It shall not be

Letters of administration not necessary in respect of small estates administered by Administrator-General in accordance with the Regimental Debts Act, 1893.

necessary for the Administrator-General to take out letters of administration of the estate of any deceased person which is being administered by him in accordance with the provisions of the Regimental Debts Act, 1893, if the value of such estate does not on the date when such administration is committed to him exceed rupees one thousand, but he shall have the same power in regard to such estate as he would have had if letters of administration had been granted to him.



17. If the Administrator-General applies, in accordance with the provisions of the Regimental Debts Act, 1893, for letters of administration of the estate of any person subject to the Army Act <sup>1</sup>[or the Air Force Act] the Court may grant to him letters of administration limited to the purpose of dealing with such estate in accordance with the provisions of the Regimental Debts Act, 1893.

(c) *Revocation of Grants.*

18. If an executor or next-of-kin of the deceased, who has not been personally served with a citation or who has not had notice thereof in time to appear pursuant thereto establishes to the satisfaction of the Court a claim to probate of will or to letters of administration in preference to the Administrator-General, any letters of administration granted in accordance with the provisions of this Act to the Administrator-General may be revoked, and probate or letters of administration may be granted to such executor or next-of-kin as the case may be:

Provided that no letters of administration granted to the Administrator-General shall be revoked for the cause aforesaid, except in cases in which a will of the deceased is proved in the <sup>2</sup>[Division] unless the application for that purpose is made within six months after the grant to the Administrator-General and the Court is satisfied that there has been no unreasonable delay in making the application, or in transmitting the authority under which the application is made.

19. If any letters of administration granted to the Administrator-General in accordance with the provisions of this Act are revoked, the Court may order the costs of obtaining such letters of administration, and the whole or any part of any fees which would otherwise have been payable under this Act, together with the costs of the Administrator-General in any proceedings taken to obtain such revocation, to be paid to or retained by the Administrator-General out of the estate:

Provided that nothing in this section shall affect the provisions of clause (c) of sub-section (2) of section 11.

20. If any letters of administration granted to the Administrator-General in accordance with the provisions of this Act are revoked, the same shall, so far as regards the Administrator-General and all persons acting under his authority in pursuance thereof, be deemed to have been only voidable, except as to any act done by any such Administrator-General or other person as aforesaid, after notice of a will or of any other fact which would render such letters void:

Provided that no notice of a will or of any other fact which would render any such letters void shall affect the Administrator-General or any person acting under his authority in pursuance of such letters unless, within the period of one month from the time of giving such notice, proceedings are commenced to prove the will, or to cause the letters to be revoked, and such proceedings are prosecuted without unreasonable delay.

LEG. REF.

<sup>1</sup> Added by Act I of 1927.

<sup>2</sup> Substituted by Order in Council, 1937.



21. If any letters of administration granted to the Administrator-General in accordance with the provisions of this Act are revoked, upon the grant of probate of a will, or upon the grant of letters of administration with a copy of the will annexed, all payments made or acts done by or under the authority of the Administrator-General in pursuance of such letters of administration, prior to the revocation, which would have been valid under any letters of administration lawfully granted to him with a copy of such will annexed shall be deemed valid notwithstanding such revocation.

(d) *General.*

22. Whenever any Administrator-General applies for letters of administration in accordance with the provisions of this Act, it shall be sufficient if the petition required to be presented for the grant of such letters states,

(i) the time and place of the death of the deceased to the best of the knowledge and belief of the petitioner,

(ii) the names and addresses of the surviving next-of-kin of the deceased if known,

(iii) the particulars and value of the assets likely to come into the hands of the petitioner,

(iv) particulars of the liabilities of the estate if known.

Name in which probate or letters to be granted.

23. (New.) <sup>1</sup>[All probates or letters of administration granted to any Administrator-General shall be granted to him by that name.]

24. Probate or letters of administration granted by the High Court <sup>2</sup>[\* \*

Effect of probate or letters granted to Administrator-General.

\*] to the Administrator-General of any <sup>1</sup>[Division] shall have effect over all the assets of the deceased throughout such <sup>1</sup>[Division] and shall be conclusive as to the representative title against all debtors of the

LEG. REF.

<sup>1</sup> Substituted by Order in Council, 1937.

<sup>2</sup> Omitted by Order in Council, 1937.

NOTES.

SECS. 22 to 24.—The estate vests in Administrator-General on grant of letters of administration. 38 M. 1134=27 M. L. J. 400. As to vesting of estate in successor of Administrator-General, see 33 C. 713.

SUITS BY ADMINISTRATOR-GENERAL.—See 28 Bom. 529; 30 C. 927. Administrator-General may sue and be sued in name of his office. See also 8 C.W.N. at p. 93.

SUITS AGAINST ADMINISTRATOR-GENERAL.—See 6 M.H.C.R. 346; 25 Cal. 54. Suit by creditor. See also 10 Cal. 929; 38 Mad. 500=22 I.C. 566. Suit under section 26 for assets improperly distributed by Administrator-General is not suit for administration.

POWERS OF ADMINISTRATOR-GENERAL.—Whereas the Administrator-General is, pending the grant of letters of administration in the same position as a private administrator the only payment he is entitled

to make is for the benefit of or for the preservation of the assets, and not a payment to the prejudice of the estate. 11 C.W.N. 113. Where the letters of administration have been granted, he can exercise his ordinary powers as Administrator-General and dispose of immovable property without the consent of the Court. 38 Mad. 1134=27 M.L.J. 400. An administration cannot be treated as closed until every act necessary for its completion has been done and where, to realise his commission he sells an item which had been previously sold by the son of the deceased on attaining majority, the sale by the son was held a nullity. 38 M. 113. There is no provision of law by which an insolvent's estate in respect of which letters of administration have been granted to the Administrator-General, can be administered under the insolvency law. 38 Mad. 500. An Administrator-General in such cases can claim no higher than the deceased himself and he has not the rights of either the trustee or Official Assignee in insolvency. 38 M. 500.



deceased and all persons holding such assets, and shall afford full indemnity to all debtors paying their debts and all persons delivering up such assets to such Administrator-General:

Provided that the High Court may direct, by its grant, that such probate or letters of administration shall have like effect throughout one or more of the other <sup>1</sup>[Divisions].

Whenever a grant is made by a High Court to the Administrator-General with such effect as last aforesaid, the Court shall send to the other High Courts a certificate that such grant has been made, and such certificate shall be filed by the Courts receiving the same.

<sup>2</sup>[A grant made by the High Court at Rangoon before the separation of Burma from India shall have the same effect for the purposes of this section as it would have had if the separation had not taken place.]

25. (1) Any private executor or administrator may, with the previous consent of the Administrator-General of the <sup>1</sup>[Division] in which any of the assets of the estate, in respect of which such executor or administrator has obtained probate or letters of administration, are situate, by an instrument in writing under his hand notified in the official Gazette, transfer the assets of the estate vested in him by virtue of such probate or letters to the Administrator-General by that name or any other sufficient description.

(2) As from the date of such transfer the transferor shall be exempt from all liability as such executor or administrator, as the case may be, except in respect of acts done before the date of such transfer, and the Administrator-General shall have the rights which he would have had, and be subject to the liabilities to which he would have been subject, if the probate or letters of administration, as the case may be, had been granted to him by that name at the date of such transfer.

26. (1) When the Administrator-General has given the prescribed notice for creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets or any part thereof in discharge of such lawful claims as he has notice of.

(2) He shall not be liable for the assets so distributed to any person of whose claim he had not notice at the time of such distribution.

(3) No notice of any claim which has been sent in and has been rejected or disallowed in part by the Administrator-General shall affect him unless proceedings to enforce such claim are commenced within one month after notice of the rejection or disallowance of such claim has been given in the prescribed manner and unless such proceedings are prosecuted without unreasonable delay.

(4) Nothing in this section shall prejudice the right of any creditor or other claimant to follow the assets or any part thereof in the hands of the persons who may have received the same respectively.

(5) In computing the period of limitation for any suit, appeal or application under the provisions of any law for the time being in force, the period between the date of submission of the claim of a creditor to the Administrator-General and the date of the final decision of the Administrator-General on such claim shall be excluded.

## LEG. REF.

<sup>1</sup> Substituted by Order in Council, 1937.

<sup>2</sup> Inserted by Order in Council, 1937.

## NOTES.

SECS. 25 and 26.—See 8 C.W.N. 362; 22 I.A. 107=22 C. 788; 22 Bom. 1.



27. (1) When the Administrator-General has, so far as may be, discharged all the liabilities of an estate administered by him, he shall notify the fact in the Official Gazette, and he may, by an instrument in writing, with the consent of the Official Trustee and subject to any rules made by the Government, appoint the Official Trustee to be the trustee of any assets then remaining in his hands.

(2) Upon such appointment such assets shall vest in the Official Trustee as if he had been appointed trustee in accordance with the provisions of the Official Trustees Act, 1913, and shall be held by him upon the same trusts as the same were held immediately before such appointment.

28. (1) The High Court <sup>1</sup>[ \* \* \* ] may, on application made to it, give to the Administrator-General of the <sup>2</sup>[Division] any general or special directions as to any estate in his charge or in regard to the administration of any such estate.

(2) Applications under sub-section (1) may be made by the Administrator-General or any person interested in the assets or in the due administration thereof.

29. (1) No Administrator-General shall be required by any Court to enter into any administration bond, or to give other security to the Court, on the grant of any letters of administration to him by that name.

(2) No Administrator-General or Deputy Administrator-General shall be required to verify, otherwise than by his signature, any petition presented by him under the provisions of this Act, and, if the facts stated in any such petition are not within the Administrator-General's own personal knowledge, the petition may be subscribed and verified by any person competent to make the verification.

(3) The entry of the Administrator-General by that name in the books of a Company shall not constitute notice of a trust, and a Company shall not be entitled to object to enter the name of the Administrator-General on its register by reason only that the Administrator-General is a corporation and in dealing with assets the fact that the person dealt with is the Administrator-General shall not of itself constitute notice of a trust.

30. The Administrator-General may, whenever he desires, for the purposes of this Act, to satisfy himself regarding any question of fact, examine upon oath (which he is hereby authorised to administer) any person who is willing to be so examined by him regarding such question.

#### (e) Grant of Certificates.

31. Whenever any person has died leaving assets within any <sup>2</sup>[Division],

#### LEG. REF.

<sup>1</sup> Omitted by Order in Council, 1937.

<sup>2</sup> Substituted by Order in Council, 1937.

#### NOTES.

SEC. 28.—The High Court should not advise on disputed points of law and fact but only on such questions as to management, advancement, change of investment, etc. 111 I.C. 16=1928 L. 514.

SEC. 29.—As to mode of verification by Administrator-General, see 26 Cal. 404. See also 20 Cal. 879.

SEC. 31.—Certificate entitling claimants to receive assets may be granted by Administrator-General without the necessity of taking out probate. 34 B. 506. Although the Limitation Act nowhere provides that time should cease to run upon a claim being



In what case Administrator-General may grant certificate.

and the Administrator-General of such <sup>1</sup>[Division] is satisfied that such assets excluding any sum of money deposited in a Government Savings Bank, or in any Provident Fund to which the provisions of the Provident Funds Act, 1897,<sup>2</sup> apply, did not at the date of death exceed in the whole <sup>3</sup>[two thousand] rupees—in value, he may, after the lapse of one month from the death if he thinks fit, or before the lapse of the said month if he is requested so to do by writing under the hand of the executor or the widow or other person entitled to administer the estate of the deceased, grant to any person, claiming otherwise than as a creditor to be interested in such assets, or in the due administration thereof, a certificate under his hand entitling the claimant to receive the assets therein mentioned left by the deceased, within the <sup>1</sup>[Division] to a value not exceeding in the whole <sup>3</sup>[two thousand] rupees:

Provided that no certificate shall be granted under this section—

(i) where probate of the deceased's will or letters of administration of his estate has or have been granted, or

(ii) in respect of any sum of money deposited in a Government Savings Bank or in any Provident Fund to which the provisions of the Provident Funds Act, 1897,<sup>2</sup> apply.

32. If, in cases falling within section 31, no person claiming to be interested otherwise than as a creditor in such assets or in the due administration thereof obtains, within three months of the death of the deceased a certificate from the Administrator-General under the same section, or

Grant of certificate to creditors and power to take charge of certain estates.

probate of a will or letters of administration of the estate of the deceased, and such deceased was not an exempted person, or was an exempted person who has left assets within the ordinary original civil jurisdiction of the High Court, or within any area notified by the Government in this behalf in the official Gazette, the Administrator-General may administer the estate without letters of administration, in the same manner as if such letters had been granted to him;

and if he neglects or refuses to administer such estate, he shall, upon the application of a creditor, grant a certificate to him in the same manner as if he were interested in such assets otherwise than as a creditor;

and such certificate shall have the same effect as a certificate granted under the provisions of section 31, and shall be subject to all the provisions of this Act which are applicable to such certificate:

Provided that the Administrator-General may, before granting such certificate, if he thinks fit, require the creditor to give reasonable security<sup>1</sup> for the due administration of the estate of the deceased.

33. The Administrator-General shall not be bound to grant any certificate under section 31 or section 32 unless he is satisfied of the title of the claimant and of the value of the assets left by the deceased within the Presidency either by the oath of the claimant, or by such other evidence as he requires.

Administrator - General not bound to grant certificate unless satisfied of claimant's title, etc.

34. The holder of a certificate granted in accordance with the provisions of section 31 or section 32 shall have in respect of the assets specified in such certificate the same powers and duties, and be subject to the same liabilities as he would have had or been subject to if letters of administration had been granted to him:

Effect of certificate.

LEG. REF.

NOTES.

<sup>1</sup> Substituted by Order in Council, 1937.  
<sup>2</sup> See now the Provident Funds Act (XIX of 1925).

<sup>3</sup> Substituted by Act XXXII of 1926.

filed or a certificate being issued by the Administrator-General, yet claims covered by such a certificate containing a memorandum that all debts will be paid as soon as possible, are not barred. 22 I.C. 262 (Cal.).



Provided that nothing in this section shall be deemed to require any person holding such certificate,

(a) to file accounts or inventories of the assets of the deceased before any Court or other authority, or

(b) save as provided in section 32 to give any bond for the due administration of the estate.

35. The Administrator-General may revoke a certificate granted under the provisions of section 31 or section 32 on any of the following grounds, namely:—

(i) that the certificate was obtained by fraud or misrepresentation made to him,

(ii) that the certificate was obtained by means of an untrue allegation of a fact essential in law to justify the grant though such allegation was made in ignorance or inadvertently.

36. (1) When a certificate is revoked in accordance with the provisions of section 35, the holder thereof shall, on the requisition of the Administrator-General, deliver it up to such Administrator-General, but shall not be entitled to the refund of any fee paid thereon.

(2) If such person wilfully and without reasonable cause omits to deliver up the certificate, he shall be punishable with imprisonment which may extend to three months, or with fine which may extend to one thousand rupees, or with both.

37. The Administrator-General shall not be bound to take out letters of administration of the estate of any deceased person on account of the assets in respect of which he grants any certificate, under section 31 or section 32, but he may do so if he revokes such certificate under section 35 or ascertains that the value of the estate exceeded <sup>1</sup>[two thousand] rupees.

38. Where a person not having his domicile in British India has died leaving assets in any <sup>2</sup>[Division] and in the country in which he had his domicile at the time of his death, and proceedings for the administration of his estate with respect to assets in any such <sup>2</sup>[Division] have been taken under section 31 or section 32, and there has been a grant of administration in the country of domicile with respect to the assets in that country,

the holder of the certificate granted under section 31 or section 32, or the Administrator-General, as the case may be, after having given the prescribed notice for creditors and others to send in to him their claims against the estate of the deceased, and after having discharged, at the expiration of the time therein named, such lawful claims as he has notice of, may, instead of himself distributing any surplus or residue of the deceased's property to persons residing out of British India who are entitled thereto transfer, with the consent of the executor or administrator, as the case may be, in the country of domicile, the surplus or residue to him for distribution to those persons.

(f) *Liability.*

39. (1) The revenues of the Government <sup>3</sup>[\* \* \*] shall be liable to make good all sums required to discharge any liability which the Administrator-General, if he were a private ad-



ministrator, would be personally liable to discharge, except when the liability is one to which neither the Administrator-General nor any of his officers has in any way contributed, or which neither he nor any of his officers could, by the exercise of reasonable diligence have averted, and in either of those cases the Administrator-General shall not, nor shall the revenues <sup>1</sup>[of the Government] <sup>2</sup>[\* \* \*] be subject to any liability.

(2) Nothing in sub-section (1) shall be deemed to render <sup>2</sup>[the Government] [\* \* \*] For the Administrator-General liable for anything done before the commencement of this Act, by or under the authority of the Administrator-General.

40. (1) If any suit be brought by a creditor against any Administrator-General, such creditor shall be liable to pay the costs of the suit unless he proves that not less than one month previous to the institution of the suit he had applied in writing to the Administrator-General, stating the amount and other particulars of his claim, and had given such evidence in support thereof as, in the circumstances of the case, the Administrator-General was reasonably entitled to require.

(2) If any such suit is decreed in favour of the creditor, he shall, nevertheless, unless he is a secured creditor, be only entitled to payment out of the assets of the deceased equally and rateably with the other creditors.

41. Nothing in section 80 of the Code of Civil Procedure, 1908, shall apply to any suit against the Administrator-General in which no relief is claimed against him personally.

#### PART IV.

##### FEES.

42. (1) There shall be charged in respect of the duties of the Administrator-General such fees, whether by way of percentage or otherwise, as may be prescribed by the Government:

Provided that, in the case of any estate, the administration of which has been committed to the Administrator-General before the commencement of this Act, the fees prescribed under this section shall not exceed the fees leviable in respect of such estate under the Administrator-General's Act, 1874, as subsequently amended:

Provided further that, in respect of the duties of the Administrator-General under the Regimental Debts Act, 1893, the fees prescribed in this section shall be determined in accordance with the provisions of that Act.

(2) The fees under this section may be at different rates for different estates or classes of estates or for different duties, and shall, so far as may be, be arranged so as to produce an amount sufficient to discharge the salaries and all other expenses incidental to the working of this Act (including such sum as

##### LEG. REF.

<sup>1</sup> Inserted by Act XXI of 1922, section 6 (a).

<sup>2</sup> The words "or Government of India omitted by A.O. 1937.

##### NOTES.

SEC. 42.—For the purpose of arriving at the amount of commission payable to the Administrator-General in the administration of an intestate's estate in cases where the administration commenced before April 1914, the value of the assets is to be taken as at the date of their distribution. 43 M.

L.J. 347. On this section, see also 22 I.C. 262 (Cal.); 31 Cal. 572; 25 Cal. 65; 4 Cal. 770. Under this section commission not to be charged by executor or administrator. 6 Cal. 70. Moneys retained as fees of Administrator-General are deemed to be assets distributed. See 1 Mad. 148; 31 Cal. 572. In an administration suit the subject-matter of the suit is the actual value of the property to which the plaintiff would be entitled if the suit succeeds, and not the notional figure at which the plaintiff chooses to value it. 41 Bom.L.R. 413=183 I.C. 655 =1939 Bom. 299.



Government may determine to be required to insure the revenues of the Government <sup>1</sup>[\* \*] against loss under this Act).

43. (1) Any expenses which might be retained or paid out of any estate in the charge of the Administrator-General, if he were a private administrator of such estate, shall be so retained or paid and the fees prescribed under section 42 shall be retained or paid in like manner as and in addition to such expenses.

(2) The Administrator-General shall transfer and pay to such authority, in such manner and at such time as the Government may prescribe, all fees received by him under this Act, and the same shall be carried to the account and credit of the Government <sup>1</sup>[\* \*].

## PART V.

### AUDIT OF THE ADMINISTRATOR-GENERAL'S ACCOUNTS.

44. The accounts of every Administrator-General shall be audited at least once annually, and at any other time if the Government so direct, by the prescribed person and in the prescribed manner.

Audit of Administrator-General's Accounts.

45. The auditors shall examine the accounts and forward to the Government a statement thereof in the prescribed form, together with a report thereon and a certificate signed by them showing—

(a) whether they contain a full and true account of everything which ought to be inserted therein,

(b) whether the books which by any rules made under this Act are directed to be kept by the Administrator-General, have been duly and regularly kept, and

(c) whether the assets and securities have been duly kept and invested and deposited in the manner prescribed by this Act, or by any rules made thereunder,

or (as the case may be) that such accounts are deficient, or that the Administrator-General has failed to comply with this Act or the rules made thereunder, in such respects as may be specified in such certificate.

Power of auditors to summon and examine witnesses, and to call for documents.

46. (1) Every auditor shall have the powers of a Civil Court under the Code of Civil Procedure, 1908,

(a) to summon any person whose presence he thinks necessary to attend him from time to time; and

(b) to examine any person on oath to be by him administered; and

(c) to issue a commission for the examination on interrogatories or otherwise of any person; and

(d) to summon any person to produce any document or thing the production of which appears to be necessary for the purpose of such audit or examination.

(2) Any person who when summoned refuses, or without reasonable cause, neglects to attend or to produce any document or thing or attends and refuses to be sworn, or to be examined, shall be deemed to have committed an offence within the meaning of, and punishable under, section 188 of the Indian Penal Code, and the auditor shall report every case of such refusal or neglect to Government.

47. The costs of and incidental to such audit and examination shall be determined in accordance with rules made by the Government, and shall be defrayed in the prescribed manner.

Costs of audit, etc.



## PART VI.

## MISCELLANEOUS.

48. The Administrator-General may, in addition to, and not in derogation of, any other powers of expenditure lawfully exercisable by him, incur expenditure—

General powers of administration.

(a) on such acts as may be necessary for the proper care and management of any property belonging to any estate in his charge; and

(b) with the sanction of the High Court <sup>1</sup>[\* \* \*] on such religious, charitable and other objects, and on such improvements as may be reasonable and proper in the case of such property.

49. Any person interested in the administration of any estate, which is in the charge of the Administrator-General shall, subject to such conditions and restrictions as may be prescribed, be entitled at all reasonable times to inspect the accounts relating to such estate and the reports and certificates of the auditor, and on payment of the prescribed fee, to copies thereof and extracts therefrom.

Power of person beneficially interested to inspect Administrator-General's account, etc., and take copies.

50. (1) The Government shall make rules<sup>2</sup> for carrying into effect the objects of this Act and for regulating the proceedings of the Administrator-General.

Power to make rules.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the accounts to be kept by the Administrator-General and the audit and inspection thereof.

(b) the safe custody, deposit and investment of assets and securities which come into the hands of the Administrator-General,

(c) the remittance of sums of money in the hands of the Administrator-General in cases in which such remittances are required,

(d) subject to the provisions of this Act, the fees to be paid under this Act, and the collection and accounting for any such fees,

(e) the statements, schedules and other documents to be submitted to the Government or to any other authority by the Administrator-General, and the publication of such statements, schedules, or other documents,

(f) the realisation of the cost of preparing any such statements, schedules or other such documents,

(ff) <sup>3</sup>[\* \* \* \* \*]

(g) the manner in which and the person by whom the costs of and incidental to any audit under the provisions of this Act are to be determined and defrayed,

## LEG. REF.

<sup>1</sup> Omitted by Order in Council, 1937.

<sup>2</sup> For rules under this section, see *Gazette of India*, 1914, Pt. I, p. 369.

For such rules, for Bengal; see *Gen. St. Rules and Orders*, Vol. IV, p. 406; for Madras, see *Madras Local Rules and Orders*, 1923, Vol. I, Pt. II, p. 231; for Bombay, see *Bombay Local Rules and Orders*, 1924, Vol. II, p. 773, for the provinces of Assam, U.P., Burma; and the Punjab, see the local *Gazettes* of 1914 or the latest editions of

the Local Rules and Orders of these provinces.

<sup>3</sup> Cl. (ff) which was inserted by Act X of 1914 was repealed by Act V of 1917, section 6 and Schedule.

## NOTES.

SECS. 50 AND 52.—“Assets” includes both movable and immovable property. 51 M.L. J. 334. The Administrator-General does not earn a commission by merely taking out letters of administration. (*Ibid.*)



(h) the manner in which summonses issued under the provisions of section 46 are to be served and the payment of the expenses of any persons summoned or examined under the provisions of this Act and of any expenditure incidental to such examination, and

(i) any matter in this Act directed to be prescribed.

(3) All rules made under this Act shall be published in the official Gazette and, on such publication, shall have effect as if enacted in this Act.

51. Whoever, during any examination authorised by this Act, makes upon oath a statement which is false and which he either knows or believes to be false or does not believe to be true, shall be deemed to have intentionally given false evidence in a stage of a judicial proceeding.

52. All assets in the charge of the Administrator-General which have been in his custody for a period of twelve years or upwards whether before or after the commencement of this Act without any application for payment thereof having been made and granted by him shall be transferred, in the prescribed manner, to the account and credit of the Government <sup>1</sup>[\* \* ]:

Provided that this section shall not authorise the transfer of any such assets as aforesaid, if any suit or proceeding is pending in respect thereof in any Court.

53. (1) If any claim is hereafter made to any part of the assets transferred to the account and credit of the Government <sup>1</sup>[\* \* ] under the provisions of this Act, or any Act hereby repealed, and if such claim is established to the satisfaction of the prescribed authority, the Government <sup>1</sup>[\* \* ] shall pay to the claimant the amount of the principal so transferred to its account and credit or so much thereof as appears to be due to the claimant.

(2) If the claim is not established to the satisfaction of the prescribed authority, the claimant may, without prejudice to his right to take any other proceedings for the recovery of such assets, apply by petition to the High Court <sup>2</sup>[\* \* ] against the <sup>3</sup>[Government] and such Court, after taking such evidence as it thinks fit, shall make such order in regard to the payment of the whole or any part of the said principal sum as it thinks fit, and such order shall be binding on all parties to the proceedings:

<sup>4</sup>[Provided that nothing in this section affects any option afforded to a claimant by section 179 of the Government of India Act, 1936]

(3) The Court may further direct by whom the whole or any part of the cost of each party shall be paid.

District Judge in certain cases to take charge of property of deceased persons, and to report to Administrator-General.

54. (1) Whenever any person, other than an exempted person, dies leaving assets within the limits of the jurisdiction of a District Judge, the District Judge shall report the circumstance without delay to the Administrator-General of the <sup>3</sup>[Division] stating the following particulars so far as they may be known to him:—

#### LEG REF.

<sup>1</sup> The words "of India" omitted by Act XXI of 1922, section 7.

<sup>2</sup> Omitted by Order in Council, 1937.

<sup>3</sup> Substituted by *ibid.*

<sup>4</sup> Inserted by Order in Council, 1937.

#### NOTES.

SEC. 52.—See 51 M.L.J. 334.



- (a) the amount and nature of the assets,
- (b) whether or not the deceased left a will and if so, in whose custody it is,
- (c) the names and addresses of the surviving next-of-kin of the deceased and, on the lapse of one month from the date of the death,
- (d) whether or not any one has applied for probate of the will of the deceased or letters of administration of his estate.

(2) The District Judge shall retain the assets under his charge, or appoint an officer under the provisions of section 239 of the Indian Succession Act, 1865,<sup>1</sup> to take and keep possession of the same until the Administrator-General has obtained letters of administration, or until some other person has obtained probate or such letters or a certificate from the Administrator-General under the provisions of this Act, when the assets shall be delivered over to the holder of such probate, letters of administration or certificate:

Provided that the District Judge may, if he thinks fit, sell any assets which are subject to speedy and natural decay, or which for any other sufficient cause he thinks should be sold, and he shall thereupon credit the proceeds of such sale to the estate.

(3) The District Judge may cause to be paid out of any assets of which he or such officer has charge, or out of the proceeds of such assets or of any part thereof, such sums as may appear to him to be necessary for all or any of the following purposes, namely:—

(a) the payment of the expenses of the funeral of the deceased and of obtaining probate of his will or letters of administration of his estate or a certificate under this Act,

(b) the payment of wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan or domestic servant,

(c) the relief of the immediate necessities of the family of the deceased, and

(d) such acts as may be necessary for the proper care and management of the assets left by the deceased,

and nothing in section 279, section 280 or section 281 of the Indian Succession Act, 1865,<sup>2</sup> or in any other law for the time being in force with respect to rights of priority of creditors of deceased persons shall be held to affect the validity of any payment so caused to be made.

Succession Act and Companies Act not to affect Administrator-General and saving of provisions of Presidency Police Acts as to petty estates.

55. (1) Nothing contained in the Indian Succession Act, 1865, or the Indian Companies Act, 1882, shall be taken to supersede or affect the rights, duties and privileges of any Administrator-General.

(2) Nothing contained in the Indian Succession Act, 1865, or in this Act shall be deemed to affect, or to have affected, any law for the time being in force relating to the movable property under two hundred rupees in value of persons dying intestate within any of the Presidency towns <sup>3</sup>[\* \*] which shall be or has been taken charge of by the police for the purpose of safe custody.

#### LEG. REF.

<sup>1</sup> See now S. 269 of the Indian Succession Act (XXXIX of 1925).

<sup>2</sup> For corresponding sections of the new

Act, see Ss. 320, 321 and 322 of Act XXXIX of 1925.

<sup>3</sup> Omitted by A.O., 1937.



Order of Court to be equivalent to decree.

56. Any order made under this Act by any Court shall have the same effect as a decree.

57. Notwithstanding anything in this Act, or in any other law for the time being in force, the Central Government may, by general or special order, direct that, where a subject of a foreign State dies in British India, and it appears that there is no one in British India other than the Administrator-General, entitled to apply to a Court of competent jurisdiction for letters of administration of the estate of the deceased, letters of administration shall, on the application to such Court of any Consular Officer of such foreign State, be granted to such Consular Officer on such terms and conditions as the Court may, subject to any rules made in this behalf by the Central Government by notification in the Official Gazette, think fit to impose.

Provision for administration by Consular Officer in case of death in certain circumstances of foreign subject.

58. <sup>1</sup>[\* \* \* \* \*]

Saving of provisions of Indian Registration Act, 1908.

59. Nothing in this Act shall be deemed to affect the provisions of the Indian Registration Act, 1908.

<sup>2</sup>[59-A.] The amendments of this Act which come into force on the commencement of Part III of the Government of India Act, 1935, shall not affect the jurisdiction of any Court with respect to any proceedings then pending before it and shall not be construed as transferring the administration of any property or estate then in the hands of any Administrator-General to any other Administrator-General.]

Saving.

60. [Repeals.] Repealed by the Repealing Act (XII of 1927), S. 2 and Sch.

## THE SCHEDULE.

### ENACTMENTS REPEALED.

[Repealed by the Repealing Act, 1927 (XII of 1927).]

## THE AGRICULTURAL PRODUCE CESS ACT (XXVII OF 1940).

[15th April, 1940.]

*An Act to make better financial provision for the Imperial Council of Agricultural Research.*

WHEREAS it is expedient to make better financial provision for the carrying out by the Imperial Council of Agricultural Research of the objects for which it is established as set forth in the Memorandum of Association of that body, and for this purpose to impose on certain articles a cess by way of customs duty on export, the proceeds of which shall be paid to the said Council;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE AGRICULTURAL PRODUCE CESS ACT, 1940.

(2) It extends to the whole of British India.

Definition.

2. In this Act, unless there is anything repugnant in the subject or context,—

LEG. REF.

<sup>1</sup> Omitted by A.O., 1937.

<sup>2</sup> Inserted by A.O., 1947.



3. Repeal of Act X of 1879, and sections 4 and 5 of Act XV of 1880. [Repealed by Act I of 1938.]

(a) "Collector" means a Customs-Collector as defined in clause (c) of section 3 of the Sea Customs Act, 1878, or a Collector of land Customs as defined in clause (c) of section 2 of the Land Customs Act, 1924, as the case may be, and

(b) "Council" means the Imperial Council of Agricultural Research.

3. (1) A customs duty at the rate of one-half of one per cent, *ad valorem* shall be levied on all articles included in the Schedule which are exported from British India:

Imposition of cess.

Provided that the said duty shall not be levied on articles proved to the satisfaction of the Collector not to have been produced in India.

(2) The Central Government may, by notification in the official Gazette, fix for the purposes of levying the said duty tariff values of any articles included in the Schedule, and may alter any tariff values for the time being in force.

4. The Central Government may, after previous consultation with the Council, by notification in the official Gazette, direct that any article specified in the Schedule shall cease to be subject to the duty imposed by section 3, and thereupon, so long as the notification remains in force, that article shall be deemed not to be included in the Schedule.

Power to exclude articles from schedule.

Refund of, and exemption from, cess.

5. The Central Board of Revenue may make rules providing, on such conditions as may be specified in the rules, for—

(a) the refund of duty levied where articles are exported by land and subsequently imported into India, and

(b) the export by land, without payment of the duty, of articles which are subsequently to be imported into India.

Payment of cess to Council and expenditure of cess by Council.

6. (1) The proceeds of the duty levied under this Act reduced by the cost of collection as determined by the Central Government shall be paid to the Council.

(2) The amount so due shall be paid by the Central Government to the Council at intervals of not more than six months.

(3) The expenditure of the money so paid to the Council shall be subject to such limitations as may be imposed by rules made in this behalf by the Central Government.

7. (1) The Council shall constitute a Standing Finance Committee, of which one member shall be chosen from among the representatives of the Central Legislature on the governing body of the Council, and one member shall be an officer appointed by the Central Government.

(2) Subject to the provisions of sub-section (1), the constitution, functions and procedure of the Standing Finance Committee shall be regulated in such manner as the Council may with the previous approval of the Central Government determine.

Reserve fund.

8. The Council shall in accordance with the rules made in this behalf by the Central Government create and maintain a reserve fund.

Power of Central Government to make rules.

9. (1) The Central Government may, after consultation with the Council, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, the Central Government may make rules regulating the expenditure of the money paid to the Council under section 6 and providing for the



creation, maintenance and management of the reserve fund referred to in section 8.

(3) All rules made under this Act shall be laid before both Chambers of the Central Legislature as soon as may be after they are made.

### THE SCHEDULE.

(See section 3.)

1. Bones.
2. Bristles.
3. Butter.
4. Cereals, other than Rice and Wheat.
5. Drugs.
6. Fibre for brushes.
7. Fish.
8. Fruits.
9. Ghee.
10. Hides, raw.
11. Manures.
12. Oilcakes.
13. Pulses.
14. Seeds.
15. Skins, raw.
16. Spices.
17. Tobacco, unmanufactured.
18. Vegetables.
19. Wheat.
20. Wheat Flour.
21. Wool, raw.

## THE AGRICULTURAL PRODUCE (GRADING AND MARKING) ACT (I OF 1937).

[24th February, 1937.]

*An Act to provide for the grading and marking of agricultural produce.*

WHEREAS it is expedient to provide for the grading and marking of agricultural produce; It is hereby enacted as follows:—

Short title and extent.	1. (1) This Act may be called THE AGRICULTURAL PRODUCE (GRADING AND MARKING) ACT, 1937.
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(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas but excluding Burma.	
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Explanations.	2. In this Act, unless the contrary appears from the subject or context,—
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(a) "agricultural produce" includes all produce of agriculture or horticulture and all articles of food or drink wholly or partly manufactured from any such produce, and fleeces and the skins of animals;

(b) "counterfeit" has the meaning assigned to that word by section 28 of the Indian Penal Code;

(c) "covering" includes any vessel, box, crate, wrapper, tray or other container;

(d) "grade designation" means a designation prescribed as indicative of the quality of any scheduled article;

(e) "grade designation mark" means a mark prescribed as representing a particular grade designation;

(f) "quality", in relation to any article, includes the state and condition of the article;



- (g) "prescribed" means prescribed by rules made under this Act;  
 (h) "scheduled article" means an article included in the Schedule; and  
 (i) an article is said to be marked with a grade designation mark, if the article itself is marked with a grade designation mark or any covering containing or label attached to such article is so marked.

Prescription of grade designations.

3. The Central Government may, after previous publication by notification in the Official Gazette make rules—

(a) fixing grade designations to indicate the quality of any scheduled article;

(b) defining the quality indicated by every grade designation;

(c) specifying grade designation marks to represent particular grade designations;

(d) authorising a person or a body of persons, subject to any prescribed conditions, to mark with a grade designation mark any article in respect of which such mark has been prescribed or any covering containing or label attached to any such article;

(e) specifying the conditions referred to in clause (d) including in respect of any article conditions as to the manner of marking, the manner in which the article shall be packed, the type of covering to be used, and the quantity by weight, number or otherwise to be included in each covering;

(f) providing for the payment of any expenses incurred in connection with the manufacture or use of any implement necessary for the reproduction of a grade designation mark or with the manufacture or use of any covering or label marked with a grade designation mark; and

(g) providing for the confiscation and disposal of produce marked otherwise than in accordance with the prescribed conditions with a grade designation mark.

Penalty for unauthorised marking with grade designation mark.

4. Whoever marks any scheduled article with a grade designation mark, not being authorised to do so by rule made under section 3, shall be punishable with fine which may extend to Rs. 500.

5. Whoever counterfeits any grade designation mark or has in his possession any die, plate or other instrument for the purpose of counterfeiting a grade designation mark shall be punishable with imprisonment which may extend to two years, or with fine, or with both.

Penalty for counterfeiting grade designation mark.

6. The Central Government after such consultation as it thinks fit of the interests likely to be affected, may by notification in the Official Gazette declare that the provisions of this Act shall apply to an article of agricultural produce not included in the Schedule and on the publication of such notification such article shall be deemed to be included in the Schedule.

Extension of application of Act.

## THE SCHEDULE.

(See Section 2.)

1. Fruit.
2. Vegetables.
3. Eggs.
4. Dairy produce.
5. Tobacco.
6. Coffee.
7. Hides and skins.



**THE AGRICULTURISTS' LOANS ACT (XII OF 1884).**

**PREFATORY NOTE.**—In a country like India, where agriculture is the main source of income for the vast majority of the people, and the income from which source contributes by far the largest portion of the revenues of State, the progress of agriculture is one of the main concerns of Government.

The poverty of the people engaged in agriculture necessitates the advance of loans by the Government to the raiyats engaged in the cultivation of land, for necessary agricultural purposes, as for instance, for purchase of seed and ploughing cattle in proper seasons, and for obtaining other agricultural implements.

The legislature has therefore provided for the granting of such loans on moderate and reasonable rates of interest and for their recovery in small instalments, spread over a number of years. But for such help, these poor raiyats, many of them illiterate, would fall into the hands of greedy and usurious money-lenders. This Act as well as the Northern India Takkavi Act were passed for the purpose of giving relief to agriculturists by grant of loans from Government funds for purposes connected with cultivation.

**EFFECT OF LEGISLATION.**

Year.	No.	Short title.	How repealed or otherwise affected by legislation.
1884	XII	The Agriculturists' Loans Act, 1884.	S. 4, Am., Act VIII of 1906; Act IV of 1914; See also Act I of 1938 and Mad. Act XVI of 1935. Rep. except Ss. 1, 4, 5, 6, in talukas of Nugur, Albaka and Cherla, Reg. I of 1909, S. 3 (2). Declared in force in Upper Burma (Except the Shan States), Act XIII of 1898, S. 4. S. 2 declared in force in British Baluchistan, Reg. II of 1913, S. 3. Declared in force in the Arakan Hill District, Reg. I of 1916, S. 2. S. 2 declared in force in British Baluchistan, Reg. II of 1913, S. 3.

[24th July, 1884.]

*An Act to amend and provide for the extension of the Northern India Takkavi Act, 1879.*

**Preamble.** WHEREAS it is expedient to amend the Northern India Takkavi Act, 1879, and provide for its extension to any part of British India; It is hereby enacted as follows:—

**Short title.** 1. (1) This Act may be called THE AGRICULTURISTS' LOANS ACT, 1884; and

**Commencement.** (2) It shall come into force on the first day of August, 1884.

**Local extent.** 2. (1) This section and section 3 extend to the whole of British India.

(2) The rest of this Act extends in the first instance only to the territories respectively administered by the Governor of Bombay in Council, the Lieutenant-Governors of the North-Western Provinces and the Punjab, and the Chief Commissioners of Oudh, the Central Provinces, Assam and Ajmere.

(3) But <sup>1</sup>[any Provincial Government] may, from time to time, by notification in the Official Gazette, extend the rest of this Act to the whole or any part of the territories under its administration.<sup>2</sup>

**LEG. REF.**

<sup>1</sup> Substituted by Order in Council, 1937.

<sup>2</sup> The Act has been declared in force in the whole of Upper Burma (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898). Burma Code, S. 2 of the Act was previously declared in force by notification under S. 5 of the Scheduled Districts Act, 1874 (XIV of 1874), see *Burma Gazette*,

1896, Pt. I, p. 112, and under that section, Ss. 4, 5 and 6 of the Act were extended there, see *ibid.*, p. 121.

It has been declared in force in the Angul District by notification under S. 3 (2) of the Angul District Regulations, 1894 (Beng. Code), see *Calcutta Gazette*, 1896, Pt. I, p. 1231.



4. (1) The Provincial Government [or in a Province for which there is a Board of Revenue, or Financial Commissioner, such Board or Financial Commissioner subject to the control of the Provincial Government]<sup>1</sup> may, from time to time, [\* \* \*]<sup>2</sup> make rules as to loans to be made to owners and occupiers of arable land for the relief of distress, the purchase of seed or cattle, or any other purpose not specified in the Land Improvement Loans Act, 1883, but connected with agricultural objects.

(2) All such rules shall be published in the Official Gazette.

5. Every loan made in accordance with such rules, all interest (if any) chargeable thereon, and costs (if any) incurred in making or recovering the same, shall when they become due, be recoverable from the person to whom the loan was made, or from any person who has become surety for the repayment thereof, as if they were arrears of land-revenue or costs incurred in recovering the same due by the person to whom the loan was made or by his surety.

6. When a loan is made under this Act to the members of a village community or to any other persons on such terms that all of them are jointly and severally bound to the Government for the payment of the whole amount payable in respect thereof, and a statement showing the portion of that amount which as among themselves each is bound to contribute is entered upon the order granting the loan and is signed, marked, or sealed by each of them or his agent duly authorized in this behalf and by the officer making the order, that statement shall be conclusive evidence of the portion of that amount which as among themselves each of those persons is bound to contribute.

## THE INDIAN AIRCRAFT ACT (XXII OF 1934).

PREFATORY NOTE.—The following is the Statement of Objects and Reasons to the original Airships Bill, 1910, entitled a Bill to control the manufacture, use, sale, import and export of Airships:—"The gradual improvement which is taking place in the construction of airships has given rise to certain new military problems. It is now considered necessary, on military grounds, to prevent the acquisition, through the use of such vehicles, of improper information as to the internal arrangements of forts, arsenals magazines, etc., and also to protect places or persons from attack from such vehicles, in times of actual hostilities. It is therefore proposed to take powers to control, for military purposes, the manufacture, sale, import, export, use and possession of all airships by a system of licences to be issued to approved persons. It is also proposed to empower Government to take out all such airships, subject to the payment of reasonable compensation, in times of grave public emergency.—(*Fort St. George Gazette*, Pt. III, dated 5th September, 1911, p. 572.)

In 1934, aircraft had advanced to a considerable extent, and there was necessity for amendment and consolidation of the old Act. The following is the Statement of Objects and Reasons appended to the Bill:—"Aerial navigation in British India is at present governed by the Indian Aircraft Act, 1911, and the rules made thereunder. In 1919 an Inter-

### LEG. REF.

<sup>1</sup> Inserted by Act IV of 1914, S. 2 and Sch. Pt. I.

<sup>2</sup> The words "with the previous sanction of the Governor-General in Council" subsequently altered into "subject to the control" by Act VII of 1906 were omitted by Act IV of 1914.

### NOTES.

Sec. 4.—A comparison of S. 4, Land Imp. Loans Act, 1883, and S. 4 of this Act would show that if a loan would be granted under the Land Imp. Loans Act, it would not be granted under this Act. I.L.R. (1939)

Mad. 1017=1939 Mad. 711=(1939) 2 M.L.J. 23. A loan granted for weeding land and for making a stone pavement comes under Land Imp. Loans Act and not this Act. 41 Bom.L.R. 257=1939 Bom. 183.

Sec. 5.—Claim under S. 5 is not cognizable by Civil Court. 19 A.L.J. 360. Recovery even by sale. See 26 A. 540; 29 C. 537; 22 A. 321. Mortgage of trees by ex-proprietory tenants to secure *takavi* loans taken from Government—Such tenants cannot by relinquishing their holding to the Zamindar defeat the interests of the Government under the security. 26 All. 540; 24 All. 538.



national Convention for the regulation of Aerial Navigation was signed by the plenipotentiaries of 27 countries, with the object of establishing regulations of universal application and of encouraging peaceful intercourse with nations by means of aerial communications. To this Convention India was a signatory. The Convention deals with all questions relating to international aerial navigation and also provides for the institution of a permanent International Commission for Air Navigation, with very wide powers as regards the formulation of rules for the making of aircraft, the grant of certificates, rules of the air and so forth.

For some years past, the inadequacy of the Indian Aircraft Act, 1911, has been increasingly felt, and the stage has now been reached where it is no longer possible to control air traffic efficiently, or to implement India's international obligations without fresh legislation. The present Bill, therefore, is designed to enlarge the rule-making powers of the Governor-General in Council in order to meet modern developments, to enable Government to give full effect to the provisions of the International Convention and its annexes and to provide for certain other matters on which legislation has become necessary."—(*Fort St. George Gazette*, Pts. III and IV, dated 17th April, 1934, p. 165.)

## THE INDIAN AIRCRAFT ACT (XXII OF 1934).

### CONTENTS.

#### SECTIONS.

1. Short title and extent.
2. Definitions.
3. Power of the Central Government to exempt certain aircraft.
4. Power of the Central Government to make rules to implement the Convention of 1919.
5. Power of the Central Government to make rules.
6. Power of the Central Government to make orders in emergency.
7. Power of the Central Government to make rules for investigation of accidents.
8. Power to detain aircraft.
- 8-A. Power of Central Government to make rules for protecting the public health.
- 8-B. Emergency powers for protecting the public health.

#### SECTIONS.

9. Wreck and salvage.
10. Penalty for act in contravention of rule made under this Act.
11. Penalty for flying so as to cause danger.
12. Penalty for abetment of offences and attempted offences.
13. Power of Court to order forfeiture.
14. Rules to be made after publication.
15. Use of patented invention on aircraft, not required in British India.
16. Power to apply customs procedure.
17. Bar of certain suits.
18. Saving for acts done in good faith under the Act.
19. Saving of application of Act.
20. Repeals.

### EFFECT OF LEGISLATION.

Year.	No.	Short title.	Rep. or otherwise how affected by Legislation.
1934	XXII	The Indian Aircraft Act, 1934.	Rep. in part by Act I of 1938. Am., by Acts VII of 1936; XXII of 1938 and XXXVII of 1939. Am., by Government of India (Adaptation of Indian Laws) Order, 1937. See also Act XXXV of 1939.

[19th August, 1934.

*'An Act to make better provision for the control of the manufacture, possession, use, operation, sale, import and export of aircraft.*

WHEREAS it is expedient to make better provision for the control of the manufacture, possession, use, operation, sale, import and export of aircraft; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN AIRCRAFT ACT, 1934.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas, <sup>1</sup>[and applies also—

LEG. REF.

<sup>1</sup>Added by Act XXXVII of 1939.



- (a) to British subjects and servants of the Crown in any part of India ;  
 (b) to British subjects who are domiciled in any part of India wherever they may be ;  
 (c) to and to persons on, aircraft registered in British India wherever they may be.]

## Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "aircraft" means any machine which can derive support in the atmosphere from reactions of the air, and includes balloons whether fixed or free, airships, kites, gliders and flying machines ;

(2) "aerodrome" means any definite or limited ground or water area intended to be used, either wholly or in part, for the landing or departure of aircraft, and includes all buildings, sheds, vessels, piers, and other structures thereon or appertaining thereto ;

(3) "import" means bringing into British India ; and

(4) "export" means taking out of British India.

3. The Central Government may, by notification in the Official Gazette, exempt from [all or any of the provisions of this Act]<sup>1</sup> any aircraft or class of aircraft and any person or class of persons, or may direct that such provisions shall apply to such aircraft or persons subject to such modifications as may be specified in the notification.

4. The Central Government may, by notification in the Official Gazette, make such rules as appear to it to be necessary for carrying out the Convention relating to the regulation of Aerial Navigation signed at Paris, October, 13, 1939, with Additional Protocol, signed at Paris, May 1, 1920, and any amendment which may be made there-to under the provisions of Art. 34 thereof.

Power of Central Government to make rules.

5. (1) The Central Government may, by notification in the Official Gazette, make rules regulating the manufacture, possession, use, operation, sale, import or export of any aircraft or class of aircraft.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the authorities by which any of the powers conferred by or under this Act are to be exercised ;

(b) the licensing, inspection and regulation of aerodromes, the conditions under which aerodromes may be maintained and the fees which may be charged thereat, and the prohibition or regulation of the use of unlicensed aerodromes ;

(c) the inspection and control of the manufacture, repair and maintenance of aircraft and of places where aircraft are being manufactured, required or kept ;

(d) the registration and marking of aircraft ;

(e) the conditions under which aircraft may be flown, or may carry passengers, mails, or goods ; or may be used for industrial purposes and the certificates, licenses or documents to be carried by aircraft ;

(f) the inspection of aircraft for the purpose of enforcing the provisions of this Act and the rules thereunder, and the facilities to be provided for such inspection ;

(g) the licensing of persons employed in the operation, manufacture, repair or maintenance of aircraft ;



(h) the air-routes by which and the conditions under which aircraft may enter or leave British India, or may fly over British India, and the places at which aircraft shall land;

(i) the prohibition of flight by aircraft over any specified area, either absolutely or at specified times or subject to specified conditions and exceptions;

(j) the supply, supervision and control of air-route beacons, aerodrome lights, and lights at or in the neighbourhood of aerodromes or on or in the neighbourhood of air-routes;

<sup>1</sup>[(jj) the installation and maintenance of lights on private property in the neighbourhood of aerodromes or on or in the neighbourhood of air-routes, by the owners or occupiers of such property, the payment by the Central Government for such installation and maintenance, and the supervision and control of such installation and maintenance, including the right of access to the property for such purposes;]

(k) the signals to be used for purposes of communication by or to aircraft and the apparatus to be employed in signalling;

(l) the prohibition and regulation of the carriage in aircraft of any specified article or substance;

(m) the measures to be taken and the equipment to be carried for the purpose of ensuring the safety of life;

(n) the issue and maintenance of log-books;

(o) the manner and conditions of the issue or renewal of any licence or certificate under the Act or the rules, the examinations and tests to be undergone in connection therewith, the form, custody, production, endorsement, cancellation, suspension or surrender of such licence or certificate, or of any log-books;

(p) the fees to be charged in connection with any inspection, examination, test, certificate, or licence made, issued or renewed under this Act;

(q) the recognition for the purposes of this Act of licences and certificates issued elsewhere than in British India relating to aircraft or to the qualifications of persons employed in the operation, manufacture, repair or maintenance of aircraft; and

(r) any matter subsidiary or incidental to the matters referred to in this sub-section.

6. (1) If the Central Government is of opinion that in the interests of the public safety or tranquillity the issue of all or any of the following orders is expedient, it may, by notification in the Official Gazette,—

(a) cancel or suspend, either absolutely or subject to such conditions as it may think fit to specify in the order all or any licences or certificates issued under this Act;

(b) prohibit, either absolutely or subject to such conditions as it may think fit to specify in the order, or regulate in such manner, as may be contained in the order, the flight of all or any aircraft or class of aircraft over the whole or any portion of British India;

(c) prohibit, either absolutely or conditionally, or regulate the erection, maintenance or use of any aerodrome, aircraft factory, flying-school or club or place where aircraft are manufactured, repaired or kept, or any class or description thereof; and



(d) direct that any aircraft or class of aircraft or any aerodrome, aircraft factory, flying-school or club, or place where aircraft are manufactured, repaired or kept, together with any machinery, plant, material or things used for the operation, manufacture, repair or maintenance of aircraft shall be delivered, either forthwith or within a specified time, to such authority and in such manner as it may specify in the order, to be at the disposal of His Majesty for the public service.

(2) Any person who suffers direct injury or loss by reason of any order made under clause (c) or clause (d) of sub-section (1) shall be paid such compensation as may be determined by such authority as the Central Government may appoint in this behalf.

(3) The Central Government may authorize such steps to be taken to secure compliance with any order made under sub-section (1) as appear to it to be necessary.

(4) Whoever knowingly disobeys, or fails to comply with, or does any act in contravention of, an order made under sub-section (1) shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both, and the Court by which he is convicted may direct that the aircraft or thing (if any) in respect of which the offence has been committed, or any part of such thing, shall be forfeited to His Majesty.

Power of Central Government to make rules for investigation of accidents.

7. (1) The Central Government may, by notification in the Official Gazette, make rules providing for the investigation of any accident arising out of or in the course of <sup>1</sup>[the navigation—

(a) in or over British India of any aircraft, or

(b) anywhere of aircraft registered in British India.]

(2) Without prejudice to the generality of the foregoing power, such rules may—

(a) require notice to be given of any accident in such manner and by such person as may be prescribed;

(b) apply for the purposes of such investigation, either with or without modification, the provisions of any law for the time being in force relating to the investigation of accidents;

(c) prohibit pending investigation access to or interference with aircraft to which an accident has occurred, and authorize any person so far as may be necessary for the purposes of an investigation to have access to, examine, remove, take measures for the preservation of, or otherwise deal with any such aircraft; and

(d) authorize or require the cancellation, suspension, endorsement or surrender of any licence or certificate granted or recognized under this Act when it appears on an investigation that the licence ought to be so dealt with, and provide for the production of any such licence for such purpose.

8. (1) Any authority authorized in this behalf by the Central Government may detain any aircraft if in the opinion of such authority—

(a) having regard to the nature of an intended flight, the flight of such aircraft would involve danger to persons in the aircraft or to any other persons or property; or

(b) such detention is necessary to secure compliance with any of the provisions of this Act or the rules applicable to such aircraft; or such detention is necessary to prevent a contravention of any rule made under clause (h) or clause (i) of sub-section (2) of section 5.



(2) The Central Government may, by notification in the Official Gazette, make rules regulating all matters incidental or subsidiary to the exercise of this power.

<sup>1</sup>[8-A. The Central Government may, by notification in the Official Gazette, make rules for the prevention of danger arising to the public health by the introduction or spread of any infectious or contagious disease from aircraft arriving at or being at any aerodrome and for the prevention of the conveyance of infection or contagion by means of any aircraft leaving an aerodrome and in particular and without prejudice to the generality of this provision may make, with respect to aircraft and aerodromes or any specified aerodrome, rules providing for any of the matters for which rules under sub-clauses (i) to (viii) of clause (p) of sub-section (1) of section 6 of the Indian Ports Act, 1908, may be made with respect to vessels and ports.]

<sup>2</sup>[8-B. (1) If the Central Government is satisfied that India or any part thereof is visited by or threatened with an outbreak of any dangerous epidemic disease, and that the ordinary provisions of the law for the time being in force are insufficient for the prevention of danger arising to the public health through the introduction or spread of the disease by the Agency of aircraft, the Central Government may take such measures as it deems necessary to prevent such danger.

(2) In any such case the Central Government may without prejudice to the powers conferred by section 8-A, by notification in the Official Gazette, make such temporary rules with respect to aircraft and persons travelling or things carried therein and aerodromes as it deems necessary in the circumstances.

(3) Notwithstanding anything contained in section 14, the power to make rules under sub-section (2) shall not be subject to the condition of the rules being made after previous publication, but such rules shall not remain in force for more than three months from the date of notification:

Provided that the Central Government may by special order continue them in force for a further period or periods of not more than three months in all.]

9. (1) The provisions of Part VII of the Indian Merchant Shipping Act, 1923, relating to Wreck and Salvage shall apply to aircraft on or over the sea or tidal waters as they apply to ships, and the owner of an aircraft shall be entitled to a reasonable reward for salvage services rendered by the aircraft in like manner as the owner of a ship.

(2) The Central Government may, by notification in the Official Gazette, make such modifications of the said provisions in their application to aircraft as appear necessary or expedient.

10. In making any rule under section 5, section 7, <sup>3</sup>[\*] section 8 <sup>1</sup>[or section 8-A] the Central Government may direct that a breach of it shall be punishable with imprisonment for any term not exceeding three months, or with fine of any amount not exceeding one thousand rupees, or with both.



11. Whoever wilfully flies any aircraft in such a manner as to cause danger to any person or to any property on land or water or in the air shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Penalty for flying so as to cause danger.

12. Whoever abets the commission of any offence under this Act or the rules, or attempts to commit such offence, and in such attempt does any act towards the commission of the offence, shall be liable to the punishment provided for the offence.

Penalty for abetment of offences and attempted offences.

13. Where any person is convicted of an offence punishable under any rule made under clause (i) or clause (l) of sub-section (2) of section 5, the Court by which he is convicted may direct that the aircraft or article or substance, as the case may be, in respect of which the offence has been committed, shall be forfeited to His Majesty.

Power of Court to order forfeiture.

14. Any power to make rules conferred by this Act is subject to the condition of the rules being made after previous publication for a period of not less than three months.

Rules to be made after publication.

15. The provisions of section 42 of the Indian Patents and Designs Act, 1911, shall apply to the use of an invention on any aircraft not registered in British India in like manner as they apply to the use of an invention in a foreign vessel.

Use of patented invention on aircraft not required in British India.

16. The Central Government may, by notification in the Official Gazette, declare that any or all of the provisions, of the Sea Customs Act, 1878, shall, with such modifications and adaptations as may be specified in the notification, apply to the import and export of goods by air.

Power to apply customs procedure.

17. No suit shall be brought in any Civil Court in respect of trespass or in respect of nuisance by reason only of the flight of aircraft over any property at a height above the ground which having regard to wind, weather and all the circumstances of the case is reasonable, or by reason only of the ordinary incidents of such flight.

Bar of certain suits.

18. No suit, prosecution or other legal proceeding shall lie against any person for anything in good faith done or intended to be done under this Act.

Saving for acts done in good faith under the Act.

19. (1) Nothing in this Act or in any order or rule made thereunder shall apply to or in respect of any aircraft belonging to or exclusively employed in His Majesty's naval, military or air forces, or to any person in such forces employed in connection with such aircraft.

Saving of application of Act.

(2) Nothing in this Act or in any order or rule made thereunder shall apply to or in respect of any lighthouse to which the Indian Lighthouse Act, 1927, applies or prejudice or affect any right or power exercisable by any authority under that Act.

Repeals.

20. [Repealed by Act I of 1938.]



## THE ANAND MARRIAGE ACT (VII OF 1909).<sup>1</sup>

**PREFATORY NOTE: REASONS FOR THE PASSING OF THE ACT.**—The Anand Marriage Act, 1909, was passed in order to remove all doubts as to the validity of the marriage ceremony common among the Sikhs called "Anand". The object of this Act was to set at rest doubts as to the validity of the marriage rite of the Sikhs called "Anand". This form of marriage had long been practised among the Sikhs, but it was apprehended that there were good reasons to believe that, in the absence of a validating enactment, doubts might be thrown upon it, and the Sikhs might have had to face great difficulties in the future, and incur heavy expenses on suits instituted in the Civil Courts. It was also apprehended that, in the absence of such a law, some judicial officers might be uncertain as to the validity of this orthodox Sikh custom. It was therefore thought desirable that all doubts, should be set at rest for the future, by passing this enactment, which merely validates an existing rite and involves no new principle. See Statement of Objects and Reasons.

[22nd October, 1909.]

*An Act to remove doubts as to the validity of the marriage ceremony common among the Sikhs called Anand.*

WHEREAS it is expedient to remove any doubts as to the validity of the marriage ceremony common among the Sikhs called Anand; It is hereby enacted as follows:

- |   |  |
|---|--|
| Short title and extent.                                       | 1. (1) This Act may be called THE ANAND MARRIAGE ACT, 1909; and  |
|   | (2) It extends to the whole of British India.  |
| Validity of Anand marriages.                                  | 2. All marriages which may be or may have been duly solemnized according to the Sikh marriage ceremony called Anand shall be, and shall be deemed to have been with effect from the date of the solemnization of each respectively,                        |
| good and valid in law.  |  |
| Exemption of certain marriages from Act.                      | 3. Nothing in this Act shall apply to—<br>(a) any marriage between persons not professing the Sikh religion, or<br>(b) any marriage which has been judicially declared to be null and void.  |
| Saving of marriages solemnized according to other ceremonies. | 4. Nothing in this Act shall affect the validity of any marriage duly solemnized according to any other marriage ceremony customary among the Sikhs.   |
| Non-validation of marriages within prohibited degrees.        | 5. Nothing in this Act shall be deemed to validate any marriage between persons who are related to each other in any degree of consanguinity or affinity which would, according to the customary law of the Sikhs, render a marriage between them illegal. |

## THE ANCIENT MONUMENTS PRESERVATION ACT (VII OF 1904).<sup>2</sup>

### EFFECT OF LEGISLATION.

Year.	No.	Short title.	How repealed or otherwise affected by legislation.
1904	IV	The Ancient Monuments Preservation Act, 1904	Amended, Act XVIII of 1932. Amended by Government of India (Adaptation of Indian Laws) Order, 1937.

#### LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons, see *Gazette of India*, 1908, Pt. V, p. 357; for Report of Select Committee, see *ibid.*, 1909, Pt. V, p. 1034; and for Proceedings in Council, see *ibid.*, 1908, Pt. VI, p. 156; and *ibid.*, 1909, Pt. VI, pp. 156, 161 and 165.

<sup>2</sup> For Statement of Objects and Reasons, see *Gazette of India*, 1903, Pt. V, p. 513; for Report of Select Committee, see *ibid.*, 1904, Pt. V, p. 57; and for Proceedings in Council, see *ibid.*, 1903, Pt. VI, pp. 166, 191; *ibid.*, 1904, Pt. VI, pp. 20 and 76.



## CONTENTS.

## SECTIONS.

1. Short title and extent.
2. Definitions.
3. Protected monuments.  
*Ancient Monuments.*
4. Acquisition of rights in or guardianship of an ancient monument.
5. Preservation of ancient monument by agreement.
6. Owners under disability or not in possession.
7. Enforcement of agreement.
8. Purchasers at certain sales and persons claiming through owner bound by instrument executed by owner.
9. Application of endowment to repair of an ancient monument.
10. Compulsory purchase of ancient monument.
- 10-A. Power of Central Government to control mining etc., near ancient monuments.
11. Maintenance of certain protected monuments.
12. Voluntary contributions.
13. Protection of place of worship from misuse, pollution or desecration.
14. Relinquishment of Government rights in a monument.
15. Right of access to certain protected

## SECTIONS.

- monuments.
16. Penalties.  
*Traffic in Antiquities.*
17. Power to Central Government to control traffic in antiquities.  
*Protection of Sculptures, Carvings, Images, Bas-reliefs, Inscriptions or like objects.*
18. Power to Central Government to control moving of sculptures, carvings or like objects.
19. Purchase of sculptures, carvings or like objects by the Government.  
*Archaeological Excavations.*
20. Power of Central Government to notify areas as protected.
- 20-A. Power to enter upon and make excavations in a protected area.
- 20-B. Power of Central Government to make rules, regulating archaeological excavation in protected areas.
- 20-C. Power to acquire a protected area.  
*General.*
21. Assessment of market-value or compensation.
22. Jurisdiction.
23. Power to make rules.
24. Protection to public servants acting under Act.

[18th March, 1904.]

*An Act to provide for the preservation of Ancient Monuments and objects of archaeological, historical or artistic interest.*

WHEREAS it is expedient to provide for the preservation of ancient monuments, for the exercise of control over traffic in antiquities and over excavation in certain places, and for the protection and acquisition in certain cases of ancient monuments and of objects of archaeological, historical or artistic interest; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE ANCIENT MONUMENTS PRESERVATION ACT, 1904.

(2) It extends to the whole of British India, inclusive of British Baluchistan, the Sonthal Parganas and the Pargana of Spiti.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) “ancient monument” means any structure, erection or monument, or any tumulus or place of interment, or any cave, rock-sculpture, inscription or monolith, which is of historical, archaeological or artistic interest, or any remains thereof, and includes—

(a) the site of an ancient monument;

(b) such portion of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument; and

(c) the means of access to and convenient inspection of an ancient monument:

(2) “antiquities” include any movable objects which the <sup>1</sup>[Central Government], by reason of their historical or archaeological associations, may think it necessary to protect against injury, removal or dispersion:

LEG. REF.

<sup>1</sup> Substituted by A.O., 1937.



(3) "Commissioner" includes any officer authorized by the <sup>1</sup>[Central Government] to perform the duties of a Commissioner under this Act:

(4) "maintain" and "maintenance" include the fencing, covering in, repairing, restoring and cleansing of a protected monument, and the doing of any act which may be necessary for the purpose of maintaining a protected monument or of securing convenient access thereto:

(5) "land" includes a revenue-free estate, a revenue-paying estate, and a permanent transferable tenure, whether such estate or tenure be subject to incumbrances or not: and

(6) "owner" includes a joint owner invested with powers of management on behalf of himself and other joint owners, and any manager or trustee exercising powers of management over an ancient monument, and the successor in title of any such owner and the successor in office of any such manager or trustee:

Provided that nothing in this Act shall be deemed to extend the powers which may lawfully be exercised by such manager or trustee.

3. (1) The <sup>1</sup>[Central Government] may, by notification<sup>2</sup> in the Official Gazette, declare an ancient monument to be a protected monument within the meaning of this Act.

(2) A copy of every notification published under sub-section (1) shall be fixed up in a conspicuous place on or near the monument, together with an intimation that any objections to the issue of the notification received by the <sup>1</sup>[Central Government] within one month from the date when it is so fixed up will be taken into consideration.

(3) On the expiry of the said period of one month, the <sup>1</sup>[Central Government], after considering the objections, if any, shall confirm or withdraw the notification.

(4) A notification published under this section shall, unless and until it is withdrawn, be conclusive evidence of the fact that the monument to which it relates is an ancient monument within the meaning of this Act.

#### *Ancient Monuments.*

Acquisition of rights in or guardianship of an ancient monument.

4. (1) The Collector, with the sanction of the <sup>1</sup>[Central Government], may purchase or take a lease of any protected monument.

(2) The Collector, with the like sanction, may accept a gift or bequest of any protected monument.

(3) The owner of any protected monument may, by written instrument, constitute the Commissioner the guardian of the monument, and the Commissioner may, with the sanction of the <sup>1</sup>[Central Government], accept such guardianship.

(4) When the Commissioner has accepted the guardianship of a monument under sub-section (3), the owner shall, except as expressly provided in this Act, have the same estate, right, title and interest in and to the monument as if the Commissioner had not been constituted guardian thereof.

(5) When the Commissioner has accepted the guardianship of a monument under sub-section (3), the provisions of this Act relating to agreements executed under section 5 shall apply to the written instrument executed under the said sub-section.

(6) Where a protected monument is without an owner, the Commissioner may assume the guardianship of the monument.

#### LEG. REF.

<sup>1</sup> Substituted for 'Local Government' by A.O., 1937.

<sup>2</sup> For notifications under this section, see General Rules and Orders and the different Local Rules and Orders.



5. (1) The Collector may, with the previous sanction of the <sup>1</sup>[Central Government], propose to the owner to enter into an agreement with the <sup>2</sup>[Central Government] for the preservation of any protected monument in his district.

(2) An agreement under this section may provide for the following matters, or for such of them as it may be found expedient to include in the agreement:—

(a) the maintenance of the monument;

(b) the custody of the monument, and the duties of any person who may be employed to watch it;

(c) the restriction of the owner's right to destroy, remove, alter or deface the monument or to build on or near the site of the monument;

(d) the facilities of access to be permitted to the public or to any portion of the public and to persons deputed by the owner or the Collector to inspect or maintain the monument;

(e) the notice to be given to the <sup>3</sup>[Central Government] in case the land on which the monument is situated is offered for sale by the owner, and the right to be reserved to the <sup>3</sup>[Central Government] to purchase such land, or any specified portion of such land, as its market-value;

(f) the payment of any expenses incurred by the owner or by the <sup>3</sup>[Central Government] in connection with the preservation of the monument;

(g) the proprietary or other rights which are to vest in His Majesty in respect of the monument when any expenses are incurred by the <sup>3</sup>[Central Government] in connection with the preservation of the monument;

(h) the appointment of an authority to decide any dispute arising out of the agreement; and

(i) any matter connected with the preservation of the monument which is a proper subject of agreement between the owner and the <sup>3</sup>[Central Government].

(3) \* \* \* \* \*

(4) The terms of an agreement under this section may be altered from time to time with the sanction of the <sup>1</sup>[Central Government] and with the consent of the owner.

(5) With the previous sanction of the <sup>1</sup>[Central Government], the Collector may terminate an agreement under this section on giving six months' notice in writing to the owner.

(6) The owner may terminate an agreement under this section on giving six months' notice to the Collector.

(7) An agreement under this section shall be binding on any person claiming to be owner of the monument to which it relates, through or under a party by whom or on whose behalf the agreement was executed.

(8) Any rights acquired by <sup>3</sup>[the Central Government] in respect of expenses incurred in protecting or preserving a monument shall not be affected by the termination of an agreement under this section.

6. (1) If the owner is unable, by reason of infancy or other disability, to act for himself, the person legally competent to act on his behalf may exercise the powers conferred upon an owner by section 5.

(2) In the case of village-property, the headman or other village-officer exercising powers of management over such property may exercise the powers conferred upon an owner by section 5.

LEG. REF.

<sup>1</sup> Substituted for the word "Local Government" by A.O., 1937.

<sup>2</sup> Substituted for "the Secretary of State

for India in Council" by A.O., 1937.

<sup>3</sup> Substituted for the word "Government" by A.O., 1937.

<sup>4</sup> Sub-S. (3) of S. 5 omitted by *ibid.*



(3) Nothing in this section shall be deemed to empower any person not being of the same religion as the persons on whose behalf he is acting to make or execute an agreement relating to a protected monument which or any part of which is periodically used for the religious worship or observances of that religion.

7. (1) If the Collector apprehends that the owner or occupier of a monument intends to destroy, remove, alter, deface, or imperil the monument or to build on or near the site thereof in contravention of the terms of an agreement for its preservation under section 5, the Collector may make an order prohibiting any such contravention of the agreement.

(2) If an owner or other person who is bound by an agreement for the preservation or maintenance of a monument under section 5 refuses to do any act which is in the opinion of the Collector necessary to such preservation or maintenance, or neglects to do any such Act within such reasonable time as may be fixed by the Collector, the Collector may authorize any person to do any such act, and the expense of doing any such act or such portion of the expense as the owner may be liable to pay under the agreement may be recovered from the owner as if it were an arrear of land-revenue.

(3) A person aggrieved by an order made under this section may appeal to the Commissioner, who may cancel or modify it and whose decision shall be final.

8. Every person who purchases, at a sale for arrears of land-revenue or any other public demand, or at a sale made under the Bengal Patni Taluks Regulation, 1819, an estate or tenure in which is situated a monument in respect of which any instrument has been executed by the owner, for the time being, under section 4 or section 5, and every person claiming any title to a monument from, through or under an owner who executed any such instrument, shall be bound by such instrument.

9. (1) If any owner or other person competent to enter into an agreement under section 5 for the preservation of a protected monument, refuses or fails to enter into such an agreement when proposed to him by the Collector, and if any endowment has been created for the purpose of keeping such monument in repair, or for that purpose among others, the Collector may institute a suit in the Court of the District Judge, or, if the estimated cost of repairing the monument does not exceed one thousand rupees, may make an application to the District Judge for the proper application of such endowment or part thereof.

(2) On the hearing of an application under sub-section (1), the District Judge may summon and examine the owner and any person whose evidence appears to him necessary, and may pass an order for the proper application of the endowment or of any part thereof, and any such order may be executed as if it were the decree of a Civil Court.

10. (1) If the <sup>1</sup>[Central Government] apprehends that a protected monument is in danger of being destroyed, injured or allowed to fall into decay, the <sup>2</sup>[Central Government] may direct the Provincial Government to acquire it under the provisions of the Land Acquisition Act, 1894, as if the preservation of a protected monument were a "public purpose" within the meaning of that Act.

#### LEG. REF.

<sup>1</sup> Substituted for the words "Local Government" by A.O., 1937.

<sup>2</sup> Substituted for the words "Local Government may proceed" by *ibid.*



(2) The powers of compulsory purchase conferred by sub-section (1) shall not be exercised in the case of—

(a) any monument which or any part of which is periodically used for religious observances; or

(b) any monument which is the subject of a subsisting agreement executed under section 5.

(3) In any case other than the cases referred to in sub-section (2) the said powers of compulsory purchase shall not be exercised unless the owner or other person competent to enter into an agreement under section 5 has failed, within such reasonable period as the Collector may fix in this behalf, to enter into an agreement proposed to him under the said section or has terminated or given notice of his intention to terminate such an agreement.

<sup>1</sup>[10-A. (1) If the <sup>2</sup>[Central Government] is of opinion that mining, quarrying, excavating, blasting and other operations of a like nature should be restricted or regulated for the purpose of protecting or preserving any ancient monument, the <sup>2</sup>[Central Government] may, by notification in the Official Gazette, make rules—

Power of [Central Government] to control mining, etc., near ancient monument.

(a) fixing the boundaries of the area to which the rules are to apply,

(b) forbidding the carrying on of mining, quarrying, excavating, blasting or any operation of a like nature except in accordance with the rules and with the terms of a licence, and

(c) prescribing the authority by which, and the terms on which, licences may be granted to carry on any of the said operations.

(2) The power to make rules given by this section is subject to the condition of the rules being made after previous publication.

(3) A rule made under this section may provide that any person committing a breach thereof shall be punishable with fine which may extend to two hundred rupees.

(4) If any owner or occupier of land included in a notification under sub-section (1) proves to the satisfaction of the <sup>2</sup>[Central Government] that he has sustained loss by reason of such land being so included, the <sup>2</sup>[Central Government] shall pay compensation in respect of such loss.]

11. (1) The Commissioner shall maintain every monument in respect of which the Government has acquired any of the rights mentioned in section 4 or which the Government has acquired under section 10.

Maintenance of certain protected monuments.

(2) When the Commissioner has accepted the guardianship of a monument under section 4, he shall, for the purpose of maintaining such monument, have access to the monument at all reasonable times, by himself and by his agents, subordinates and workmen, for the purpose of inspecting the monument, and for the purpose of bringing such materials and doing such acts as he may consider necessary or desirable for the maintenance thereof.

12. The Commissioner may receive voluntary contributions towards the cost of maintaining a protected monument and may give orders as to the management and application of any funds so received by him:

Voluntary contributions.

Provided that no contribution received under this section shall be applied to any purpose other than the purpose for which it was contributed.

#### LEG. REF.

<sup>1</sup> S. 10-A inserted by Act XVIII of 1932; S. 20 was also recast by that Act. The object of the Amending Act was "to empower the Government (i) to control excavations by or enlist the aid of the archaeologists, Indian or foreign, outside the Department and (ii) to regulate the disposal of antiquities found by such agencies." Vide *Gazette of India*, dated 8th October, 1932.

<sup>2</sup> Substituted for the words 'Local Government' by A. O., 1937.



Protection of place of worship from misuse, pollution or desecration.

13. (1) A place of worship or shrine maintained by the Government under this Act shall not be used for any purpose inconsistent with its character.

(2) Where the Collector has, under section 4, purchased or taken a lease of any protected monument, or has accepted a gift or bequest, or the Commissioner has, under the same section, accepted the guardianship thereof, and such monument or any part thereof, is periodically used for religious worship or observances by any community, the Collector shall make due provision for the protection of such monument, or such part thereof, from pollution or desecration—

(a) by prohibiting the entry therein, except in accordance with conditions prescribed with the concurrence of the persons in religious charge of the said monument or part thereof, of any person not entitled so to enter by the religious usages of the community by which the monument or part thereof is used, or

(b) by taking such other action as he may think necessary in this behalf.

Relinquishment of Government rights in a monument.

14. With the sanction of the <sup>1</sup>[Central Government], the Commissioner may—

(a) where rights have been acquired by <sup>2</sup>[the Central Government] in respect of any monument under this Act by virtue of any sale, lease, gift or will, relinquish the rights so acquired to the person who would for the time being be the owner of the monument if such rights had not been acquired; or

(b) relinquish any guardianship of a monument which he has accepted under this Act.

15. (1) Subject to such rules as may after previous publication be made by the <sup>1</sup>[Central Government], the public shall have a right of access to any monument maintained by the <sup>2</sup>[Central Government] under this Act.

(2) In making any rule under sub-section (1) the <sup>1</sup>[Central Government] may provide that a breach of it shall be punishable with fine which may extend to twenty rupees.

16. Any person other than the owner who destroys, removes, injures, alters, defaces or imperils a protected monument, and any owner who destroys, removes, injures, alters, defaces or imperils a monument maintained by the <sup>2</sup>[Central Government] under this Act, or in respect of which an agreement has been executed under section 5, and any owner or occupier who contravenes an order made under section 7, sub-section (1), shall be punishable with fine which may extend to five thousand rupees, or with imprisonment which may extend to three months, or with both.

#### *Traffic in antiquities.*

17. (1) If the Central Government apprehends that antiquities are being sold or removed to the detriment of India or of any neighbouring country, it may, by notification<sup>3</sup> in the Official Gazette, prohibit or restrict the bringing or taking by sea or by land of any antiquities or class of antiquities described in the notification into or out of British India or any specified part of British India.

#### LEG. REF.

<sup>1</sup> Substituted for the words 'Local Government' by A.O., 1937.

<sup>2</sup> Substituted for the word 'Government' by *ibid.*

<sup>3</sup> Notification No. 110, dated 28th May, 1917, *Gazette of India*, 1917, Pt. I, p. 989, and notification No. 1385, dated 8th July, 1924; *ibid.*, 1924, Pt. I, p. 641; Genl. R. & O., Vol. III.



(2) Any person who brings or takes or attempts to bring or take any such antiquities into or out of British India or any part of British India in contravention of a notification issued under sub-section (1), shall be punishable with fine which may extend to five hundred rupees.

(3) Antiquities in respect of which an offence referred to in sub-section (2) has been committed shall be liable to confiscation.

(4) An officer of Customs, or an officer of Police of a grade not lower than Sub-Inspector, duly empowered by the <sup>1</sup>[Central Government] in this behalf, may search any vessel, cart or other means of conveyance, and may open any baggage or package of goods, if he has reason to believe that goods in respect of which an offence has been committed under sub-section (2) are contained therein.

(5) A person who complains that the power of search mentioned in sub-section (4) has been vexatiously or improperly exercised may address his complaint to the <sup>1</sup>[Central Government], and the <sup>1</sup>[Central Government] shall pass such order and may award such compensation, if any, as appears to it to be just.

*Protection of Sculptures, Carvings, Images, Bas-reliefs,  
Inscriptions or like objects.*

18. (1) If the <sup>1</sup>[Central Government] considers that any sculptures, carvings, images, bas-reliefs, inscriptions or other like objects ought not to be moved from the place where they are without the sanction of the <sup>2</sup>[Central Government], the <sup>1</sup>[Central Government] may, by notification<sup>3</sup> in the Official Gazette, direct that any such object or any class of such objects shall not be moved unless with the written permission of the Collector.

(2) A person applying for the permission mentioned in sub-section (1) shall specify the object or objects which he proposes to move, and shall furnish, in regard to such object or objects, any information which the Collector may require.

(3) If the Collector refuses to grant such permission, the applicant may appeal to the Commissioner, whose decision shall be final.

(4) Any person who moves any object in contravention of a notification issued under sub-section (1), shall be punishable with fine which may extend to five hundred rupees.

(5) If the owner of any property proves to the satisfaction of the <sup>1</sup>[Central Government] that he has suffered any loss or damage by reason of the inclusion of such property in a notification published under sub-section (1), the <sup>1</sup>[Central Government] shall either—

- (a) exempt such property from the said notification;
- (b) purchase such property, if it be movable, at its market-value; or
- (c) pay compensation for any loss or damage sustained by the owner of such property, if it be immovable.

19. (1) If the <sup>1</sup>[Central Government] apprehends that any object mentioned in a notification issued under section 18, sub-section (1) is in danger of being destroyed, removed, injured or allowed to fall into decay, the <sup>1</sup>[Central Government] may pass orders for the compulsory

Purchase of sculptures, carvings or like objects by the Government.

LEG. REF.

<sup>1</sup> Substituted for the words 'Local Government' by A.O., 1937.

<sup>2</sup> Substituted for the word 'Government' by *ibid.*

<sup>3</sup> For notification by the Government of—

(1) Bengal, see *Calcutta Gazette*, 1908, Pt. I, p. 1248 and *ibid.*, 1909, Pt. I, p. 23; and

p. 957 as to Gaya District;

(2) Central Provinces, see *C. P. Gazette*, 1906, Pt. III, p. 616.

(3) Chief Commissioner, N.-W.F.P., see *Gazette of India*, 1909, Pt. II, p. 1554;

(4) Burma, see *Burma Gazette*, Pt. I, p. 596.



purchase of such object at its market-value, and the Collector shall thereupon give notice to the owner of the object to be purchased.

(2) The power of compulsory purchase given by this section shall not extend to—

(a) any image or symbol actually used for the purpose of any religious observance; or

(b) anything which the owner desires to retain on any reasonable ground personal to himself or to any of his ancestors or to any member of his family.

#### *Archaeological Excavation.*

20. (1) If the Central Government <sup>1</sup>[\* \* \* \*] is of opinion that excavation for archæological purposes in any area should be restricted and regulated in the interests of archæological research, the Central Government may by notification<sup>2</sup> in the Official Gazette specifying the boundaries of the area, declare it to be a protected area.

Power of Central Government to notify areas as protected.

(2) From the date of such notification all antiquities buried in the protected area shall be the property of <sup>3</sup>[the Crown], and shall be deemed to be in the possession of <sup>3</sup>[the Crown] and shall remain the property and in the possession of <sup>3</sup>[the Crown] until ownership thereof is transferred; but in all other respects the rights of any owner or occupier of land in such area shall not be affected.

Power to enter upon and make excavations in a protected area.

20-A. (1) Any officer of the Archæological Department or any person holding a licence under section 20-B may, with the written permission of the Collector, enter upon and make excavations in any protected area.

(2) Where, in the exercise of the power conferred by sub-section (1), the rights of any person are infringed by the occupation or disturbance of the surface of any land, <sup>4</sup>[the Central Government] shall pay to that person compensation for the infringement.

Power of Central Government to make rules regulating archæological excavation in protected areas.

20-B. (1) The Central Government may make rules—

(a) prescribing the authorities by whom licences to excavate for archæological purposes in a protected area may be granted;

(b) regulating the conditions on which such licences may be granted, the form of such licences, and the taking of security from licensees;

(c) prescribing the manner in which antiquities found by a licensee shall be divided between <sup>4</sup>[the Central Government] and the licensee; and

(d) generally to carry out the purposes of section 20.

(2) The power to make rules given by this section is subject to the condition of the rules being made after previous publication.

(3) Such rules may be general for all protected areas for the time being, or may be special for any particular protected area or areas.

(4) Such rules may provide that any person committing a breach of any rule or of any condition of a licence shall be punishable with fine which may

#### LEG. REF.

<sup>1</sup> Words 'after consulting the Local Government' omitted by A.O., 1937.

<sup>2</sup> For notification by the Government of—  
(1) Central Provinces, see *C. P. Gazette*, 1906, Pt. III, p. 617.

(2) Madras, see *Madras R. & O.*

(3) Bengal, see *Calcutta Gazette*, 1909, Pt. I, p. 703 and 1642.

(4) Burma, see *Burma Gazette*, 1909, Pt.

I, p. 448.

(5) Bihar and Orissa, see *B. and O. Gazette*, 1914, Pt. II, p. 733.

<sup>3</sup> Substituted for the word 'Government' by A.O., 1937.

<sup>4</sup> Substituted for 'the Government' by *ibid.*

#### NOTES.

SECS. 20 TO 20-C.—New Ss. 20, 20-A, 20-B and 20-C were substituted for the old S. 20 by the Amending Act, XVIII of 1932.



extend to five thousand rupees, and may further provide that where the breach has been by the agent or servant of a licensee, the licensee himself shall be punishable.

20-C. If the Central Government is of opinion that a protected area contains an ancient monument or antiquities of national interest and value, it may direct the Provincial Government to acquire such area, or any part thereof, and the Provincial Government may thereupon acquire such area or part under the Land Acquisition Act, 1894, as for a public purpose.

#### General.

21. (1) The market-value of any property which Government is empowered to purchase at such value under this Act, or the Assessment of market-value or compensation. <sup>1</sup>[\* \*] compensation to be paid by Government in respect of anything done under this Act, shall, where any dispute arises <sup>1</sup>[in respect] of such market-value or compensation, be ascertained in the manner provided by the Land Acquisition Act, 1894, sections 3, 8 to 34, 45 to 47, 51 and 52, so far as they can be made applicable:

Provided that when making an inquiry under the said Land Acquisition Act, 1894, the Collector shall be assisted by two assessors, one of whom shall be a competent person nominated by the Collector, and one a person nominated by the owner or, in case the owner fails to nominate an assessor within such reasonable time as may be fixed by the Collector in this behalf, by the Collector.

Jurisdiction. 22. A Magistrate of the third class shall not have jurisdiction to try any person charged with an offence against this Act.

Power to make rules. 23. (1) The Central Government <sup>2</sup>[\* \* \*] may make rules<sup>3</sup> for carrying out any of the purposes of this Act.

(2) The power to make rules given by this section is subject to the condition of the rules being made after previous publication.

24. No suit for compensation and no criminal proceeding shall lie against any public servant in respect of any act done, or in good faith intended to be done, in the exercise of any power conferred by this Act.

#### THE APPRENTICES ACT (XIX OF 1850).

Year	No.	Short title.	How repealed or otherwise affected by legislation.
1850	XIX	The Apprentices Act, 1850	Short title given, Act XIV of 1897. Rep. in pt., Act XIV of 1870; Act XIV of 1874; Act XXI of 1923. Am., Act XII of 1891.

#### LEG. REF.

<sup>1</sup> The words "amount of" before the word "compensation" were omitted and the words "in respect" substituted for the words "touching the amount" by the Amending Act, XVIII of 1932.

<sup>2</sup> Words 'or the Local Government' omitted by A.O., 1937.

<sup>3</sup> For Rules made by the Government of

Madras for the decipherment, publication, and custody of Indian Inscriptions on stone or copper, see Madras Local Rules and Orders.

#### NOTES.

SEC. 21.—Section applies to the purchase, of movable antiquities. Regarding mode of determining compensation, see 19 Bom.L.R. 937=42 Bom. 100.



**PREFATORY NOTE.**—An Apprentice is a person bound in the form of law to a master, to learn from him his art, trade, or business, and to serve him during the time of his apprenticeship. [1 Black. Com. 426; 2 Kent 211; *Attemus v. Ely*, 3 Rawle (Pa.) 307.]

Apprenticeship is a contract by which one person who understands some art, trade, or business, and is called the master, undertakes to teach the same to another person, commonly a minor, and called the apprentice, who, on his part, is bound to serve the master, during a definite period of time, in such art, trade, or business. The term "apprenticeship" is also used to denote the term during which an apprentice is to serve. (Pardessus, *Droit Comm.* n. 34.)

A contract of apprenticeship is not invalid because the master to whom the apprentice is bound is a corporation. [(1891) 1 Q.B. 75.]

At common law, an infant may bind himself apprentice by indenture, because it is for his benefit. [5 M. & S. 257; 5 D. & R. 339.] But this contract, on account of its liability to abuse, has been regulated by statute, and is not binding upon the infant unless entered into by him with the consent of the parent or guardian.

To be binding on the apprentice, the contract must be made as prescribed by statute.

Education is necessary for an infant. What particular kind of education is necessary is a matter that is settled having regard to the infant's inclinations, state of mind and condition in life. Therefore, where an infant executes an apprenticeship deed by which he covenants to pay a certain premium, and it is found that the arrangement is provident and proper and beneficial for him and that the premium is fair and reasonable, and that instruction has been given under the deed, it is held that he is liable to pay the premium, as being a necessary, and the fact that he enters into a covenant for the payment of it does not prevent his being liable. [*Walter v. Everard* (1881) 2 Q.B. 369.]

A contract of apprenticeship is generally to be regarded as for the benefit of an infant, and, therefore, he may make a legal binding contract of apprenticeship, under conditions laid down by this Act. [*R. v. Petrox*, 4 T.R. 196.] If he could not do so, he could not be bound at all, for a father has no common law authority to bind his infant son as an apprentice without his consent. [*R. v. Arnesby*, 3 B. & Ald. 584.]

The contract of apprenticeship need not specify the particular trade to be taught, but it is sufficient if it be a contract to teach such manual occupation or branch of business as shall be found best suited to the genius or capacity of the apprentice. [*Fowler v. Hollenbeck*, 9 Barb. (N.Y.) 309; *People v. Pillow*, 1 Sandf. (N.Y.) 672.]

A contract of apprenticeship, of hiring and service, may be beneficial to an infant, and would, generally speaking, be binding upon him, and may be made even with his own father or mother. [*R. v. Chillisford*, 4 B. & C. 94.] Such a contract would subject him to the statutable regulations applicable to masters and servants, although he might not be liable to any action upon the contract. For if an infant of five years of age or other person who is *non-potens in corpore*, be retained and serve in the best manner he can, his master must pay him his wages. [See *Phillips v. Jones*, 1 A. & E. 333.]

Difficult questions sometimes arise whether or not an agreement of hiring and service, of an infant is so beneficial as to be binding upon him. It is impossible to frame a deed between a master and an apprentice in which some stipulations are not in favour of the master. When any stipulation is relied upon by the infant as being unfair to him, it is the duty of the Court to decide on the construction of the whole contract, and then to say whether, as a whole, it is clearly and manifestly for the benefit of the infant. The question is whether the agreement taken as a whole is so much to the detriment of the infant as to render it unfair that he should be bound by his agreement. If there is any stipulation such as to make the whole contract an unfair one, then the whole contract is void. [*Corn v. Matthews* (1893) 1 Q.B. 310. See also (1894) 2 Q.B. 65; (1894) 2 Q.B. 482.]

The duties of the master are to instruct the apprentice by teaching him the knowledge of the art which he has undertaken to teach him, though he will be excused for not making a good workman if the apprentice is incapable of learning the trade, the burden of proving which is on the master. [*Barger v. Caldwell*, 2 Dana (Ky) 131; *Clancy v. Overman*, 18 N.C. 402.] He ought to watch over the conduct of the apprentice, giving him prudent advice and showing him a good example, and fulfilling towards him the duties of a father, as in his character of master he stands *in loco parentis*. He is also required to fulfil all the covenants he has entered into by the contract. He must not abuse his authority, either by bad treatment or by employing his apprentice in menial employments wholly unconnected with the business he has to learn, or in any service which is immoral or contrary to law. [4 Clark & F. 234; *Hall v. Gardner*, 1 Mass. 172] but may correct him with moderation for negligence and misbehaviour. [*Com. v. Baird*, 1 Ashm. (Pa.) 267; 4 Keb. 661, pl. 50; *People v. Sniffen*, 1 Wheel. Cr. Cas. (N.Y.) 502.]

An apprentice is bound to obey his master in all his lawful commands, take care of his property, and promote his interest, endeavour to learn his trade or business, and perform all the conditions of his contract not contrary to law. He must not leave his master's service during the terms of his apprenticeship. [*James v. Le Roy*, 6 Johns. (N.Y.) 274; *Coffin v. Bassett*, 2 Pick. (Mass.) 357.]



Apprenticeship is a relation which cannot be assigned at common law though if under such an assignment the apprentice continue with his new master, with the consent of all the parties and his own, it will be construed as a continuation of the old apprenticeship. [See *Bouvier's Law Dictionary*, Tit. "Apprentice".]

## CONTENTS.

## PREAMBLE.

## SECTIONS.

1. Apprenticing of child between ten and eighteen years old.
2. Evidence of age in questions as to right to service.
3. Powers of Magistrate or justice acting for orphans, etc.
4. Apprenticing of child brought up by public charity.
5. [Repealed.]
6. [Repealed.]
7. [Repealed.]
8. Form and contents of contract of apprenticeship.
9. Signatures to contract.
10. Contract not valid unless executed as prescribed and deposited. Copies to be given to parties.
11. Alteration of terms of service and termination of contract.
12. Assignment of apprentice to new master.
13. Powers of Magistrate in case of complaint by apprentice against master.
14. Powers of master or his agent to chastise apprentice.

## SECTIONS.

Liability of master or agent for assault, etc.

15. Power of Magistrate in case of complaint by master against apprentice.

16. Cancelment of contract for misconduct of apprentice.

17. Appropriation of sum recovered for apprentice on cancelment of contract.

18. Limitation of complaint of master against apprentice, of apprentice against master.

19. Effect of death of master during apprenticeship. Offer by representative of master to continue apprentice.

20. Offer to be certified on original contract and copies.

21. Maintenance of apprentice whose master dies. Apprentice to continue to service.

22. Effect of insolvency of master during apprenticeship.

23. Persons amenable to jurisdiction of Magistrates' Courts.

24. Appeal from orders of Mufassal Magistrates.

25. Interpretation of terms.

SCHEDULES A AND B.

THE APPRENTICES ACT (XIX OF 1850).<sup>1</sup>

[11th April, 1850.]

*Concerning the binding of Apprentices.*

FOR better enabling children, and especially orphans and poor children brought up by public charity, to learn trades, crafts and employments, by which when they come to full age, they may gain a livelihood; It is enacted as follows:—

## LEG. REF.

<sup>1</sup> Short title, "The Apprentices Act, 1850". See the Indian Short Titles Act, 1897 (XIV of 1897).

This Act has been declared to be in force in the whole of British India, except as regards the Scheduled Districts, by the Laws Local Extent Act, 1874 (XV of 1874), section 3.

It has been declared in force in Upper Burma generally (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898), Bur. Code, Vol. I.

It has been declared, by notification under section 3 (a) of the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in the following Scheduled Districts, namely:—

Sindh. See *Gazette of India*, 1880, Pt. I, p. 672.

West Jalpaiguri, the Western Duars, the Western Hills of Darjiling, the Darjiling Tarai, and the Damson Sub-division of the Darjiling District. See *Gazette of India*, 1881, Pt. I, p. 74.

The Districts of Hazaribagh, Lohardaga (now the Ranchi District, see *Calcutta Gazette*, 1899, Pt. I, p. 44), and Manbhum; and Pargana Dhalbhum and the Kolhan in the District of Singhbhum, see *Gazette of India*, 1881, Pt. I, p. 504.

The Scheduled portion of the Mirzapur District, see *Gazette of India*, 1879, Pt. I, p. 383.

Jaunsar Bawar, see *Gazette of India*, 1879, Pt. I, p. 382.

The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan and Dera Ghazi Khan. [Portions of the Districts of Hazara, Bannu, Dera Ismail Khan and Dera Ghazi Khan and the District of Peshawar and Kohat now form the North-West Frontier Province, see *Gazette of India*, 1901, Pt. I, p. 857, and *ibid.*, 1902, Pt. I, p. 575; but its application has been barred in that part of the Hazara District known as Upper Tanawal, by the Hazara (Upper Tanawal) Regulation (II of 1900, S. 3), Punjab and



1. Any child, above the age of ten, and under the age of eighteen years, may be bound apprentice by his or her father or guardian to learn any fit trade, craft or employment, for such term as is set forth in the contract of apprenticeship, not exceeding seven years, so that it be not prolonged beyond the time when such child shall be of the full age of twenty-one years, or, in the case of a female, beyond the time of her marriage.

Apprenticing of child between ten and eighteen years.

2. The age set forth in the contracts shall be evidence of the age of the child, in all questions which arise as to the right of the master to the continuance of the service.

3. Any Magistrate or Justice of the Peace may act with all the powers of a guardian under the Act, on behalf of any orphan, or poor child abandoned by its parents, or of any child convicted before him, or any other Magistrate, of vagrancy, or the commission of any petty offence.

Evidence of age in questions as to right to service.

4. An orphan or poor child, brought up by any public charity, may be bound apprentice by the governors, directors or managers thereof, as his or her guardians for this purpose.

Powers of Magistrate or Justice acting for orphans, etc.

5. [*Apprenticing of such boy in sea service.*] Rep. by Act XXI of 1923.

6. [*Apprenticing of such boy in ship of the East India Company.*] Rep. by the Repealing Act, 1870 (XIV of 1870).

7. [*Who to be agent of master of apprentice serving in ship.*] Rep. by Act XXI of 1923.

8. Every contract of apprenticeship shall be in writing, according to the form given in the schedule (A) annexed to this Act, or to the like effect, which shall set forth the conditions agreed upon, particularly specifying the age of the apprentice, the term for which he is bound, and what he is to be taught.

Form and contents of contract of apprenticeship.

9. Every such contract shall be signed by the person to whom the apprentice is bound, and by the person by whom he is bound, and by the apprentice, when he is of the age of fourteen years or more at the time of binding; but when the apprentice is bound by the Governors, Directors or Managers of public charity, the signature of two of them, or of their secretary or officer shall be sufficient on behalf of the persons binding the apprentice.

Signatures to contract.

LEG. REF.  
N.-W. Code,] see *Gazette of India*, 1886, Pt. I, p. 48.

The Scheduled Districts of the Central Provinces, see *Gazette of India*, 1879, Pt. I, p. 771.

The Scheduled Districts in Ganjam and Vizagapatam, see *Gazette of India*, 1898, Pt. I, p. 870.

The District of Sylhet, see *Gazette of India*, 1879 Pt. I, p. 631.

The rest of Assam (except the North Lushai Hills, see *Gazette of India*, 1897, Pt. I, p. 299.

It has been extended, by notification under section 5 of the last-mentioned Act, to the

following Scheduled Districts, namely:—

Kumaon and Garhwal, see *Gazette of India*, 1876, Pt. I, p. 606.

The Tarai of the Province of Agra, see *Gazette of India*, 1876, Pt. I, p. 505.

It has been declared, by notification under section 3 (b) of the same Act, not to be in force in the Scheduled Districts of Lahaul, see *Gazette of India*, 1886, Pt. I, p. 301.

Instruments of apprenticeship executed by a Magistrate under this Act, or by which a person is apprenticed by or at the charge of a public charity, are exempted from stamp duty by the Stamp Act, 1899 (II of 1899), Sch. I, Art. No. 9.



10. No such contract shall be valid unless it be executed in the manner aforesaid, nor until it has been deposited in the office of the Chief Magistrate of the place or district where it has been executed <sup>1</sup>[\* \* \*]; and the person in whose office any such contract is deposited shall give to each of the parties a copy thereof, certified under his hand, which certified copies shall be received as evidence of the contract, without formal proof of the handwriting of the Magistrate <sup>2</sup>[\* \* \*].

Contract not valid unless executed as prescribed and deposited.  
Copies to be given to parties.

11. The terms of service may be changed at any time during the apprenticeship, or the contract may be determined, with the consent of both parties to the contract or their personal representatives, and with the consent of the apprentice if he is above the age of fourteen years:

Alteration of terms of service and termination of contract.

Provided that the changes agreed to or the termination of the contract shall be expressed in writing on the original contract, with the signature of the proper parties according to section <sup>3</sup>[9] of this Act; and the magistrate <sup>2</sup>[\* \* \*] shall thereupon make under his hand corresponding endorsements on the office copies, which shall be brought to him at the same time for that purpose.

12. The master of any apprentice bound under this Act may, with the consent of the person by whom he was bound, and with the consent of the apprentice if he is above the age of fourteen years, assign such apprentice to any other person, who is willing to take him for the residue of his apprenticeship, and subject to the conditions thereof: Provided that such person shall by endorsement under his own hand on the contract, declare his acceptance of such apprentice, and acknowledge himself bound by the agreements and covenants therein mentioned, to be performed on the part of the master, and that the consent of the other parties aforesaid shall be expressed in writing on the same, and signed by them respectively: And every such assignment shall be certified on the office copies of the contract under the hand of the Magistrate <sup>2</sup>[\* \* \*] according to the form given in Schedule (B) annexed to this Act.

Assignment of apprentice to new master.

13. Upon complaint made to any Magistrate in the said territories, by or on behalf of any apprentice bound under this Act, of refusal or neglect to provide for him, or to teach him according to the contract of apprenticeship, or of cruelty, or other ill-treatment by his master, or by the agent under whom he shall have been placed by his master, the Magistrate may summon the master or his agent, as the case may be, if he shall be within his jurisdiction, to appear before him at a reasonable time, to be stated in the summons, to answer the complaint;

Powers of Magistrate in case of complaint by apprentice against master.

and at such time, whether the master or his agent be present or not (service of the summons being proved), may examine into the matter of the complaint; and, upon proof thereof, may cancel the contract of apprenticeship, and assess upon the offender, whether he shall be the master or his agent, a reasonable sum for behoof of the apprentice, not exceeding four times the amount of the premium paid upon the binding, or if no premium, or a less premium than fifty rupees was paid, not exceeding two hundred rupees;

## LEG. REF.

<sup>1</sup> The words "or, if the apprentice is bound to the sea service, in the office of the person appointed under Act X, 1841, to make registry of ships at the port where the apprentice is to begin his service" were

omitted by Act XXI of 1923.

<sup>2</sup> The words "or Registering Officer" in sections 10 to 12 were omitted by *ibid.*

<sup>3</sup> The figure "9" was substituted for the figure "8" by the Amending Act, 1891 (XII of 1891).



and, if the offender shall not pay the sum so assessed, may levy the same by distress and sale of his goods and chattels, and, if the offender shall not be the master but his agent, by distress and sale of the goods and chattels of the master also.

14. No contract of apprenticeship shall be cancelled, nor shall any master or his agent be liable to any criminal proceeding, on account of such moderate chastisement for misbehaviour given to any apprentice by his master or the agent of his master, as may lawfully be given by a father to his child; and the provision for enabling the contract of apprenticeship to be cancelled shall not bar any criminal proceeding against any master or his agent for an assault or other offence committed against his apprentice, for which he would be liable to be punished had it been against his child, whether or not any proceedings be taken for cancelling the contract of apprenticeship.

15. Upon complaint made to any Magistrate, by or on behalf of the master of any apprentice bound to him under this Act, of any ill-behaviour of such apprentice, or if such apprentice shall have absconded, the Magistrate may issue his warrant for apprehending such apprentice, and may hear and determine the complaint, and punish the offender by an order for keeping the offender, if a boy, in confinement in any debtor's prison or other suitable place, not being a criminal gaol, for any time not exceeding one month, of which one week may be in solitary confinement, during which time such allowance shall be made for his subsistence by the master or his agent as the Magistrate shall order; and, if the offender be a boy of not more than fourteen years of age, may order him to be privately whipped; or, if the offender be a girl, or in the case of any boy, the Magistrate deem any such punishment unfit, he may pass an order empowering the master of the apprentice or his agent to keep the offender in close confinement in his own house, or on board the vessel to which he belongs, upon bread and water, or such other plain food as may be given without injury to the health of the apprentice, for a period not exceeding one month.

16. Upon complaint of wilful and repeated ill-behaviour on the part of the apprentice, and on the demand of the master, the Magistrate may order the contract of apprenticeship to be cancelled, whether or not the charge is proved; but only with the consent of the apprentice and of his father or guardian, if the charge is not proved; and such cancelling shall be with or without refund of the whole or part of any premium that may have been paid to the master on binding such apprentice, as to the Magistrate seems fit on consideration of the case; and all sums so refunded shall be applied under the direction of the Magistrate for behoof of the apprentice.

#### NOTES.

SEC. 14.—It is conceived, notwithstanding passages which may be found in the books apparently to the contrary that no master would be justified by the law of England even in moderately chastising a hired servant of full age for dereliction of duty; and that where the books speak of a master being justified in moderately chastising his servant or apprentice, they must be taken to apply only to the case of a servant or apprentice under age; and the only

civil remedies a master has for idleness, disobedience or other dereliction of duty, or breach of contract on the part of a servant are, to bring an action against him, or, as Puffendorf expressed it, "to expel the lazy drone from his family, and leave him to his own beggarly condition". The circumstances which justify the discharge of a servant will also sometimes justify the non-payment of his wages. (*See Smith's Master and Servant*, 5th Ed., p. 107.)



17. The Magistrate may order any sum recovered for behoof of the apprentice on cancelling the contract to be either laid out in binding him to another master, or otherwise for his benefit, or to be paid to the person by whom any premium was paid when he was bound apprentice.

*Appropriation of sum recovered for apprentice on cancelment of contract.*

18. No Magistrate shall entertain a complaint on the part of a master against an apprentice under this Act unless it be brought within one month after the cause of complaint arose, or, if the cause of complaint arose on board ship during a voyage, within one month after the arrival thereof at a port or place in the said territories, and no Magistrate shall entertain a complaint on the part of an apprentice against his master or the agent of his master under this Act unless it be brought within three months after the cause of complaint arose, or, if the cause of complaint arose on board ship during a voyage, within three months after the arrival thereof at a port or place in the said territories.

*Limitation of complaint of master against apprentice;*

*of apprentice against master.*

19. If the master of any apprentice shall die before the end of the apprenticeship, the contract of apprenticeship shall be thereby determined; and a proportionate part, corresponding to the unexpired portion of the term of any premium, which shall have been paid to such master on the binding of the apprentice to him, shall be returned by the executors or administrators out of the estate of the deceased to the person or persons who shall have paid the same; unless the executors or administrators of the deceased master shall continue the business in which such apprentice shall have been employed, and shall, within three months from the death of the late master, make offer in writing to keep the apprentice on the terms of the original contract; in which case the estate of the deceased shall be discharged from all liabilities on account of such premium.

*Effect of death of master during apprenticeship.*

*Offer by representative of master to continue apprenticeship.*

20. If such offer to keep the apprentice shall be made as aforesaid, the same shall be fully expressed and certified by the executors <sup>1</sup>[or] administrators on the original contract of apprenticeship, and also on the office copies thereof, by the Magistrate <sup>2</sup>[\* \* \*] and the apprentice shall be bound to the executors or administrators so keeping him for the remaining term of his apprenticeship.

*Offer to be certified on original contracts and copies.*

21. Any apprentice bound under this Act, whose master shall die during the apprenticeship, shall be entitled to maintenance for three months from and after the death of his master, out of the assets left by him: Provided that during such three months such apprentice shall continue to live with, and serve as an apprentice, the executors or administrators of such master, or such person as they appoint.

*Maintenance of apprentice whose master dies. Apprentice to continue to serve.*

22. The apprentice of any person against whom a commission of bankruptcy shall be issued, or who shall be adjudged to have committed an act of insolvency, during the apprenticeship, shall be discharged from all obligation under the contract of apprenticeship, and, if any premium was paid on binding him as an apprentice, he or a person by whom he

*Effect of insolvency of master during apprenticeship.*

## LEG. REF.

<sup>1</sup> The word "or" was substituted for the word "and" by the Amending Act, 1891

(XII of 1891).

<sup>2</sup> The words "or Registering Officer" were omitted by Act XXI of 1923.



was bound shall be entitled to claim the amount thereof as a debt against the estate of the bankrupt or insolvent.<sup>4</sup>

23. For the purposes of this Act all British subjects, wherever or of whatever parents born, as well as other persons in <sup>Persons amenable to jurisdiction of Magistrates' Courts.</sup> <sup>2</sup>[British India] without the towns of Calcutta and Madras and the town and island of Bombay, shall be amenable to the jurisdiction of the Courts and <sup>2</sup>[Magistrates of British India].

24. An appeal shall lie from any order passed by any Magistrate without the said towns and island to the Court of Session to which such Magistrate is subordinate, provided the appeal is made within one month from the date of the order.

Appeal from orders of Mufassal Magistrates.

25. In this Act the words "master", "owner," "person", and the pronoun "he" shall be understood to include several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, unless there is something in the context repugnant to such construction.

Interpretation of terms.

#### SCHEDULE A.

##### FORM OF AGREEMENT.

This agreement made the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ between A. B. of \_\_\_\_\_ and C. D. of \_\_\_\_\_ witnesseth that the said A. B., doth this day bind E. F., a boy (or girl) of the age of \_\_\_\_\_ years completed, son (or daughter) of the said A. B. (or otherwise describing the relation in which A. B. and E. F. stand) to dwell with and serve the said C. D., as an apprentice, from this day forth for \_\_\_\_\_ years (in the case of a girl add, or until the time of her marriage, which shall first happen), during all which term the said apprentice shall duly and faithfully serve the said C. D., according to his (or her) skill and ability in all lawful business, and demand and behave himself (or herself) honestly, orderly and obediently, in all things, towards the said C. D. and his (or her) family. And the said C. D. for himself (or herself) and his (or her) executors and administrators, in consideration [of the premium or sum of \_\_\_\_\_ paid by the said A. B. to the said C. D., the receipt whereof the said C. D., hereby acknowledges, and] of the faithful service of the said E. F., doth covenant and agree with the said A. B., his (or her) executors and administrators, that he (or she) will teach or cause to be taught to the said E. F., in the best way and manner that he (or she) can, the trade (craft or employment) of a \_\_\_\_\_ during the said term; and will also, during the said term, find and allow unto the said apprentice good, wholesome and sufficient food, clothes, lodging, \*washing; and all other things necessary; fit and reasonable for an apprentice: (and further, *here insert any special covenants*).

In witness whereof the parties have hereunto set their hands and seals the day and year above written.

A. B.

\_\_\_\_\_  
[L. S.]

C. D.

\_\_\_\_\_  
[L. S.]

#### LEG. REF.

<sup>4</sup>Cf. the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict., c. 106); section 170.

<sup>2</sup>Substituted by Order in Council.

#### NOTES.

##### SCHEDULE.

\*SUPPLY OF FOOD, CLOTHES AND LODGING.—At common law the duty of a master or mistress to supply food and other necessities to their servants, and apprentices arises solely from a contract, either express or implied, on their part to do so. And the

merely a breach of contract, for which they were civilly, but not criminally, liable; except in the case of a person of tender years. But at a meeting of all the Judges (except Lord Kenyon and Rooke, J.), held on 25th February, 1802, the general opinion was, that it was indictable as a misdemeanor to refuse or neglect to provide sufficient food, bedding, etc., to any infant of tender years unable to provide for and take care of itself (whether such infant were child, apprentice or servant), whom a man was obliged by duty omission to perform this duty was formerly



## SCHEDULE B.

## FORM OF ORDER OF ASSIGNMENT.

(To be endorsed on the Agreement.)

Be it known to all men that on the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ personally appeared before G. H., Magistrate of C. D., of \_\_\_\_\_ with E. F., his (or her) apprentice and J. K., of \_\_\_\_\_ and desired that the agreement of apprenticeship whereby the said E. F., was bound to the said C. D. might be assigned and made over to the said J. K. and the said G. H., having satisfied himself, by personal examination of the said E. F. and by other lawful ways and means that such assignment is for the benefit of the said E. F., and is made with the consent of (the said E. F., and of) all persons whose consent thereunto by law is required, doth allow such assignment; and the contract of apprenticeship whereby the said E. F., was on the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ bound to the said C. D. as an apprentice to earn the trade (craft or employment) of a \_\_\_\_\_ shall henceforth endure, unto the end of the said term, as if the said J. K., had been originally party to the said deed, and had executed the same in the place and stead of the said C. D., and shall be bound, for himself (or herself), his (or her) executors or administrators, to fulfil the covenants by the said C. D. to be performed, and said E. F. shall henceforth be bound unto the said J. K., in like manner as he (or she) was by the said agreement bound unto the said C. D.

If E.F. is not above the age of fourteen years, the words between brackets may be omitted.

C. D. E. F. J. K.

In witness whereof the said C. D., E. F., and J. K., have hereunto set their hands before me the day and year above written.

G. H., Magistrate.

## THE ARBITRATION ACT (X OF 1940).

[11th March, 1940.]

*An Act to consolidate and amend the law relating to Arbitration.*

WHEREAS it is expedient to consolidate and amend the law relating to arbitration in British India; It is hereby enacted as follows:—

## CHAPTER I.

## INTRODUCTORY.

Short title, extent and commencement.

1. (1) This Act may be called THE ARBITRATION ACT, 1940.

## NOTES.

or contract to provide for, so as thereby to injure its health. (See Friends' case, Russ. and Ry. C. C. 20; Smith's Master and Servant, 5th Ed., p. 190).

SEC. 1.—Reasons for the passing of the New Arbitration Act as explained in the Statement of Objects and reasons.—“The law of arbitration in British India is at present substantially contained in two enactments, the Indian Arbitration Act, 1899 (IX of 1899) and the Second Schedule to the Code of Civil Procedure, 1908. The operation of the 1899 Act, is limited to the Presidency towns and to such other areas as it may be extended to by the appropriate Provincial Government; its scope is confined to “arbitration by agreement without the intervention of a Court”. The Second Schedule to the Code of Civil Procedure deals with arbitrations outside the operation and scope of the 1899 Act; it relates for the most part to arbitration in suits, though arbitration without intervention of a Court is also briefly provided for. This Schedule also contains an alternative method whereby the parties to a dispute or any of them may file their arbitration agreement before a Court which, after a certain procedure, refers the

matter to an arbitrator. The question of amending and consolidating this law is not new. The Civil Justice Committee in 1925, recommended several changes in the Arbitration Law. The Act of 1899, was based largely on the then English Law, to which several substantial amendments have been effected by an amending Act of Parliament in 1934, (24 and 25 Geo. 5, c. 14). In 1938 the Central Government placed an officer on special duty to examine the question, the present Bill is the outcome of this examination. The existing law, the amended English Law and the recommendations of the Civil Justice Committee have been scrutinised together, and the present Act seeks to consolidate and standardize the law relating to arbitration throughout British India.” (See Gazette of India, 22nd July, 1939.)

SEC. 1: SCOPE OF THE ACT—GENERAL.—The Act is an independent enactment, and has no connection with rules relating to appeals under C. P. Code. 1 Rang. 661. The Arbitration Act of 1899, must govern an application made thereunder even though the new Act of 1940, comes into operation at the time when the application is heard. 1941 Cal. 415. Act is exhaustive and Courts cannot go beyond its provision. See



(2) It extends to the whole of British India.

# NOTES.

1938 Pat. 231=19 Pat.L.T. 549. This is an amending Act and must be construed strictly. 43 B. 809. *See also* 1934 Sind 29. An arbitrator is not bound by the technical rules of procedure which the Court must follow, nor need he record separate findings on the various points on which the parties are at issue, or write a reasoned judicial decision. All that he is required to do is to give an intelligible decision which determines the rights of parties in relation to the subject matter of the reference. Where an arbitrator has been selected by reason of his special knowledge of the affairs of the parties to decide their dispute, he is entitled to take a broad view of the case and give an award, which he conceives to be just and equitable in the circumstances. 190 I.C. 399=A.I.R. 1940 Lah. 186. Even Arbitration Courts must act according to the *principles of natural justice* and not deliberately refuse a hearing or take evidence from one side behind the back of the other. 64 I.C. 706. *See also* 1934 Pat. 550. Though arbitrators are not bound by technical rules of evidence they are nevertheless expected to conform to the fundamental rules of evidence and procedure. 64 I.C. 706; 11 Mys.L.J. 300=39 Mys.H.C.R. 51. No procedure is laid down for the arbitrator in Schedule II, C. P. Code, and unless it is proved that the arbitrator refused to examine any evidence tendered by the parties, the mere fact that he did not record any proceedings or did not hold a public enquiry will not be enough to vitiate the award. I.L.R. (1940) Lah. 599=188 I.C. 493=A.I.R. 1940 Lah. 73. It is true that when arbitrators are appointed they are supposed to act together, but it is not absolutely essential that all the arbitrators should be present when all the evidence is recorded provided all the arbitrators are made acquainted with the evidence that has been recorded before they come to their decision. There is nothing illegal or contrary to the principles of natural justice in this. Hence where reference is made to a number of arbitrators and some of them record evidence and then the award is sent to the absentee arbitrator who gets himself acquainted with the evidence the award is not invalidated. 1941 Rang. 22. Where in arbitration proceedings, one of the parties is in jail, and the fact of his being in jail is an obstacle, known to all the parties concerned to the examination of one party in the presence of the other parties, it cannot be said that the examination of one party by the arbitrator in the absence of the others amounts to misconduct which will vitiate his award. 1940 M.W.N. 808=52 L.W. 373=A.I.R. 1940 Mad. 905=(1940) 2 M.L.J. 356. Statement of arbitrators as to what transpires before them is *prima facie* conclusive of. *See* 17 L.W. 648=75 I.C. 850=1924 Mad. 274. No questions can be put to an arbitrator as

to what passed in his own mind when exercising his discretionary power on the matters submitted to him. 1940 Rang. 203. The Indian law as to arbitration is irrelevant where the parties agreed in referring to an arbitration to be bound by *English law and procedure*. 45 M. 496=43 M.L.J. 422 (P. C. Questions of fact and law upon which the jurisdiction of the arbitrators depends are for the Courts. 44 All. 472. An application to Court to appoint fresh arbitrators amounts to an abandonment of the previous proceedings. 46 Bom. 854. The ordinary meaning of the word 'umpire' is a person who is to decide upon disagreement. 187 I.C. 262=A.I.R. 1940 Sind 37. In a case where the arbitrators disagreed on the matters referred to them, and the necessity for umpire became established, it may well be that the omission of the arbitrators to appoint an umpire before they entered upon the submission would be fatal to the whole proceedings. But when, no disagreement between the arbitrators occurred, the omission to make the appointment of umpire is not a defect amounting to legal misconduct on the part of the arbitrators and sufficient to vitiate the award made. 187 I.C. 262=A.I.R. 1940 Sind 37. The provisions of the C. P. Code, as to joinder of claim cannot be strictly applied to arbitration proceedings. 9 I.C. 712=4 S.L.R. 196. Judge cannot put himself in the position of arbitrator without the consent of the parties. 1930 Rang. 8. As to distinction between arbitrator and commissioner. *See* 18 Pat. 193. Difference between a referee and arbitrator. *See* 1939 All. 92. A Court has very limited jurisdiction to review awards passed by arbitrators. The nature of the jurisdiction of the Court is not that of a Court of appeal reviewing the decision of an inferior Court. 122 I.C. 516. *See also* 1940 O.W. N. 974. A reference to arbitration deprives a party of his right to resort to the ordinary tribunals, and it *must be strictly construed*, more so against the party who is responsible for the reference being drawn up in a particular manner. 148 I.C. 977=1934 Sind 29; 43 Bom. 809. A clause in a contract providing for reference to arbitration does not oust jurisdiction of Court or make it obligatory on plaintiff to submit to arbitration before going to Court. The only effect of such a clause is that if a suit is brought, the defendant may apply for a stay of the suit. 142 I.C. 351=33 P.L.R. 1020=1933 Lah. 79. An arbitration clause can be incorporated into a contract by reference. 27 S.L.R. 159=140 I.C. 626=1933 Sind 75. Such a clause in a contract will be binding on an assignee if the subject-matter of reference is capable of assignment. 1933 S. 75. Where part of an award is found to be invalid, being in excess of the arbitrators' powers, and it is separable from the rest, the remainder of the award is good. In the same way because of an omission on the part of



(3) It shall come into force on the 1st day of July, 1940.

2. In this Act, unless there is anything repugnant in the subject or context,—

Definitions.

#### NOTES.

the arbitrators to decide one of the matters referred to arbitration the award cannot be considered invalid unless the omission has substantially influenced the decision given. 191 I.C. 107=A.I.R. 1940 Rang. 203. *See also* 41 P.L.R. 201=1939 Lah. 308. An award on an arbitration, which has been acted upon by the parties for a considerable length of time, may be treated as an agreement between the parties, that they would abide by it, even though the award contains a clause which is in excess of the terms of reference. Where a clause in such an award allotting maintenance to a Hindu widow at a certain rate, provides that the widow cannot ask for any increase at all, and that the party bound to pay it cannot get it reduced, though it may be in excess of the terms of reference, if the parties have acted upon it for a long time, and maintenance has been paid and received at such rate, the widow is bound by it and cannot claim a higher rate afterwards on the ground of altered circumstances. 1937 M.W.N. 1039. It is clear law that it is not necessary that there should be the signatures of both parties to a written submission. A document signed by one party and accepted by the other party is enough, for the purposes of the Arbitration Act, to constitute a submission. 61 Cal. 702=1934 Cal. 796=38 C.W.N. 737. *See also* 105 I.C. 105=1931 Oudh 127=1931 O.W.N. 642. Where the parties to a reference to an arbitration agree that the decision of the majority of the arbitrators would prevail, the fact that the award was not signed by the arbitrator who differed from the opinion of the majority does not affect its validity. 44 C.W.N. 866. Where all interested parties are not joined in a reference out of Court regarding to partnership accounts there is no valid reference and is invalid. 41 P.L.R. 580. 1939 Lah. 154. The principle that in a pending suit all parties must join in the reference also applies to arbitrations out of Court, *ibid.* The mere fact that all the heirs did not join in the reference to arbitration of a dispute about inheritance is no ground for upsetting the award so far as those people who made the reference are concerned. A.I.R. 1941 Rang. 22. The arbitrators have jurisdiction to continue the arbitration proceedings although one of the parties dies before they give their decision, where one of the terms of the agreement between the parties is that their heirs and legal representatives would be bound by the decision of the arbitrators. In the absence of such a term in the agreement between the parties, the arbitrators have no authority to go on, although a son of the deceased files an application on behalf of himself and on behalf of his minor

brothers to the effect that the arbitration proceedings should continue. 44 C.W.N. 866. A submission of a party to an arbitration clause need not be in writing. It may be proved by other evidence. 42 P.L.R. 48=A.I.R. 1940 Lah. 180. *See also* 36 Bom.L.R. 47=1934 Bom. 79. *See now* Sec. 2 (a) and 105 I.C. 105; 1938 Oudh 127=1938 O.W.N. 642. A Court has jurisdiction to entertain an application to file an award or enforce it as a decree only if it has jurisdiction to entertain a suit the subject of which is the subject-matter submitted to arbitration. 148 I.C. 977=1934 Sind 29. *See also* 1934 Sind 183; 1935 Sind 228; 1934 Lah. 652; 1938 Lah. 838; and sec. 31 *infra*. An arbitrator cannot abdicate his functions in favour of a third party. If the parties desire the arbitrator to take the opinion of the members of a panchayat, he can do so, but he would act illegally if he undertakes to be bound by the decision of the panchayat and to give his award in accordance with the wishes of the panchayat. 152 I.C. 1023. When a member of the firm of architects is holding an inquiry as to the cost of certain work redone, on the refusal of the contractor to do so, he acts in his capacity as an arbitrator and is subject to the provisions of the Arbitration Act. 173 I.C. 401=A.I.R. 1938 Sind 45.

REGISTRATION:—Provision in award for payment of money by one party to the other as the equivalent of latter's share in immovable property—Clause that until such payment ownership of latter shall not cease does not operate as a document of title and as present creation, declaration or assignment of title. Registration is not necessary. 17 Pat.L.T. 835=16 Pat. 34=1937 Pat. 214.

RULE OF COURT.—Rule framed under the Act, but not in accordance with it, will not be given effect to. 40 Cal. 219. As to applicability of the Act to references to arbitration under the *Companies Act*, see 14 Lah. 249=141 I.C. 64=33 P.L.R. 1048=1933 Lah. 44; 143 I.C. 435=1933 Pesh. 66. *See also* 1938 Pesh 54. Where one of the parties to an arbitration is a corporation registered under the *Companies Act*, section 152 (3) of that Act applies and an award obtained by it may be filed under the provisions of the Arbitration Act. (1933 Lah. 44 and 1933 Pat. 49, Foll.). 1935 Sind 228. An award made against a firm is executable against an individual partner thereof personally even though he has not received notice of the arbitration or of the filing of the award. It is not necessary to give notice of the filing of an award made under the Arbitration Act to the parties to the reference or to every member of a firm who is sought to be made liable. 61 C.L.J. 515.



(a) "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not;

(b) "award" means an arbitration award.

#### NOTES.

See also 44 C.W.N. 285. As to *arbitrator's fees*, see 1933 Sind 300.

SEC. 2—(a) "SUBMIT PRESENT OR FUTURE DIFFERENCES" TO ARBITRATION.—A *submission* is a written agreement signed by both parties to submit differences to arbitration; and this agreement may be collected from a series of documents even though connected by parol evidence. 42 A. 525; 53 A. 384, or contained in the bye-laws framed under Bombay Cotton Contract Act. 32 Bom.L.R. 1451. In order that there may be a valid submission to arbitration, it is only necessary that there should be a written agreement embodying either directly or by implication all the terms. It is not necessary that each party should sign the submission to arbitration. All that is required is that both parties accept a written document as containing the agreed terms; it might be in the form of a signed document by both parties containing the terms, or a signed document by one party containing the claims and a plain acceptance either signed or orally accepted by the other party, or in the third case, an unsigned document containing the term of the submission to arbitration, agreed to orally by both parties. (56 C. 118 and 53 All. 384, Foll.) 44 C.W.N. 607. One of the essential ingredients of a submission to arbitration is that the parties should intend to have the dispute referred determined quasi-judicially. If it is not to be so determined, the agreement is not a submission, nor the person deciding it an arbitrator. That is the *distinction between an agreement for submission to an arbitrator and an agreement to accept the decision of a valuer or appraiser or of a racing steward or of counsel for the parties*. In these latter cases there is no *animus arbitrandi*. 28 S.L.R. 223=1934 Sind 200. See also 1939 All. 176. Where the Counsel's statement makes it clear that a person is being appointed as a referee and that he is to make a statement in Court, the fact that he was allowed to make the statement after taking the statements of the parties, could not have the legal effect of altering the character of the referee, for it cannot be said that a referee can never be authorized by the parties to examine the parties before making his statement in Court. Such a person is not an arbitrator. I.L.R. (1939) All. 50=180 I.C. 316=1938 A.L.J. 1132=A.I.R. (1939) All. 92. The provisions of Sch. II, para. 5, C. P. Code, have no application to a case where parties agree to abide by the statement of a specified person and he makes such a statement in Court. 180 I.C. 364=1939 A.L.J. 1=A.I.R. 1939 All. 176.

The term *submission* is construed very broadly. Where a contract between the parties was subject to the rules and bye-laws of an Association, which provided that disputes in relation to the contract should be

referred to arbitration by two disinterested persons, prescribed the procedure provided for an appeal to the Board of Directors of the Association, and finally made provision for the award being filed in the High Court, a reference to arbitration under the bye-laws in question would amount to a submission as defined by S. 4 (b) of the Act. 36 Bom. L.R. 1005=1934 Bom. 476. Arbitrators were appointed to consider and determine the respective claims of the parties and their disputes in connexion with "houses, shops, moneys, etc.": *Held*, that the word 'etcetera' after the word "moneys" could be read as covering the jewellery. A.I.R. 1940 Rang. 203. The requirements of section 4 are duly complied with, if the submission is in writing and is binding on both the parties as their agreement or as the equivalent in law to an agreement between them. Their actual signatures are not essential. 49 I.C. 135; 32 C.W.N. 1101=56 C. 118. (dissenting from 53 C. 65). See also 19 I.C. 925=6 S.L.R. 278; 1929 Sind 83. But see 61 C. 702=38 C.W.N. 737 (Signatures of both parties necessary for validity of a written submission to arbitration). When a party interested in the dispute does not join in making the reference the Court has no jurisdiction to refer the dispute to arbitration. 1929 Lah. 171. The existence of a "dispute" is essential to the validity of a reference to arbitration under the terms of a contract. A dispute involves the assertion of a right by one party and its denial by the other. 64 I.C. 798=33 C.L.J. 545. See also 47 Cal. 799; 46 Cal. 534. Only matters in dispute between the parties to a litigation which affect private rights can be referred to arbitration. 72 I.C. 1016=1923 Nag. 112. Withholding of payment is a 'dispute' between the parties. 46 Cal. 534. But see 1931 B. 164. What amounts to submission to arbitration, see 33 C. 1237; 33 C. 1169. See also 6 S.L.R. 278; 4 S.L.R. 14. The definition of submission in S. 4 covers what is ordinarily termed an arbitration clause as well as what is commonly called a reference. 35 I.C. 536=10 S.L.R. 1. See also 71 I.C. 817=1924 Lah. 405.

ORAL SUBMISSION.—Award based on—Validity of. See 63 M.L.J. 610; 1931 Pat. 92. "Submission" is of course, defined as a submission in writing and all the operative sections of the Act proceed on the assumption that it is in writing. But an *oral submission* is not in terms prohibited by the Act. An oral agreement to refer to arbitration can therefore be proved and sued on. 36 Bom.L.R. 47=1934 Bom. 79=150 I.C. 478=58 B. 369. See also 105 I.C. 105=1938 Oudh 127.

WHAT ARE SUBMISSIONS.—Where an association, at the instance of and on a claim by the members against another member, lays the matter before arbitrators and the latter



(c) "Court" means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court;

#### NOTES.

member in his own hand and over his signature sent an answer to the claim, the document constituted a written agreement to submit their difference to arbitrators. 43 All. 348. See also I.L.R. (1937) 1 Cal. 606. The words of the definition of 'submission' in S. 4 of the Arbitration Act (1899) are sufficiently wide to include cases where the agreement is made without, at the time it is made, there being any differences between the parties, either in existence or in direct contemplation. Also it is not necessary to constitute a 'submission' that the terms of the agreement should all be contained in one document. Such an agreement may be found in correspondence consisting of a number of letters. The printed rules of Merchants' Association requiring all members in all cases of dispute or differences *inter se* arising from certain transactions to submit the said disputes or differences to arbitration together with the written undertakings to abide by the rules, signed by members at the time of their admission as members are sufficient to constitute the written agreement to submit to arbitration. I.L.R. (1939) Kar. 769=1939 Sind 357. A policy of marine insurance provided, "all disputes must be referred to in England for settlement and no legal proceedings shall be taken to enforce any claim except in England where the under-writers are domiciled and carry on business." Held, that the clause amounted to a submission to arbitration. 26 Bom.L.R. 224=80 I.C. 523=1924 Bom. 381. A clause in a Bill of lading that all disputes shall be settled by the British Consul at the port of destination is similar to a submission to arbitration. 15 S.L.R. 88. The petition of compromise in a suit for accounts amounts to a submission to arbitration within the meaning of S. 4. 71 I.C. 817=1924 L. 405.

WHAT ARE NOT 'SUBMISSIONS' TO ARBITRATION.—A document embodying the terms of an agreement to refer to arbitration, which is not signed by or on behalf of both parties is not a submission as defined in S. 4. 19 I.C. 925=6 S.L.R. 278. Writing amounting to a bond does not amount to a submission to arbitration. 16 I.C. 861=6 S.L.R. 89. The words "office dhara" (office terms) do not constitute a written agreement to submit differences to arbitration. They are used merely as symbols to denote that such an agreement had been made and the use of such symbols does not justify the Court in accepting oral evidence of the agreement. 19 I.C. 925=6 S.L.R. 278.

WHO MAY SUBMIT.—(i) As to infant, see 14 C.L.J. 188. An arbitration to which a minor is a party is not in itself void; it is only voidable at the instance of the minor. And when the minor supports it, it is not open to the other party who is a major, to have the award made at his instance set aside on the

ground of the other party being a minor. 1940 M.W.N. 808=52 L.W. 373=A.I.R. 1940 Mad. 905=(1940) 2 M.L.J. 356. Where on the death of a Hindu, disputes arose between his collaterals on the one side and his widow, a minor and a married daughter on the other, the mother acting on behalf of her minor daughter has no power to bind the minor by an agreement to refer the disputes to arbitration and the minor's right to the property would be unaffected by any award that might be passed in pursuance of any such reference. 190 I.C. 184=1940 A.L.J. 774=45 C.W.N. 40=52 L.W. 409=A.I.R. 1940 P.C. 181 (P.C.). As an infant is unable to bind himself by contract, he cannot enter into a submission which will render the award *absolutely* binding on him. In the case of a pending suit, the Court may authorise a submission to arbitration so as to render the award binding on the infant. 14 C.L.J. 188=11 I.C. 481. See also 41 Bom. L.R. 1208; 20 Pat.L.J. 170=1939 Pat. 278; 1939 Pat. 387; 1939 Cal. 500; 1939 Bom. 296. (ii) Guardian. 11 I.C. 481; 12 L. 767; 59 C.L.J. 521; 38 B. 153. (iii) Father, manager of Hindu family. 24 I.C. 863; 1930 Lah. 388. See also 19 N.L.J. 151=1936 Nag. 197. (iv) Mother of minors. 29 I.C. 800=8 Bur.L.T. 122. See also 67 L.A. 386=43 Bom.L.R. 141 (P.C.). (v) Manager of Court of Wards. 1930 Sind 195=121 I.C. 164. (vi) Where one of the parties to a contract is a firm, a clause for the submission of disputes to the arbitration of its directors is perfectly legal. 42 P.L.R. 48=A.I.R. 1940 Lah. 180. See also 1938 Oudh 54.

WHAT MATTERS MAY BE REFERRED to arbitration. See 24 I.C. 264=5 S.L.R. 4. Criminal complaint cannot be referred. 1929 Lah. 394. In a suit for restitution of conjugal rights, the question of validity of marriage can be referred. 1929 Lah. 177=118 I.C. 464. See also 1930 Sind 195=121 I.C. 164. In a suit for a declaration that the plaintiff is the mutawalli of a mosque, reference to arbitration is not illegal and the decree passed in accordance with the award is not invalid. 189 I.C. 812=A.I.R. 1940 Lah. 123.

CONSTRUCTION OF REFERENCES to arbitrator to be liberal. 15 I.C. 321. See also 43 Bom. 809; 148 I.C. 977=1934 Sind 29. The intention of the parties is to be the sole guide for determining the mode of working out the submission and reaching a final decision. 36 Bom.L.R. 1005=1934 Bom. 476. Reference to arbitration and proceedings thereon, how far affected by rules of special bodies or corporations. 42 C. 1140; 20 C.W.N. 365. See also 47 C. 849; 46 C. 534. Effect of award on oral submission. 33 B. 69.

EFFECT AND BINDING NATURE OF AWARD.—Opportunity to prove to be given to the parties. 65 I.C. 497=1922 L. 149. There



(d) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting;

(e) "reference" means a reference to arbitration.

## CHAPTER II.

### ARBITRATION WITHOUT INTERVENTION OF A COURT.

3. An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference.

Provisions implied in arbitration agreement.

4. The parties to an arbitration agreement may agree that any reference thereunder shall be to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment.

Agreement that arbitrators be appointed by third party.

Authority of appointed arbitrator or umpire irrevocable except by leave of Court.

5. The authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement.

### NOTES.

cannot be two tribunals each with jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. 26 C.W.N. 967=69 I.C. 863=1923 C. 135 (2). In a suit on a mortgage the dispute was referred to arbitration. The award allowed three years to the mortgagors to occupy the mortgaged house free of rent, though it was to be conveyed to the mortgagees from the date of award. In case the mortgagors failed to hand over possession at the expiry of three years they would pay mesne profits at the rate of Rs.100 per month from date of default up to possession. The house could realize only Rs. 10 per mensem as rent. The mortgagors occupied the house rentfree for 3 years failed to hand over possession. The mortgagees obtained decree for mesne profits at the rate of Rs. 100 per mensem. *Held*, that a Court executing the decree was *prima facie* bound by the decree. As the mortgagors did not raise any objection to the award at the proper time, it was too late for them to challenge the decree. The mere fact that the house if given on rent might not fetch Rs. 100 was not sufficient ground for affording relief to the mortgagors; there might be several considerations weighing with the arbitrators in fixing the amount. 171 I.C. 515=A.I.R. 1937 Sind 219. Where an agreement between the Military and a contractor for the supply of fodder provided that, any dispute or difference arising out of this contract shall be referred to the arbitration of the officer sanctioning the contract, a reference made by the Assistant Director of Grass Farms is competent. The rules framed by the Government regarding the conduct of Government litigation have no bearing on the question of reference to arbitration. The reference has to be made not to the person who sanctioned the contract but to the officer who may be holding the appointment of the sanctioning authority at the time of the dis-

pute. So reference to the Officer who became the successor of a different officer as the sanctioning authority on a re-organization of the department is valid. 171 I.C. 361. *See also* 1933 Sind 75. Abortive award if prevents fresh reference—Court's power to decide if there was a valid contract. 44 A. 472.

STAMP.—Stamp duty on agreement to refer to arbitration. 33 C. 669; 13 C.W.N. 63; 19 Bom. 32; 40 C. 219. Want of *proper stamp* when and how can be called in question. 39 C. 669. On this section, *see also* 27 Bom.L.R. 1098.

SECS. 3, 4 AND 5.—Reproduce with minor alterations the provisions of section 6, 7 and 5 respectively in the 1899 Act, and deal with the terms of arbitration agreements. (*Statement of Objects and Reasons*.)

SEC. 3.—The intention of the parties is to be the sole guide for determining the mode of working out the submission and reaching a final decision. The law of arbitration is based upon the principle of withdrawing the dispute from the ordinary Court and enabling the parties to substitute a domestic tribunal. Once that tribunal reaches a final decision as contemplated or agreed upon by the parties, then the Arbitration Act steps in to help the parties to enforce the said decision. 36 Bom.L.R. 1005=1934 Bom. 476.

SEC. 4.—Where a clause in the contract between the parties relating to certain drainage works provided for reference of the disputes to the Chief Engineer of the Karachi Municipality, the mere fact that the Chief Engineer had a duty to look after the interests of the Municipality and as an interested party might have already formed an opinion upon the matters in dispute is not sufficient to prevent him from being a proper person to decide the disputes. 27 S.L.R. 169=1933 Sind 75. *See also* 171 I.C. 361.

SEC. 5: SCOPE OF SECTION.—Once a valid



## NOTES.

submission has been made it is irrevocable without good cause. 12 M.I.A. 112 at 130; 7 A. 273; 8 M.H.C.R. 46; 27 M. 112; 20 A. 145; 29 A. 13; 1914 M.W.N. 52. The Court has jurisdiction, in a proper case, to grant leave to revoke an arbitration on good cause being shown. But that jurisdiction has to be exercised with great care and caution and should never be considered a venue for making applications, from time to time in pending arbitrations with a view to obstruct the progress of the arbitration. Unless, therefore, a strong and irresistible case is made out, the Court should be reluctant to supersede an arbitration. 36 Bom. L.R. 827=1934 B. 388. *See also* 45 L.W. 405=1937 Mad. 405=171 I.C. 690 (where submission is *ultra vires* submission will be revoked). If the arbitrator refuses or neglects to act, the procedure under section 8 of the Act should be followed. 44 I.C. 360=20 I.C. 504. If the original appointment of arbitrators is bad the tribunal constituted is without jurisdiction and no subsequent realization of a mistake or an attempt to rectify matters by one party can clothe with jurisdiction a tribunal which is in its inception illegal and without jurisdiction, and the award by such tribunal is invalid, and if filed in Court should be removed from the file. A.I.R. 1941 Sind 111.

**POWERS OF ARBITRATOR.**—An arbitrator has jurisdiction to inquire and decide whether a party to the submission has signed it or whether the signature is that of a partnership and if so, who the individual partners are. 11 I.C. 274 (S.). Where joint property belonging to certain persons has been partitioned by an award made without the intervention of the Court, the mere fact that no specific directions were given by the arbitrators about the ventilators and drains existing in the properties partitioned does not render the award invalid on the ground of difficulty in execution of the award or indefiniteness in the award. It is open to the parties to find out for themselves what would be the legal inference to be derived from the award with respect to these particular easements in the properties. The ordinary rules of law relating to easements in a joint property divided between two owners will apply unless there is something in the award which takes any particular easement out of the general law and assigns a particular right in any party to that easement. 188 I.C. 477=A.I.R. 1940 Lah. 24.

If a matter in dispute submitted to arbitration is not within the jurisdiction of arbitrators, the proper remedy of a party to the submission is to apply to the Court for leave to revoke the submission. If the Court is satisfied that the submission was *ultra vires* it has undoubtedly the power to give leave to revoke the submission to arbitration, and that is the appropriate remedy. 171 I.C. 690=1937 M.W.N. 518=45 L.W. 405=A.I.R. 1937 Mad. 405. Once arbitrators have issued an award, they become *functus officio*, and they have no jurisdiction subse-

quently to re-write the original award. A.I.R. 1941 Pat. 215. *See also* 1923 All. 31. Where an entire suit has been referred to arbitration, the arbitrator has power to allow an amendment of the plaint in order to correct a mistake in a date given therein, when the amendment is one which the Court had power to allow if it had tried it, even though the Court had refused such amendment on a previous occasion. 20 Pat.L.T. 700=1939 P.W. N. 703=A.I.R. 1939 Pat. 597. The arbitrators whose only duty is to ascertain the actual value of certain property at a certain time have no power to include interest in their assessment of value. 169 I.C. 562=A.I.R. 1937 P.C. 214 (P.C.).

**PROCEDURE.**—The ordinary rule is to refer to a single arbitrator. An intention to refer to more than one arbitrator must be plain and clear. 12 I.C. 662=5 S.L.R. 97. An order refusing to set aside an award based purely on evidence recorded by Court itself is not bad in law. 11 I.C. 274 (S.). Where an agreement has provided that if any party shall refuse or neglect to appoint an arbitrator within certain days after one party shall have appointed an arbitrator and served a written notice upon the other party requiring him to appoint an arbitrator, then upon such failure the party making the request may appoint another arbitrator to act on behalf of the party so failing to appoint and the arbitrator so appointed may proceed and act in all respects as if he had been appointed by the person failing to make such appointment, the appointment of such arbitrator cannot be deemed to be inoperative or incomplete until other party received notice of it. 187 I.C. 262=12 R. S. 224=A.I.R. 1940 Sind 37. *Leave to revoke a reference* to arbitration will not be given unless a substantial miscarriage of justice will take place in the event of leave being refused. 1933 Sind 347.

**WHAT ARE PROPER GROUNDS.**—Good grounds for revocation (i) Collusion (29 A. 13); (ii) Partiality (29 C. 278); (iii) Indebtedness of arbitrator to one of the parties (29 C. 278; 3 C.W.N. 361; 25 C. 141); (iv) Unreasonable delay (17 C. 200); (v) Neglect of arbitrator (11 S.L.R. 101; 44 I.C. 360). (vi) *Submission ultra vires*. 45 L.W. 405=1937 Mad. 405. (vii) Where the parties to a proceeding enter into an agreement to be bound by whatever statement is made by a certain third person in relation to their disputes, they are at liberty to resile from that agreement before such statement is made. 42 P.L.R. 495. *See also* 144 I.C. 42=1933 S. 115.

**WHAT ARE NOT PROPER GROUNDS.**—(i) Excess of authority by arbitrator not proper ground. 37 B. 183=24 M.L.J. 328 (P.C.). (ii) Mere delay in making award. 4 Pat. L.J. 394. *See also* 44 A. 432.

**DEATH OF PARTY.**—Effect on reference, *see* 15 C.L.J. 360; 4 S.L.R. 14=7 I.C. 590. 14 C.W.N. 759; 44 C.W.N. 866; 10 C.L.J. 449=4 I.C. 370.

**"LEAVE OF COURT."**—Leave is granted only when there would be failure of justice. 10



6. (1) An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

(2) The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.

(3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.

7. (1) Where it is provided by a term in a contract to which an insolvent is a party that any differences arising thereout or in connection therewith shall be referred to arbitration, the said term shall, if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such differences.

(2) Where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (1) does not apply, any other party to the agreement or the receiver may apply to the Court having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement, and the Court may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

(3) In this section the expression "receiver" includes an Official Assignee.

Power of Court to appoint arbitrator or umpire.

8. (1) In any of the following cases—

#### NOTES.

Bom.L.R. 351. But see 11 Bom.L.R. 1. Irregularity in reference may be waived. 14 C.L.J. 188. See also 61 M.L.J. 761; 1931 Mad. 619. If an award is valid, it is operative, even though neither party has sought to enforce it by a regular suit or by summary procedure. 28 C.W.N. 140. Agreement to refer—Subsequent suit on contract not maintainable. 45 A. 472. See also 26 C.W.N. 69 = 69 I.C. 863.

SECS. 6 and 7 follow closely sections 1 and 2 of the English Arbitration Act, 1934 (24 and 25 Geo. V, c. 14): their purpose is to standardize the law as to the effect on an arbitration agreement and proceedings of the death or insolvency of a party thereto. (*Statement of Objects and Reasons.*)

SEC. 8 dealing with the Court's power to appoint an arbitrator in certain cases, reproduces with some verbal changes section 8 of the 1899 Act. (*Statement of Objects and Reasons.*). See also para. 5 of C.P.C., Sch. II.

CHANGES MADE BY THE SELECT COMMITTEE.—"We have removed an obscurity from clause 8 (1) (a) where it was not clear whether failure to concur in any one of the appointments or failure to concur in all the appointments was contemplated. We have omitted the words "or is removed" from section 8 (1) (b) and also from section 9 to remove the inconsistency which would otherwise exist between these sections and

section 12, which gives to the Court and not to the parties power to appoint arbitrators in place of arbitrators removed by the Court. In sub-clause (2) we have extended the time for making an appointment to 15 days instead of seven days from the service of notice under sub-clause (1)." (*Rep. of Sel. Com.*).

SEC. 8: SCOPE OF SECTION.—Act does not limit number of arbitrators. 43 A. 456.

APPLICABILITY OF SECTION.—Section is not applicable where a different course is provided by contract. 44 M. 406 = 40 M.L.J. 166. Nor to the case if independent appointments of two arbitrators. 43 B. 809. Not to independent appointment of second arbitrator. 1924 Sind 29. When according to the agreement an arbitrator has been nominated and the same is communicated to the other party in clear and unequivocal language, it *ipso facto* confers authority to arbitrate. If he refuses to act and the submission does not show that it was intended the vacancy should not be supplied, section 8 provides for the appointment of another but the right of the party to nominate is exhausted. 1925 Sind 12. See also 1937 Cal. 523. (Refusal to act by arbitrator until his fees are paid.)

SEC. 8 CL. (1) (b) must be read as qualified by sec. (2). 181 I.C. 337 = 1939 Sind 81. The Court has no power to appoint new arbitrators in place of those who declined to proceed further in



(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him;  
any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

Power to party to appoint new arbitrator or, in certain cases, a sole arbitrator. 9. Where an arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed in the agreement,—

#### NOTES.

a case submitted to them, when the number of arbitrators is more than two. 43 B. 309. Any vacancy is to be filled up by original appointer as mentioned in section 9. (*Ibid.*) The neglect of an arbitrator in not acting for nearly three years is in itself a sufficient ground for appointing another arbitrator in his place. 144 I.C. 42=1933 Sind 115. Where two arbitrators were mutually agreed upon and appointed by the parties but there was no provision made as to filling up of a vacancy, and it so happened that one of the arbitrators refused to act, *held*, that section 8 (1) (b) of the Arbitration Act (1899) and not section 9 or section 8 (1) (a) would apply. Meaning of the expression "appointed arbitrator" discussed. 56 C. 848. Where the parties have jointly appointed two arbitrators and one of the arbitrators dies or a vacancy otherwise occurs, the Court has no power under clause (1) (b) to supply the vacancy and appoint an arbitrator. 1939 Sind 81. If the arbitrators are directed to appoint an umpire in the first instance, they cannot appoint an umpire after they have entered on the reference. 13 C.W.N. 297. Where under the agreement, the parties have twenty days' time after receipt of notice within which to appoint an arbitrator, *held*, the failure to give the requisite number of days was fatal to the award delivered by the only arbitrator. 42 A. 525. Section 8 of the Arbitration Act deals only with cases of appointment of a single arbitrator or of an umpire or a third arbitrator. Where, therefore, the intention of the parties, as expressed in the agreement of reference, is that the submission should

be to more than one arbitrator, the District Judge has no jurisdiction to appoint an arbitrator under section 8 (2). 11 O.W.N. 1347=1935 Oudh 26. Where the arbitrator says that he would act no further till his fees are paid in advance, such action amounts to a refusal to act on his part and a new arbitrator can be appointed in his place. A. I.R. 1937 Cal. 523.

SECS. 8 AND 9: DIFFERENCE BETWEEN.—Under section 8 an application must be made to the Court and the Court appoints an arbitrator, while under section 9 appointment may be made by a party, whether originally or by way of substitution. 1927 Sind 177. *See also* 1929 Sind 55.

SEC. 9 amends section 9 of the 1899 Act in the following directions: Provision is made to suit *mofussil* conditions by making it clear that the defaulting party's time for appointing an arbitrator runs only from the receipt of notice, and the proviso is elaborated (a) to make it clear that it is only in the arbitrator's capacity as sole arbitrator (and not as the arbitrator of the party appointing him) that the Court may set aside the appointment, and (b) to permit the Court, on sufficient cause being shown, to allow further time to the defaulting party, or in any event to make such alternative order as it thinks fit. (*Statement of Objects and Reasons.*)

ALTERATIONS BY THE SELECT COMMITTEE.—"The first change made in sub-clause (a) brings the section into accord with the wording of section 8 (1) (b). The second change has been explained in our remarks on section 8. In section 9 (b) we have extended the time there given from 7 days to 15 days



(a) if either of the appointed arbitrators neglects or refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;

#### NOTES.

and have provided that it shall date from service of notice and not receipt of notice in order to relate it to a definite ascertainable point of time by the help of the provisions of section 42. We have also added an explanation, applicable to both section 8 and this section, of the expression "neglects or refuses to act". (*Rep. of Sel. Com.*).

**SEC. 9: APPLICABILITY OF SECTION.**—Section applies only where a different intention is not expressed in the submission. 7 S.L.R. 1=20 I.C. 504. See also 1939 Sind 24. Section 9 does not apply where the parties by their contract provide that a different course should be adopted if one of the parties fails to nominate an arbitrator as provided in the contract. 40 M.L.J. 166=44 M. 406. See also 1927 Sind 177; 1939 Sind 24=180 I.C. 143. Section 9 provides for an appointment by way of substitution in a case when each party is entitled to appoint an arbitrator. It does not provide for the case where one party is entitled in certain circumstances to appoint two arbitrators. 142 I.C. 706=1933 Sind 6. See also 1939 Sind 24. Official Receiver is not a "party" within this section. 1926 Sind 209. Where the agreement between the parties contained a term that on the default of either party to appoint an arbitrator in time the chairman of the Trade Association was to appoint one on behalf of the defaulter, *held*, that section 9 (b) would not apply and an award made by one arbitrator alone, who was appointed by one of the parties was without jurisdiction. 50 C. 1=44 M.L.J. 758 (P.C.). Where the indent provided that in case of dispute there was to be a reference to arbitration and that if the buyers failed to appoint an arbitrator the sellers would have the power to appoint an arbitrator on behalf of the buyers but no such power was conferred on the buyers in the event of the sellers failing to appoint an arbitrator; *held*, that in such an eventuality, the right of the buyers was to appoint the arbitrator nominated by them as sole arbitrator under section 9 of the Act. 27 S.L.R. 186=1933 Sind 328. (Case-law discussed.) Where in pursuance of an agreement, both parties appoint an arbitrator each, it is not necessary that there should be a reference in writing or that they should accept the appointment formally in writing. The fact that the arbitrators peruse relevant papers in the absence of parties does not amount to misconduct. They are judges of law and fact and an erroneous decision on a point of law will not justify interference. 76 I.C. 36=1924 Sind 91. The appointment of an arbitrator within 15 days from the service of notice is illegal. 1939 Sind 24.

**CASES UNDER THE ACT OF 1899.**—An arbi-

trator is a Judge chosen by the parties themselves and a Court should not thrust an arbitrator on an unwilling party except under circumstances laid down in section 8. 51 A. 501=27 A.L.J. 182=115 I.C. 611=1929 A. 144. Section 9 applies to cases where arbitrator accepts and afterwards refuses to act. 6 M. 414; 18 C. 324. See also 31 P.L.R. 386=1930 L. 125; 1929 B. 51. Where arbitrator refused to act and Court acting *suo motu* superseded the reference to arbitration, *held*, that order superseding arbitration was contrary to law and that it should be set aside. 7 O.W.N. 1043. A reference to arbitration stands on the same footing as all other lawful agreements and cannot be revoked by a party except on good cause. 22 I.C. 548=1914 M.W.N. 52. See also 64 I.C. 459=19 A.L.J. 823. Where in fact reference to arbitration has become impossible and by implication Court has superseded it, the jurisdiction of Court to try the issue between the parties is not affected. But where the proceeding is still pending before the arbitrators, Court has no jurisdiction to try the case. 5 Pat.L.J. 672=57 I.C. 473; 16 I.C. 277=10 A.L.J. 23. See also S. 23 (2) of the Act. The fact that one of three arbitrators gave evidence before the others, does not constitute misconduct on the part of the arbitrators so as to vitiate their award. 40 I.C. 646=21 C.W.N. 895. Where one of the parties to an arbitration deliberately absents himself from the hearing, the award concluded in his absence is not bad. (*Ibid.*) "Refuses to act" in section 9, meaning of. 7 A. 20; 7 A. 523; 10 A. 137; 1 A.L.J. 683. The mere fact that an arbitrator returns the papers to the Court intimating that he was doing so as one of the parties did not wish him to act and also because he had no leisure in future to carry out the task, does not amount to a flat refusal by him to act, especially when subsequently he agrees to carry on the arbitration on a requisition from the Court. The arbitrator in such a case cannot be considered to have divested himself of his character as an arbitrator, and an award subsequently made by him cannot be attacked on that ground. 1937 A.L.J. 651=A.I.R. 1937 All. 582. The mere fact that an arbitrator has declined to sign an award made by a majority of arbitrators does not show that he has refused to act. 1 A.L.J. 683. A refusal to accept by some arbitrators makes the award of the rest illegal. 21 M.L.J. 263=9 I.C. 173 (F.B.). The appointment of a new arbitrator in place of one who refused to act must be made by both the parties. 112 P.R. 1918=48 I.C. 395. The Court may appoint a new arbitrator in the place of one who has refused nomination, for that is a refusal to act within the meaning of the section. (6 M. 414; 18 C.



(b) if one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for fifteen clear days after the service by the other party of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

Provided that the Court may set aside any appointment as sole arbitrator made under clause (b) and either, on sufficient cause being shown, allow further time to the defaulting party to appoint an arbitrator or pass such other order as it thinks fit.

*Explanation.*—The fact that an arbitrator or umpire, after a request by either party to enter on and proceed with the reference, does not within one month comply with the request may constitute a neglect or refusal to act within the meaning of section 8 and this section.

#### NOTES.

324, overruled.) 33 A. 743=38 I.A. 181=21 M.L.J. 1151 (P.C.). The power of Court to appoint an arbitrator in the place of one who refuses to act arises, not on the refusal, but only on the failure of one of the parties to appoint a new arbitrator after formal notice to do so. (17 M. 498, Dist.) 134 I.C. 733=33 Bom.L.R. 1022=1931 B. 529. Court appointing fresh arbitrator, on refusal of first arbitrator, without issuing notice to the other party acts with material irregularity. 50 I.C. 655=17 A.L.J. 643. Whether non-compliance with section 9 is an irregularity or illegality, see 1931 A.L.J. 682=1931 A. 761. An arbitrator failing to submit his award within the time fixed may be held to have "refused or neglected to act" so that if another arbitrator is appointed without formally discharging the former, the appointment cannot be questioned. 23 I.C. 842. Where two arbitrators were appointed to decide a case and one of them withdraws pending the arbitration the remaining arbitrator cannot proceed with the case and file an award. 56 I.C. 644=2 Lah.L.J. 637; 17 I.C. 389=24 M.L.J. 15.

"BECOMES INCAPABLE OF ACTING" IN SECTION 9.—When a person goes away from the country and remains away, and there is no evidence to show an intention to return, that person becomes incapable of acting. 4 Beng. L.R. (O.C.). 89. Arbitrators could not delegate the powers conferred on them. 17 B. 129. The performance of acts of a ministerial character may be delegated. 29 C. 854 (P.C.). Where only one arbitrator is appointed to decide a matter, no umpire can be appointed. 25 W.R. 11.

CL. (b).—CASES UNDER THE OLD ACT.—See 1 C. 200; 11 M.L.J. 128; 23 W.R. 221; 6 C.L.R. 1; 24 A. 312; 16 I.C. 177=10 A.L.J. 23. When the agreement to refer does not give Court any power to appoint an umpire, Court could not appoint one. 8 A. 64. Where parties had agreed that the case should be decided by arbitration and counsel for parties made statements before Court giving the names of the two persons who were to be appointed arbitrators, but the

statements were silent as to what was to happen in case both the persons refused to act and there was no express provision that Court would have no power to appoint a third arbitrator and that the suit must be decided on the original side and Court appointed a third arbitrator on refusal of named arbitrators to act, *held*, (i) that the powers conferred upon Court under section 9 existed and was not contrary to any agreement between the parties; (ii) that by leaving the question open the parties obviously intended that the ordinary statutory powers would be enforced in the case of a deadlock. 151 I.C. 148=1934 A.L.J. 711=1934 A. 368. It cannot be seriously disputed that there is some difference between the procedure to be followed where the arbitration is made in a pending suit and where there is a mere agreement to refer to arbitration which is sought to be filed in Court. In the latter case the Court obviously cannot go beyond the terms of the agreement, and if the agreement specifies the persons who are to be appointed arbitrators and makes no provision for the case where the arbitrators refuse to act, the Court cannot substitute in the place of the named arbitrators other persons, in the face of the clear provision in para. 17 (4) of Sch. II, C.P. Code. Para. 5 of Sch. II, C.P. Code, will not apply to such a case, as it can come into play only after there has been an order of reference by the Court. If one or more of the arbitrators named in the agreement refuse to act and thus make the agreement incapable of performance, the agreement becomes void, and the Court has no jurisdiction under para. 17 (4) to make a reference to the arbitrators who are willing to act. 19 P. 927. The parties to a suit agreed to refer their dispute to two arbitrators. It was also agreed that in case of difference between the arbitrators, the award of an umpire, agreeing with that made by any of the arbitrators should be final. One of the arbitrators refused to act as an arbitrator. The defendant applied to the Court to order the umpire to proceed with the matter, and the Court passed an order to that effect although objected



10. (1) Where an arbitration agreement provides that a reference shall be to three arbitrators, one to be appointed by each party and the third by the two appointed arbitrators, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

## NOTES.

to by the plaintiff. In pursuance of that order the other arbitrator and the umpire proceeded with the inquiry and then the other arbitrator passed an award against the plaintiff and at the foot of that award the umpire made a note that he agreed with the award. This award was accepted by the Court and a decree followed. *Held*, that it was not open to the Court to refer the dispute to the other arbitrator and the umpire when one of the arbitrators had refused to act. It was open to the Court to substitute another arbitrator in place of the one who refuses to act. The umpire could only be called in to act as an umpire when the two arbitrators made differing awards and not before. 1937 Sind 171. When a party selects an arbitrator he cannot subsequently ask Court to select another on the ground that the arbitrator whom he selected turned out to be a friend of the opposite party. 3 A.L.J. 185. Where a Court appoints a fresh arbitrator without complying with the formalities prescribed in section 9 the appointment is without jurisdiction or at least tainted with material irregularity, and the order appointing the arbitrator can be set aside in revision. 146 I.C. 493=1933 O. 540. Paras. 5, 8 and 15 of C.P.C., Sch. II do not exhaust the cases in which a Court can revoke an arbitration, Para. 3 (2), C.P.C. Sch. II does not deprive Court of all its powers over an arbitration proceeding under its order except in the cases mentioned in paras. 5, 8 and 15, *supra*. The Court has jurisdiction in a proper case, to grant leave to revoke an arbitration on good cause being shown. 36 Bom. L.R. 827=1934 B. 388. An agreement to refer a matter to certain specified arbitrators becomes void and of no effect if one or more of the arbitrators refuses to act, thus making the agreement incapable of performance; the Court in such a case has no jurisdiction to make a reference to arbitrators who are willing to act. It can only make an order of reference if, on the date of such order, the arbitrators appointed in accordance with the agreement are willing to act as such; though it has power under section 9 to appoint arbitrators in the place of those refusing to act, that can be done only after the order is made. 151 I.C. 1001=11 O.W.N. 1188. An agreement to have a dispute settled by one or more individuals is one thing; an agreement to go to arbitration rather than to litigate in the Courts is quite another. Where it is at all possible, if parties desire arbitration, they should be as free as possible under the guidance of the Court to have their disputes settled by arbitrators they chose themselves.

So it is primarily the original intention of the parties which should be cherished by the Court. Hence where in a dispute regarding certain land, the parties agree that the dispute should be decided by certain named persons, the Court is not entitled to appoint another in the event of one of arbitrators being unable or unwilling to act. 41 C.W.N. 981=I.L.R. (1937) 2 Cal. 434=A.I.R. 1937 Cal. 388.

SEC. 10 makes provision for cases in which more than two arbitrators are appointed. The first two sub-clauses follow closely section 4 of the 1934 Act of Parliament.

CHANGES MADE BY THE SELECT COMMITTEE.—“In sub-clauses (2) and (3) we have made provision for modification of the terms of these sub-clauses by express provision in the arbitration agreement.” (*Rep. of Select Committee*).

SEC. 10.—CASES UNDER THE OLD ACT.—An award is not invalid in case the order of reference does not provide for a difference of opinion between the arbitrators, when there is no difference of opinion among them. 17 W.R. 30. That there is no provision made for the appointment of an umpire in case of difference of opinion among arbitration, does not make the submission bad on that account. 13 I.C. 161=15 C.L.J. 360. The Court has no jurisdiction to appoint somebody as an umpire if the arbitrators differ, when the deed of reference to arbitration filed by the parties makes no provision for this contingency but expressly states that the Court should then decide the matter. 189 I.C. 466=42 P.L.R. 124=A.I.R. 1940 Lah. 276. Award of umpire without consultation with arbitrators is good. 55 P.R. 1915=30 I.C. 87. There is nothing in law which prevents an umpire when there is a difference of opinion between the arbitrators from deciding the case entirely on his own opinion. 144 I.C. 1020=1933 L. 587. An arbitrator cannot be an arbitrator as well as an umpire. 138 I.C. 651=36 C.W.N. 332=1932 C. 491. “Umpire” meaning of. *See* 1940 Sind 37. In case where arbitrators are empowered to appoint an umpire from seven persons named in the order of reference, they cannot appoint a person not named. 7 M.H.C.R. 72. A majority award is not bad even in the absence of a specific provision to that effect in the reference. 40 I.C. 646=21 C.W.N. 895. *See* section 10 of the Act. But *see* next case. Where a dispute is referred to several arbitrators and the deed of reference does not provide for the prevalence of the views of the majority in the case of the decision not being unanimous a majority award cannot be maintained. 49 I.C. 522. (*See* now sec-



(2) Where an arbitration agreement provides that a reference shall be to three arbitrators to be appointed otherwise than as mentioned in sub-section (1), the award of the majority shall, unless the arbitration agreement otherwise provides, prevail.

(3) Where an arbitration agreement provides for the appointment of more arbitrators than three, the award of the majority, or if the arbitrators are equally divided in their opinions, the award of the umpire shall, unless the arbitration agreement otherwise provides, prevail.

Power to Court to remove arbitrators or umpire in certain circumstances.

11. (1) The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.

(2) The Court may remove an arbitrator or umpire who has misconducted himself or the proceedings.

(3) Where an arbitrator or umpire is removed under this section, he shall not be entitled to receive any remuneration in respect of his services.

(4) For the purposes of this section the expression "proceeding with the reference" includes, in a case where reference to the umpire becomes necessary, giving notice of that fact to the parties and to the umpire.

12. (1) Where the Court removes an umpire who has not entered on the reference or one or more arbitrators (not being all the arbitrators), the Court may, on the application of any party to the arbitration agreement, appoint persons to fill the vacancies.

Power of Court where arbitrator is removed or his authority revoked.

(2) Where the authority of an arbitrator or arbitrators or an umpire is revoked by leave of the Court, or where the Court removes an umpire who has entered on the reference or a sole arbitrator or all the arbitrators, the Court may, on the application of any party to the arbitration agreement, either—

(a) appoint a person to act as sole arbitrator in the place of the person or persons displaced, or

(b) order that the arbitration agreement shall cease to have effect with respect to the difference referred.

#### NOTES.

tion 10 of the Act.) Where parties have entered into an agreement to be bound by the opinion of the majority of arbitrators, the omission of the Court to record that fact in the order of reference does not vitiate the arbitration. 23 I.C. 842. In the absence of a clause providing for an award made by less than all being valid, each of them must Act personally as if he were the sole arbitrator. For as the office is joint if one refuse or omit to act, the others can make no valid award. 17 I.C. 320=16 O.C. 94. In case no provision is made that the decision of the majority of arbitrators should be binding, and two out of five arbitrators withdraw a decision by the majority is invalid. 7 M. 174; 4 M. 311; 17 B. 129. (See now section 10 of the Act). The parties to a suit agreed that three gentlemen could be appointed arbitrators and one of them should be appointed 'sarpanch' and they should decide the case. No provision was made for any difference of opinion. The arbitrators could

C.C.M.—12

not agree and there was a majority of 2 to 1. *Held*, that as no umpire was appointed in the case it was necessary that there should be a unanimous decision for a valid award to be made. 1934 A.L.J. 66=147 I.C. 623 (1)=1934 A. 109. See now section 10 of the Act.

SEC. 11 empowers the Court to remove a dilatory arbitrator or umpire or one who misconducts himself or proceedings. Section 16 of the 1899 Act and sections 6 and 15 of the 1934 Act of Parliament have been drawn on.

SEC. 12 which follows section 3 of the 1934 Act of the Parliament makes provisions for the consequences of the removal of arbitrators. (See also section 36.)

CHANGE MADE BY SEL. COM.—"The word 'authority' has been substituted for 'appointment' in view of the wording of section 5." (Rep. of Sel. Com.)

SEC. 13 sets out the powers of arbitrators: it is based to some extent on section 10 of the 1899 Act and on paragraph 11 of the



(3) A person appointed under this section as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the arbitration agreement.

13. The arbitrators or umpire shall, unless a different intention is expressed in the agreement, have power to—

Powers of arbitrator.

### NOTES.

Second Schedule to the Code of Civil Procedure 1908.

CHANGES MADE BY THE SELECT COMMITTEE.—“We have omitted the words ‘acting under an arbitration agreement’ as being unnecessary and as being inappropriate in certain cases, such as when arbitration is under a statute. We have also inserted a provision giving power to the arbitrators to make a conditional or alternative award.” (*Rep. of Sel. Com.*)

SEC. 13: POWER OF COURT.—Civil Courts have no power to issue a summons or commission to a witness to give evidence in a private arbitration. Consent of parties cannot confer this power. 47 B. 250. The arbitrators have no power to summon witnesses and procure their attendance when the arbitrators are acting under the provisions of the Arbitration Act. If parties go to private arbitration under the Act it is for them to produce witness before the arbitrators. 1933 Sind 300. Where questions of fact under the Arbitration Act as to the conduct of arbitrators or the umpire, the procedure adopted and the instructions and so forth are raised, the Court should have evidence properly brought before it. 64 I.C. 706 (All.).

POWERS OF ARBITRATORS.—See 1925 Bom. 22. Powers depend on clause of reference the scope of which is to be decided by the Court. 47 B. 578=44 M.L.J. 706 (P.C.). The arbitrator has the power to act on any evidence which would satisfy a reasonable man without reference to strict rules of evidence. 49 I.C. 135=12 S. R. 55, or to strict judicial procedure, 1928 M. 48, in a reference for partition to determine everything incidental or consequential relating to the mode of partition and the rights of female members, 1924 Oudh 54, to allow interest on amount awarded after date of award, 27 C.W.N. 933, dissenting from 27 C.W.N. 494, when a party to reference is a firm to decide whether a person is a partner, 19 I.C. 363; but see 1932 B. 375, if so empowered to appoint a receiver, 1929 Sind 200. *Re* his power to use personal knowledge, see 1926 B. 527; *Re* his power to make successive awards. But they have no power to delegate their powers, *e.g.*, of appointing an umpire, 17 B. 129, unless the reference is to an association consisting of a large and fluctuating body who can only select individuals as arbitrators. 33 C. 1169, or the delegated work is of a ministerial nature, 4 Pat. 670.

DUTIES OF ARBITRATORS.—An arbitrator is not of course bound by the technical and

strict rules of evidence. But he must not disregard the rules of evidence which are founded on fundamental principles of justice and public policy. 39 Bom.L.R. 476=A.I.R. 1937 Bom. 410. See also 120 I.C. 494=1930 Lah. 280. To hear each side only in the presence of the other, if one of the parties should not appear to give notice of his intention to proceed *ex parte*, 66 I.C. 389=34 C.L.J. 39; to give effect to all legal defences, *e.g.*, plea based on limitation; 56 C. 1048=56 M.L.J. 614 (P.C.).

POWERS OF UMPIRE.—Same as those of arbitrator. He has a discretion to state a special case for the opinion of the Court and his refusal to do so is not misconduct. 27 C.W.N. 494; 1928 M. 107; 61 M.L.J. 623 (P.C.). He cannot take evidence from the notes of arbitrators in the face of objection by parties unless so authorised by the submission. 64 I.C. 706.

FORM OF OATH.—See 2 L.W. 320=29 I. C. 49.

PROCEDURE.—Where an umpire is appointed owing to disagreement he must re-hear the evidence if applied to, and failure to do so would be misconduct; but if no application is made to that effect, he can proceed with the case and decide it on the evidence already produced. 63 I.C. 141=15 S.L.R. 68. An award of an umpire without hearing parties is against principles of equity and justice. Award of costs, without mentioning the amount, is bad for uncertainty, and the umpire can award costs only for the reference and award. The costs of obtaining an order from the Court is at the discretion of the Court. 12 I.C. 637. Award may be made in the form of a special case. 52 C. 100=1925 C. 599. A charge of misconduct against the umpire cannot be (based on or) strengthened by the mere fact that in the exercise of his discretion, he refused to state a special case. 134 I.C. 1080=35 C.W.N. 1287=1931 P.C. 289=61 M.L.J. 623 (P.C.). Arbitrators cannot apply to the Court for confirmation of an order passed by them making payment of their fees a condition precedent to the hearing of the reference. 6 C. 809.

IRREGULARITY—WAIVER OF.—The party who makes an objection must prove that he objected at the time to the umpire's proceedings in making a final award without hearing his witnesses. He cannot, in law, be allowed to question the regularity, subsequently if there was any decision upon merits. 64 I.C. 706 (All.); 61 M. L. J. 761; 1931 M. 619. See also 14 C.L.J. 188.



- (a) administer oath to the parties and witnesses appearing;
- (b) state a special case for the opinion of the Court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the Court;
- (c) make the award conditional or in the alternative;
- (d) correct in an award any clerical mistake or error arising from any accidental slip or omission;
- (e) administer to any party to the arbitration such interrogatories as may, in the opinion of the arbitrators or umpire, be necessary.

14. (1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.

#### NOTES.

But if the party in fact objected, his proceeding with the case and defending himself as best as he can does not amount to waiver of his objection. 1931 B. 81; 55 B. 503=33 Bom.L.R. 759.

EFFECT AND NATURE OF ORDER UNDER CL. (b).—Where arbitrators state a case for the opinion of the Court, the order thereon is not necessarily binding on them, as they still remain the final Judges of the fact and law. Nor can such order amount to a judgment or operate as *res judicata*. Distinction between the English and Indian Acts pointed out. 79 I.C. 986=1925 S. 83.

AMBIGUITY IN AWARD.—In the case of a reference to arbitration the umpire is *functus officio* after he has published his umpirage or award and the document must speak for itself. Where an ambiguity in the award is patent it would not be competent to the Court to launch into an inquiry to ascertain which of the two possible interpretations of the document the Court should accept. 1927 Bom. 428=29 Bom.L.R. 660.

INTERFERENCE WITH AWARDS.—It is necessary that Courts should be very cautious in interfering with award and the grounds on which the Court will remit the matter for reconsideration are:—(1) that the award is bad on the face of it, (2) that there has been misconduct on the part of the arbitrator, (3) that there has been an admitted mistake and the arbitrator asks that the matter may be remitted to him, (4) where additional evidence has been discovered after the making of the award. 49 C. 646. Mere errors in law unless distinctly appearing on the face of the award or from any document accompanying or forming part of the award are not sufficient ground for remitting an award. 49 C. 646. The decision of the arbitrators is final. If there is on the face of the award, a patent inconsistency such as a flat contradiction in measurement, or a mistake of arithmetical calculation the Court to which application is made can send the award back to the arbitrators to correct it before a decree is passed in accordance with it. But anything of this kind cannot be done in execution pro-

ceedings. 45 A. 628. See also 50 L. W. 195. Award beyond reference but with consent of parties is valid—*Arithmetical error does not vitiate award*. 42 A. 277. Award as to divisions of testator's property is not invalid by reason of the pendency of probate proceedings. 25 Bom.L.R. 437=1923 B. 365.

SEC. 14 relating to the procedure in filing an award, reproduces section 11 of the 1899 Act with two small changes in sub-clause (2): the provision of paragraph 10 of the Second Schedule to the Code, requiring that depositions and documents shall accompany the award, is included, and the notice of filing is to be issued by Court and not by the arbitrator as in the 1899 Act.

ILLUSTRATIVE CASES UNDER THE OLD ACT (C. P. C., SCH. II).—When parties accept an award and apply to the Court for filing it, the Court should not refuse to file it basing its view on some correspondence between the Registrar of the High Court and the District Judge, which it is not entitled to look at. 38 P.L.R. 318. The provisions of the rule are mandatory. 17 I.C. 430=15 O.C. 294. See also 43 C.W.N. 924. The duty imposed upon the arbitrator by this rule can be enforced by an order of Court made upon the arbitrator. 17 C. 832 (839). Whether omission to file depositions and documents invalidates the award, see 93 I.C. 446 (2)=1926 O. 307=1 Luck. 139; 119 I.C. 694=26 N.L.R. 168=1929 N. 264. Arbitrators may deliver their award to a third person to be filed in Court. 5 B.L.R. 357. Court is bound to give notice to parties of the filing of the award. 20 A. 474. Omission to give notice is a serious irregularity and is a good ground for revision. 94 I. C. 115=1926 C. 1018; 119 I.C. 331. Notice is not necessary where parties are present in Court when award is filed or where they have come to know of the award otherwise. 21 I.C. 298=310 P.L.R. 1913. See also 28 Bom.L.R. 511=95 I.C. 547=1926 B. 312. Notice to pleaders sufficient. 45 C. L.J. 458=1927 C. 619; 119 I.C. 331. Pleadings of parties seeing the award and initialling the order sheet amount to waiver



(2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the

#### NOTES.

of notice. 95 I.C. 321=1927 P. 135. Decree passed without notice of the filing of the award being given to the parties is invalid. 11 M. 144; 62 I.C. 849=24 O. C. 263; 89 I.C. 240=1925 L. 619; 158 I.C. 904=1925 A.L.J. 986=1935 A. 852. Court cannot pass a decree in terms of an award before expiry of 10 days allowed by Art. 158 of the Limitation Act. An agreement not to object to the award does not cover illegalities. 45 M. 466=71 I.C. 269=1922 M. 179. The draft award signed by the arbitrators is the award. 1 M. H. C. R. 178. The arbitrators need not sign award at the same time and in the presence of each other. 18 M. 22; 29 B. 36. When two out of three arbitrators alone sign the award and file it in Court, and third signs it after it is filed, the award is invalid. 33 C. 498. See also 1 P.L.J. 306=35 I.C. 358; 56 M. L.J. 35; 7 O. W. N. 541=1930 O. 389. Case referred to three arbitrators—Only two arbitrators acting—To hold that only two arbitrators had full authority to act is to commit either error of law or fact. 1929 C. 831. After an award is made the arbitrators have no power to review it. 9 C. 575. Award signed by arbitrators—Subsequent change of opinion by one of them—Legality. 11 I.C. 481=14 C. L. J. 188. Rejection of an application for further time to file objections—Effect of. 45 M. 466=71 I.C. 266. See also 24 O. C. 234=64 I.C. 90=8 O.L.J. 626. Where parties agree to be bound by the decision of the majority of arbitrators, the refusal of the minority to sign the award will not invalidate the proceedings provided there was a decision of the majority after full discussion by the whole body of arbitrators. 1 P.L.J. 90=34 I.C. 105. The parties to a partition suit referred the matter to the arbitration of certain Amins. When the Amins had decided what they were going to do, the parties joined together with the Amins and certain local gentlemen and executed a document by which they agreed that the parties shall be bound to compromise the suit upon certain terms which were annexed to the document which was signed by the parties. *Held*, that the document was not an award but an agreement to compromise. 45 C. W. N. 381.

**ESTOPPEL.**—The mere signature by a party to an award does not necessarily in all cases estop him from afterwards disputing its correctness. Nor does the mere signature necessarily remove all objection to the irregularity in the award. Where the suit is based on the award itself and not on any agreement by the parties whereby they mutually accepted the award and the question of the acceptance of the award is not in issue it cannot be said that a party is estopped because of his signature. If both

parties to the award signed it after it was delivered it may be that a suit could be filed to enforce the terms of the award on the ground that there was a definite contract by the parties by virtue of their signatures. 7 R. 136=117 I.C. 574=1929 R. 166.

**AWARD SENT BY POST.**—A Court is not competent to act on an award unless it is not only signed by all the arbitrators but is also properly placed before it by the arbitrators and by no other persons. Where award was sent to Court by post and none of the arbitrators took responsibility for saying as to who caused the award to be sent to Court, the award was not properly placed before the Court, and, as such, could not be acted upon by it. (1928 P. 231, Rel. on; 1 P.L.J. 90; 6 B. 663, Expl.; 6 W. R. 95, Ref.) 118 I.C. 606=1929 P. 178.

**ORAL AWARD.**—The question whether an oral award can extinguish a decretal debt depends on the terms of the reference and the terms of the award. *Quære*.—Whether an oral award is good. 1933 L. 777.

**SEC. 14: SCOPE OF SECTION.**—See 76 I.C. 1007; 35 P.L.R. 482=1934 Lah. 652; 64 M.L.J. 341 (P.C.); 36 Bom.L.R. 1005=1934 Bom. 476; 1941 Sind 111.

Per C. C. Ghose, J.—“There is nothing to prevent the parties from agreeing to a submission containing in it a further submission to arbitration. No doubt in section 11 of the Arbitration Act there is not to be found any reference to arbitration by a committee; but it does not matter in the slightest whether the committee is described as a committee of appeal or whether they are described as a fresh set of arbitrators. The contract contains as it were two submissions or a submission within a submission.” 1927 Cal. 647. But see 1927 Cal. 391.

**ESSENTIALS.**—An award under section 11 must be in writing and signed. 82 I.C. 802=1924 Rang. 319. See also 5 I.C. 374. If not signed, it cannot be made a rule of Court. 56 M.L.J. 35. Where an award was declared by the arbitrators in the presence of both parties on a certain date but signed by them on a later date, the effectiveness of the award is not postponed to the date on which it was signed. The award becomes effective on the date on which the parties are made aware of it. 45 C.W.N. 223. Where a third arbitrator resigned because there was a majority against his view and did not sign the award, *held*, that did not affect the validity of the award. 76 I.C. 1007=1923 Lah. 411. Under section 11 of the Act, the award must be signed by all the arbitrators who join in making the award. But the omission on the part of some of them to so sign it is mere irregularity capable of being rectified. 36 Bom. L.R. 1005=1934 Bom. 476. See also 1938 O.W.N. 480=1938 Oudh 125. Where the



arbitration and award and of the costs and charges of filing the award cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court, shall thereupon give notice to the parties of the filing of the award.

(3) Where the arbitrators or umpire state a special case under clause (b) of section 13, the Court, after giving notice to the parties and hearing them, shall

#### NOTES.

arbitrators take a reasonable fee for their services before entering upon their duties with a view to avoid the necessity of suing the parties in Court, their conduct in so doing, does not amount to misconduct and does not vitiate the award. 17 L.W. 648 = 1924 Mad. 274. An application to file in Court, a compromise, settling the differences independently of arbitrators appointed, and signed by the parties and arbitrators, cannot be granted inasmuch as such a deed does not amount to an award. 48 P.L.R. 1915 = 28 I.C. 298. An award which purports to be the considered award of the arbitrators cannot be said to be no award simply because the arbitrators accepted the compromise arrived at by the parties and cast the terms of the compromise in the form of an award. Such an award cannot be invalidated. I.L.R. (1937) Nag. 449. The doctrine of estoppel applies, even if an award were not an award but merely a compromise acted under. I.L.R. (1937) Nag. 449.

**JURISDICTION.**—An application to file an award made to a wrong Court is not to be dismissed but returned for presentation to the proper Court. I.L.R. (1940) Cal. 358 = 1940 Cal. 220 = 44 C.W.N. 285.

**NOTICE.**—Where an arbitrator proceeds *ex parte* he should give notice to the parties before he so proceeds; otherwise his award is liable to be set aside. 47 C. 951. See also 47 C. 29. Failure to give notice of filing an award does not by itself vitiate award. 1926 Sind 242. Award—Legality of—Ministerial Act—Notice to parties—No necessity for. 17 L.W. 648 = 1924 Mad. 274.

**AWARD WHEN ENFORCEABLE.**—An award becomes enforceable as soon as it is filed in Court and no notice of filing need be given to the parties by the arbitrator. 47 C. 951 = 60 I.C. 987. See also 5 R. 171 = 102 I. C. 800. The filing of an award is an act to be done at the instance of an arbitrator, and when it is filed the result is not that there is a suit in which a decree has been passed, but that there is an award enforceable as if it were a decree. 40 C. 219.

**PROCEDURE.**—The provisions of the Act and the requirements of the rules and orders of the High Court must be complied with before the Registrar can file the award and that it is only when the award is legally and properly filed that it will be executable as a decree. 5 R. 171. See also 1940 Lah. 164 = 42 P.L.R. 114 (appointment of proper guardian necessary where award against a minor is sought to be filed in Court). Under section 141, C. P. Code, the procedure pro-

vided in regard to suits is to be followed, so far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. The presentation of an application by an arbitrator for filing an award under the Arbitration Act comes within the category of "civil proceedings". Where, therefore, the award is against a minor, it is incumbent to make a prayer in the application for the appointment of a proper guardian for such minor under O. 32, R. 3, C. P. Code. If a proper guardian is not appointed, a decree passed against the minor on the basis of the award is a nullity. 42 P.L.R. 114 = A.I.R. 1940 Lah. 164. The procedure laid down by the Act seems to be that the various stages to be found in sections 11 to 15 (1899 Act) are to be followed in the same chronological order as the numerical order of the sections and that an application to set aside is not as a rule within the jurisdiction of the Court, until some application or attempt has been made to file the award or some other similar step is taken to enforce it. 1923 All. 31. See also 160 I.C. 693 = 1936 Pesh. 2. There are express provisions to be found in section 11 of the 1899 Act as to what is to be done by an arbitrator, if he has made his award. When the question, when an arbitrator in India becomes *functus officio* comes to be decided, the line will have to be drawn somewhere in the procedure which is laid down for getting the award into Court. It is difficult to hold that an arbitrator is *functus officio*, while there are still express statutory duties laid upon him by the Act. 1923 All. 31. A rule framed by the Court under, but not in accordance with, the Arbitration Act will not be given effect to. 40 C. 219.

**FILING OF THE AWARD.**—Any one of the arbitrators can legally file the award, the filing being a purely ministerial act. 29 I.C. 602 = 8 S.L.R. 302. If an application to file an award is made in a Court which has no jurisdiction to entertain it, the proper order on it would be, not an order of dismissal, but an order for return of the application for presentation to the proper Court. I.L.R. (1940) 1 Cal. 358 = 71 C.L.J. 62 = 44 C.W.N. 285 = A.I.R. 1940 Cal. 220. Irregularities in filing can be rectified by Court in exercise of its inherent jurisdiction. 5 R. 171. But part of an award cannot be filed. 56 M.L.J. 35. Though under the proviso to section 2 the Act is made applicable to Karachi, the Act is rendered inapplicable by section 2 to an award made on a reference to arbitration in Karachi entitling a party to realise a certain sum of money by the sale of the properties at



pronounce its opinion thereon and such opinion shall be added to, and shall form part of, the award.

Power of Court to modify award.

15. The Court may by order modify or correct an award.—

#### NOTES.

Lahore which were mortgaged in his favour, as a suit relating to the subject-matter submitted to arbitration could be instituted only at Lahore and not at Karachi according to section 16, C. P. Code. Such an award could not therefore be legally filed under the Act. 35 P.L.R. 482=1934 Lah. 652. See also 44 C. W. N. 285. There is no provision in the Act by which the Court can compel the arbitrators to file an award in the Court when the fees and charges due to them in respect of the arbitration have not been paid. 189 I.C. 806=A.I.R. 1940 Sind 144.

**APPOINTMENT WHEN COMPLETE.**—The appointment of a certain person as arbitrator is not complete, until such person has accepted the reference and consented to act. 29 I.C. 602=8 S.L.R. 302. Arbitrators can decide questions of law as well as points involving construction of agreement. 53 B. 271=31 Bom.L.R. 21=1929 Bom. 19. (See also 32 Bom.L.R. 43 construction of clause in bill of lading excluding jurisdiction of Courts in that respect.) Arbitrator can also appoint receiver for estate in dispute. 119 I.C. 529=1929 Sind 200 [29 C. 590 (P.C.), Rel. on.] See also 1928 Sind 144. As to power of arbitrator to make successive awards, see 1930 Lah. 425 and cases referred to therein.

**APPEAL.**—An order refusing to set aside an award is a judgment within Letters Patent and is appealable. There is no right of appeal against such an order under section 104, C. P. Code, which has no application to the filing of an award under section 11, Cl. (2) of the Arbitration Act. 46 I.C. 687=45 C. 502. There is no provision in the Act for appeal against an order refusing to file an award. But an appeal filed through mistake can be heard as a revision. 173 I.C. 11=40 P.L.R. 79=A.I.R. 1938 Pesh. 3. No appeal lies unless it is given by law. There can be no appeal from an order setting aside an award. 5 Bur.L.T. 155=6 L.B.R. 88; 1934 Lah. 1019 (1)=36 P.L.R. 283. Where application is by arbitrator to District Judge for filing award and the District Judge transfers file to Sub-Judge the procedure is not legal. 160 I.C. 693=1936 Pesh. 2. See also 1938 Lah. 838.

**FILING AWARD OF OTHERS THAN ARBITRATOR OR UMPIRE.**—Where by an association contract the arbitrator's award was made subject to the decision of the committee in appeal and in the particular case the committee reversed the arbitrator's award and their decision was sought to be filed in Court; held, that the award of the committee is not within the terms of the Arbitration Act and cannot be filed under it. 1927

C. 391. But see 1927 C. 647.

Per Pearson, J.—Ss. 10 to 15 of the 1899 Act are general sections applying to all awards under the Act whether the provisions of the first schedule are applicable to the particular arbitration, whether they are excluded by the expressed intention of the parties or not. (*Ibid.*) Unless therefore the meaning of the word 'umpire' itself in the Act can be enlarged beyond its ordinary meaning, there is no recognition to be found in the Act for an award by a tribunal superior to the umpire. It would be impossible to hold that 'umpire' meant 'umpire or any higher domestic tribunal upon which, the parties may agree'. (*Ibid.*)

**AGAINST WHOM AWARD CAN BE EXECUTED.**—An award obtained against a firm cannot be executed against a party who is alleged to have been a partner in the firm but who was not served either with the notice of arbitration or the filing of the award. 1927 Bom. 428.

SEC. 15 dealing with the Court's powers to correct an award, reproduces without change paragraph 12 of the Second Schedule to the C. P. Code. [N. B.—For notes see C. P. Code, Sch. II, para. 12.]

SEC. 15.—The jurisdiction of arbitrators to make an award on a reference must be limited to the subject-matter in dispute between the parties, and the subject-matter in dispute, so far as property in suit is concerned, must be property mentioned in the plaint in respect of which relief is claimed. 30 S.L.R. 478. The fact that the defendant in his written statement raises issues as to other properties and the fact that the Court apparently raises issues covering not only the property mentioned in the plaint but also property referred to in the written statement will not give the arbitrators jurisdiction to decide as to that property which is not the subject-matter of the suit at all. The decision of the arbitrators must relate only to the property specifically mentioned in the plaint. (*Ibid.*) Where one portion of the award related to matters referred, and another portion went beyond the strict terms of the reference, but the two portions are clearly separable, the whole award is not invalid. 29 C. 854 (P.C.). If some portion of the award refers to extraneous matters it can be separated from other portions, provided it does not attack the decision relating to matters of reference. 2 P. 777=76 I.C. 2=5 Pat. L. T. 239. An award should be construed not by oral evidence given by the arbitrators, but by looking at the language of the award itself. 3 N.-W.P. 117; 20 A. 245. Sections 15 and 16 do not apply to an award made without the intervention of Court. In such a case Court has no power to amend or remit the



(a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or

(b) where the award is imperfect in form, or contains by obvious error which can be amended without affecting such decision; or

(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

#### NOTES.

award. (27 A. 526, approved.) 14 I.C. 978=5 Bur.L.T. 55. See also 141 I.C. 72=34 P.L.R. 34=1933 L. 139. Modifications and corrections of the award by Court must be confined to section 15 and if a Court goes beyond that and makes substantial modifications because it takes a different view from that held by the arbitrator as to what was just and fair, it acts without jurisdiction. 78 P. R. 1916=35 I.C. 887. See also 34 P.L.R. 34=1933 L. 139=141 I.C. 72. When Court modifies or corrects an award, it is that award and not the original one with which the decree must accord. No appeal or second appeal therefrom is competent. 34 P.L.R. 34=141 I.C. 72=1933 L. 139. Courts have long ceased from sitting in appeal on award either with regard to errors of law or error on questions of fact. 1933 S. 292. The award in accordance with which Court has to pronounce judgment is the one that embodies the real intention of the parties. 19 I.C. 496=24 M.L.J. 483. Court is bound to correct any obvious mistakes or slips in an award as in the case of decrees. 19 I.C. 496=24 M.L.J. 483. Section 15 applies only if the "imperfection in form" exists in the award at the time when it is filed in Court by the arbitrator, and not if it comes into existence at a subsequent stage on the happening of an unanticipated event. 1930 L. 26. Award—Reference to Commissioner for taking accounts—Report—Procedure. 22 Bom.L.R. 1416=45 B. 512. Dissolution of partnership—Power to award interest. 56 I.C. 941, see section 29. An arbitrator has no power to review his own award. 99 P.R. 1917=43 I.C. 350. Material irregularity on the part of Court in dealing with objections to an award of arbitrators is a ground for revision. 78 P.R. 1916=35 I.C. 887.

REFERENCE TO ARBITRATION—SUBSEQUENT OFFER BY DEFENDANT TO BE BOUND BY OATH OF PLAINTIFF—OATH MADE—EFFECT.—Plaintiff sued defendant for a sum of money and parties subsequently agreed to refer the matter to the arbitration of an advocate of the Court. The arbitrator was empowered to decide the dispute between the parties after hearing evidence. Subsequently defendant made a statement, in the course of which he said that if plaintiff were to make certain statements on oath a decree might be passed in accordance with the plaint, and plaintiff stated on oath the facts which defendant had required of him. In making his award, however, the arbitrator made

certain deductions from the claim of plaintiff. Plaintiff made an objection to the award that the arbitrator ignored the compromise or adjustment which had been made between the parties. Held, that the statement of defendant and the conduct of plaintiff did not amount to a compromise as defined in O. 23, R. 3 which would deprive the arbitrator of the powers with which he was vested by the reference to arbitration and that Court could not modify the award. 1933 A. 956.

ARBITRATOR'S POWER TO-DIRECT PAYMENT BY INSTALMENTS.—In adjudging the amount payable by one party to another, an arbitrator has full power to direct payment by instalments. The directions as to the number, amount, mode and time of payment of these instalments are, therefore, matters within the discretion of the arbitrator and the essential parts of an award which a Court has no more power to modify than it has to enhance or reduce the total sum found payable by the arbitration. Even if the order fixing the instalments is erroneous, harsh or oppressive, the error is one of substance in the adjudication of the dispute, and not of form which could be amended without affecting the decision. 1930 L. 26=11 L. 342. The jurisdiction of arbitrators to make an award on a reference must be limited to the subject-matter in dispute between the parties, and the subject-matter in dispute, so far as property in suit is concerned, must be properly mentioned in the plaint in respect of which relief is claimed. The fact that the defendant in his written statement raises issues as to other properties and the fact the Court apparently raises issues covering not only the property mentioned in the plaint but also property referred to in the written statement will not give the arbitrators jurisdiction to decide as to that property which is not the subject-matter of the suit at all. The decision of the arbitrators must relate only to the property specifically mentioned in the plaint. 30 S.L.R. 478=170 I.C. 102=A.I.R. 1937 Sind 174.

SECS. 15 AND 16: LIMITATION.—Art. 158 of the Limitation Act applies only to objections under section 30, i.e., where the application is to set aside the award completely. Where the application, on the other hand, is only for the modification or remission of the award, it comes within sections 15 and 16 and Art. 158, which provides 10 days limitation is not applicable thereto. 146 I.C. 596=1933 A.L.J. 519=1933 A. 648.



16. (1) The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit—  
Power to remit award.

## NOTES.

SEC. 16.—Section 16 deals with the Court's powers to remit an award for reconsideration. Sub-clause (1) repeats without change para. 14 of the Second Schedule to the C.P.Code, and the remaining sub-clauses reproduce the substance of the first sentence of para. 15 (1) *ibid.* (For Notes see C.P.Code, Sch. II, paras. 14 and 15.).

CHANGES MADE BY THE SELECT COMMITTEE.—“The alteration made in sub-clause (1) is merely a drafting improvement. In sub-clause (2) we have provided for possible extension of the time within which the arbitrator or umpire shall submit his decision.” (*Rep. of Sel. Com.*).

SEC. 16: CASES UNDER OLD ACT—AWARD WHEN CAN BE REMITTED.—When the award is set aside for legal and not moral misconduct, it can be remitted to the same arbitrator for further consideration. 41 C. 313. See also 66 I.C. 389=34 C.L.J. 39. A Court in remitting an award under S. 13 of the Arbitration Act (1899) must remit it as a whole and has no jurisdiction to remit only a part of the award for re-consideration. 171 I.C. 470=39 Bom.L.R. 476=A.I.R. 1937 Bom. 410. The Court is not bound to remit the award only on the grounds mentioned in para. 14, Sch. II, C.P.Code. An award may generally be remitted on the following grounds: (1) defect patent on the face of the record; (2) mistake on the part of the arbitrator, such that he himself desires a remission of the award to him; (3) discovery of some material evidence subsequent to the making of the award which might have affected the arbitrator's decision; and (4) misconduct. These are not, however, exhaustive. The grounds for remitting an award are much wider than those for setting an award aside under para. 14; but the jurisdiction is statutory and cannot be increased or decreased. 171 I.C. 470=39 Bom.L.R. 476=A.I.R. 1937 Bom. 410. Ordinarily an Appellate Court will not interfere with discretion of the first Court in declining to remit an award, but the Appellate Court will interfere where no grounds have been shown. 70 I.C. 353=16 L.W. 657=1923 Mad. 222. Where an arbitration is made without the intervention of a Court and an application is made to file the award, then if the award is good in part, the Court cannot remit the arbitrator for amendment or declare valid the part to which no exception is taken even if it is separable from the bad part. 74 I.C. 649=1923 Pat. 470. When an award is remitted for reconsideration by arbitrator with specific direction on certain points, the arbitrator has power to indicate the method by which his decision

can be carried out. This incidental and consequential power is always implied in a remittal of the award. 1936 Lah. 865.

AWARD WHEN CANNOT BE REMITTED.—When the misconduct is one justifying the removal of the arbitrator, the Court will not remit the award but will set it aside. 66 I.C. 349=34 C.L.J. 39. Order by a Court to arbitrators to make an award anew, is equal to refusal to file an award and is not appealable either under the C.P.Code or the Arbitration Act. 1 Rang. 661. This section does not apply to award on private references. 14 I.C. 978; 24 I.C. 132; 34 I.C. 355 see also 29 Cal. 793. An award should not be remitted for reconsideration in the light of legal opinion obtained by one of the parties. 2 A. 181. See also 16 C. 806. A portion only of the award cannot be remitted. 24 A.L.J. 705=96 I.C. 531=1926 A. 567. An award is not invalid if it refers the parties to a regular suit concerning certain matters. 15 M. 348. The legality of an order remitting an award for reconsideration of the arbitrators may be challenged on appeal against the decree ultimately passed. 22 M. 202. See also 3 A. 636. A document although headed as an award and signed by the arbitrators, which merely recommended a solution of the matters referred, will not be treated as an award. 11 C. 356. In case the arbitrators refuse to re-consider an award remitted to them, Court may set aside the award. If it does so, it should decide the case itself. 16 C. 806. Main question left over by arbitrators to be decided by Court—Award not final—Procedure. 146 I.C. 22=1933 L. 530. On this section see also 119 I.C. 726=1930 L. 22; 1929 S. 164. Where the arbitrator clearly holds that the plaintiff's suit should be dismissed and that he should be directed to apply to the Revenue Authorities for partition, the Court acts wholly without jurisdiction in remitting the award to the arbitrator for reconsideration in the absence of any of the grounds mentioned in this section. 152 I.C. 1923=37 P.L.R. 18=1935 L. 113.

ILLUSTRATIVE CASES.—Evidence taken by some only of the arbitrators—Award is invalid. 45 I.C. 34=16 A.L.J. 307. Court could set aside an award if there was an error of law patent on the face of it as misconstruction of documents. 44 B. 780=21 Bom.L.R. 1037. Where an arbitrator neglects to consider some of the matters referred to arbitration he is guilty of an irregularity and the award is vitiated. 149 I.C. 396=3 A.W.R. 415=1934 A. 493. Acting on evidence adduced by one party behind the back of the other vitiates the award. 64 I.C. 363=22 P.L.R. 1922. Where



(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or

(b) where the award is so indefinite as to be incapable of execution; or

#### NOTES.

parties agree to refer their disputes to an arbitrator they ought not to be allowed to resile from the position which they took at the time of the reference. 15 I.C. 321. Merely technical objections should not be allowed to disturb an award, which is fairly made. (*Ibid.*) Parties representing whole property to be theirs—Third persons interested in the property—Party to reference cannot challenge the award on that ground. 4 P. 670=1925 P. 810. Obvious slip on the part of the arbitrator, effect of. See 52 I.C. 100=1925 C. 599. Where a portion of the award is in excess of the reference, it is open to Court to pass a decree and enforce the award so far as it relates to the dispute between the parties. 1 Bur. L.J. 265=72 I.C. 193=1923 R. 130.

TRANSFER OF CASE.—As a rule in the absence of any provision to the contrary when a case is transferred from the file of one Court to that of another, the Court to which the case is so transferred is vested with all the powers possessed by the Court which was originally seized of the case and such Court can deal with the case in the same manner as the original Court and there is no provision of law which excludes a Court to which a case is transferred to deal with an award based on a reference made by the other Court before transfer of the case from its file. 146 I.C. 582=10 O.W.N. 1196=1933 O. 547.

SEC. 16 (a).—Where the parties to arbitration withdraw certain questions they cannot be allowed to say that they are not decided. 38 A. 380=14 A.L.J. 481. Arbitrators have jurisdiction to decide whether they should award interest and an award of interest does not invalidate the award. 46 C. 534=23 C.W.N. 704. An award must conform both in form and substance to the submission. 31 I.C. 33=32 C.L.J. 237. An award is bad if it goes beyond the scope of the reference. 26 I.C. 73. Mistake of law on a legal point referred to an arbitrator does not vitiate his award. 26 I.C. 697=19 C.W.N. 476. A Court may remit an award on ground of some matters being left out. 23 I.C. 862. See also 116 I.C. 590=1929 S. 164; 131 I.C. 303 (1)=1931 L. 215. An arbitrator is not bound by the strict rules of practice adopted in Courts, but he cannot go beyond the questions submitted to him. 15 C.L.J. 110=16 C.W.N. 256. When an award deals with a matter extraneous to the reference which matter can be separated therefrom the Court may modify the award or may remit it to the arbitrators for correc-

tion. 76 I.C. 1007=1923 L. 411. See also 14 I.C. 978=5 Bur.L.T. 55; 66 P.R. 1915=31 I.C. 80. But see 1936 A.M.L.J. 55. An arbitrator appointed to decide whether a sale should be set aside is competent to say that it may be set aside if the vendor repays the purchase-money. 15 I.C. 573=1912 M.W.N. 901. When the valid part of an award is separable from the invalid part, the award should be declared valid to that extent but where misconduct is proved, the whole award is invalid. 14 I.C. 978=5 Bur.L.T. 55. A refusal of a Court to remit an award is unappealable. 15 I.C. 573=1912 M.W.N. 901. When arbitrators have to decide disputes between firms they must inquire who the partners are, to discover whether they have jurisdiction, whom they must serve with notices and the scope of their inquiries. 9 I.C. 712=4 S.L.R. 196. The fact that the arbitrators have taken evidence on matters outside their jurisdiction will not necessarily invalidate the award or make the proceedings improper, if the award is within jurisdiction. 9 I.C. 712=4 S.L.R. 196. Where a cause or matters in difference are referred to an arbitrator, whether a lawyer or layman, he is constituted the sole and final judge of all questions of both law and fact. The only exceptions to that rule are the cases where the award is the result or corruption or fraud and one other where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. 146 I.C. 582=10 O.W.N. 1196=1933 O. 547.

SEC. 16 (b).—An award is not incapable of execution simply because the executing Court will have to make an enquiry into the various circumstances before determining what each party is entitled to get. 119 I.C. 726. An award against a firm is not bad and is governed by the provisions relating to the execution of a decree against a firm. 56 I.C. 325=47 C. 29. Where the arbitrators give rules for calculation without giving the actual result, it can be considered as sufficiently certain if the actual result may be worked out. 13 I.C. 161=15 C.L.J. 360. An award cannot be set aside on the ground of uncertainty upon a point upon which there is no controversy between the parties. 174 I.C. 334=A.I.R. 1938 Sind 59. Where an award directs certain produce to be sold at market price, the amount to be realized is sufficiently certain and cannot make the award uncertain. 174 I.C. 334=A.I.R. 1938 Sind 59. Costs are a matter for decision by the Court, and the omission of a direction by the arbitrator



(c) where an objection to the legality of the award is apparent upon the face of it.

(2) Where an award is remitted under sub-section (1) the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court:

Provided that any time so fixed may be extended by subsequent order of the Court.

(3) An award remitted under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.

#### NOTES.

regarding costs does not vitiate the award. 190 I.C. 399=A.I.R. 1940 Lab. 186. An award should be a final decision on all matters referred to the arbitrator. Where it leaves undecided one of the cardinal points in controversy, the award is bad. 10 I.C. 450=13 C.L.J. 399; 92 P.R. 1913. It should be signed by all the arbitrators at the same time and place. 92 P.R. 1913=22 I.C. 811. But see 43 I.C. 154; 1 Lab. 481; 55 I.C. 883; 8 L.W. 171. Private arbitration—Omission to determine some of the questions—Court not empowered to remit—Refusal. 48 I.C. 711=4 P.L.J. 394. Uncertain award—Setting aside of. 34 I.C. 355=3 O.L.J. 137.

SEC. 16 (c).—The error of law must be apparent on the face of the award or from any document or paper connected with or forming part of the award. See 49 C. 646; 30 L.W. 868=1930 M. 38; 52 C. 100; 24 A.L.J. 480; 78 I.C. 230; 78 I.C. 238 (M.); 48 A. 475=95 I.C. 416=1926 A. 501; 1939 Cal. 557. An award made in favour of an unregistered company can be filed on the application of that company, and such an application is not barred under section 69 (1) of the Partnership Act. The fact that it is in favour of an unregistered company does not make the award illegal on the face of it within the meaning of para. 14 (c) of Sch. II, C.P.Code. 16 Pat. 742=19 Pat.L.T. 549=A.I.R. 1938 Pat. 231. An error on the face of an award is a very narrow ground and the jurisdiction has to be administered with great care in order that extraneous considerations not appearing on the face of the award are not introduced into the matter. 145 I.C. 465=27 S.L.R. 96=1933 S. 260. An award of an arbitrator cannot be set aside merely because he has taken an erroneous view of the law. What he must not do is to lay down an erroneous proposition of law as being the true proposition of law and proceed to decide the rights of the parties on the foundation of this erroneous proposition of law. Where the parties in a case entrust the decision of the dispute between them to an arbitrator giving the fullest rights to the arbitrator, the arbitrator is entitled to decide the dispute between the parties on

his own views of right and wrong and he need not follow the ordinary accepted views of law on the subject. 1940 O.W.N. 670=A.I.R. 1940 Oudh 405. An arithmetical error will not bring it under this clause if the decision is within the terms of reference. 42 A. 277=18 A.L.J. 241. Where a suit on a promissory note claiming interest, is referred to arbitration and an award is filed awarding interest to the plaintiff, it is doubtful whether the want of provision in the promissory note for the payment of interest is the kind of objection to legality of the award apparent on the face of it. 1934 A.L.J. 939=4 A.W.R. 95=1934 A. 939. A patent inconsistency or mistake can be corrected before the award is made a rule of Court. 21 A.L.J. 541. When a party's absence is intentional at the time of the delivery of the award, whether it is vitiated by such absence. See 33 I.C. 467. Award given after a long time—Revocation of submission—Effect of. 13 I.C. 48. An award to be valid must be the award of all the arbitrators without difference. Where there is an uneven number of arbitrators, there is no presumption that a majority award shall be binding. 54 I.C. 912=38 M.L.J. 145. Reference to three persons—Award signed by two—Application to set aside award—Limitation. 8 L.W. 171=47 I.C. 597. A decision of an arbitrator should not be set aside under section 115 on the ground of errors in the admission of evidence where such admission does not materially affect his decision. 26 I.C. 106=1914 M.W.N. 614. An award need not be a reasoned judicial decision and the arbitrators need not even give their reasons for their conclusions. 23 M.L.J. 290=16 I.C. 478 (29 C. 854, Rel.). See also 1939 Cal. 557. Arbitrators can get the help of others' opinions in arriving at their own opinions provided they do not thereby delegate or surrender their own judgments. 23 M.L.J. 290=16 I.C. 478. A refusal by some arbitrators to act makes the award of the rest illegal. 21 M.L.J. 263=9 I.C. 173 (F.B.). The mere approval of a compromise arrived at between the parties before an arbitrator is not an award. 54 I.C. 311. On this section see also the following cases:—Effect of award signed by some arbitrators only. See 25



17, Where the Court sees no cause to remit the award or any of the matters Judgment in terms of referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application

## NOTES.

C.L.J. 396=22 C.W.N. 301; 55 I.C. 883; 8 L.W. 171=47 I.C. 597; 1 L. 481, distinguishing, 12 M. 113 and 7 A. 523. Award in excess of claim cannot be upheld. 25 I.C. 951. Where an award has clearly dealt with the subject-matter of the suit referred, the mere fact that the relief given by the award is different from what either party claimed does not make the award invalid on the ground that it went beyond the scope of the suit. 190 I.C. 399=A.I.R. 1940 Lah. 186. Effect of arbitrators signing at different times. 13 I.C. 161=15 C.L.J. 360; 16 I.C. 223=16 C.L.J. 573; 22 I.C. 811; 70 C.L.J. 43=1939 Cal. 739; 55 I.C. 883=1 L. 481. Minute of dissent by one of the arbitrators after signing award. 49 I.C. 522. The law of succession of orasas sons is not so obvious as to bring a wrong decision of arbitrators on this question within the meaning of section 16, cl. (c). 1935 R. 16=154 I.C. 557. A second or supplemental award given by the arbitrators in pursuance of a reservation made in the first award is not illegal, and it cannot be said to have been passed by the arbitrators at a time when they were *functus officio*. 70 C.L.J. 43=A.I.R. 1939 Cal. 739.

APPEAL.—An order remitting an award for reconsideration of the arbitrators is not open to challenge in appeal. (1925 L. 466 and 1921 L. 145, Rel. on; 1929 L. 174, Ref.) 146 I.C. 22=1933 L. 530. Reference to arbitration pending criminal proceedings—Prosecution withdrawn by District Magistrate on application of parties before award—Reference and award—If illegal. *Held*, that as an independent and responsible authority, such as a District Magistrate, had intervened and discharged the duty imposed upon him by law, it could not be said that the fact that he acted on the request of one of the parties to a reference made that reference or the award upon it unlawful on the ground that the consideration was immoral or against public policy. 1937 S. 156. Where the arbitrator gave his decision after examination of the parties only and the parties did not at the time protest against this procedure and demand that witnesses should be examined. *Held*, that they could not be heard to complain of this defect in the procedure adopted and urge it as a ground for setting aside the award. The failure of the arbitrator to ask the parties whether they desired to produce any witnesses for examination was just such a slip in his procedure which did not go to the substance of his decision. 158 I.C. 832=1935 R. 308.

SEC. 17.—Follow with minor alterations paragraph 16 of the Second Schedule to the Code. Herein lies one of the substantial points of difference in the existing law; under the Code, judgment is entered in accordance with the reward and a decree follows. Under the 1899 Act (following the then English Law) an award is executable as a decree but is not a decree for all purposes. The 1934 Act of Parliament has changed the English Law in this respect, and by this clause it is proposed to standardize the law in the direction of providing that judgment shall be pronounced in the terms of the award and that a decree shall follow. (*Statement of Objects and Reasons*.)

CASES UNDER THE OLD ACT, SCH. II, C.P.C.—RIGHT OF SUIT.—The intention of section 17 is to give finality to a decree passed in accordance with the decision of the arbitrator. 9 O.W.N. 191. No suit to set aside an award is maintainable, the proper way being an application to the Court to set aside the award. 56 I.C. 677=13 Bur.L.T. 34. Nor a suit on the original claim which has become merged in the award. 33 I.C. 554=8 L.B.R. 157. See also 32 Bom.L.R. 389; 1935 L. 134. The provisions of the section are applicable also to appellate Courts. 10 A. 8. *Arbitrator—Position of—If same as that of commissioner—Distinction*. The contention that the position of an arbitrator is like that of a commissioner appointed by Court is obviously untenable. The essential difference between a commissioner and an arbitrator is that the former is an officer selected and appointed by the Court, in whose selection the parties have not, as of right, any choice, whereas the latter is a person selected by the parties in whose selection the Court has no choice. In the former case the parties have expressed no consent to be bound by the decision of the commissioner who is appointed by the Court and whose decision the parties may challenge before the Court passing a final decree. In the latter case they have expressed such consent, and cannot challenge the arbitrator's decision on questions of law and fact except on the limited grounds mentioned in the Act. 18 Pat. 193=1939 P.W.N. 591=A.I.R. 1939 Pat. 526.

POWERS OF COURT.—In delivering the judgment Court must confine itself to plaintiff's claim and give a decision thereon. 14 W.R. 369; and cannot grant interest when the award does not grant it. 23 W.R. 105. See also section 29. When an award grants maintenance in perpetuity Court will not pass a decree to that effect. 7 B. 151. Court can separate the valid part from the invalid part of an award. 16 P.W.R. 1913=17 I.C. 684. The word 'award' in the last sentence must be understood to mean an award as given by the arbitrators and not as amended by the Court. 8 A. 449 (452). Where



having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no

# NOTES.

an award has been given on a reference and objections are filed but no orders are passed either accepting or rejecting them, it is not competent for the Court to dismiss the suit on the merits. 1941 R.D. 284. See also 42 C.W.N. 367.

FORM OF AWARD.—An award stated "I am of opinion that the plaintiff's case is not proved. I accordingly recommend the Court to dismiss the suit of the plaintiff with costs". It was contended that the award was invalid in form and that it should say "I dismiss the suit". Held, overruling the contention, that the function of an arbitrator is to come to a decision on the issues which have been referred to him and when his award is received the Court decides the suit and it is not for the arbitrator to dismiss or decree the suit. 1935 A.L.J. 396=159 I.C. 35=1935 A. 372.

"AFTER THE TIME FOR MAKING SUCH APPLICATION HAS EXPIRED".—Court should give time to enable a party to apply to set aside an award. 1906 A.W.N. 221. See Art. 158, Lim. Act. Court should not pronounce judgment within ten days of the receipt of the award, which is the period under Art. 158, Limitation Act, for putting in objections to the award. 152 I.C. 157=1934 M. 619=67 M.L.J. 377. A decree passed before the expiration of such time is liable to be set aside. 9 I.C. 197 (2)=21 M.L.J. 444. See also 25 A.L.J. 787=102 I.C. 608=1927 A. 614. Such decree can be set aside by High Court only under section 115 and no appeal lies. 45 B. 832=22 Bom.L.R. 1454=59 I.C. 811. An appeal against such a decree can be treated as a revision. 1912 M.W.N. 1232=17 I.C. 431; 9 I.C. 197=21 M.L.J. 444. An order refusing to hear such objections as time-barred is liable to be set aside in revision. 96 P.L.R. 1915=28 I.C. 427. It is not necessary to allow 10 days where an award has been accepted by the parties. 27 P.W.R. 1914=23 I.C. 591. Also 27 N.L.R. 240=134 I.C. 282; but see 34 I.C. 845 (Sind). Where such objections were dismissed for default, and decree was passed on the award, Court cannot refuse to entertain a subsequent application for restoration of the petition of objections. 18 A.L.J. 756=57 I.C. 200.

APPEAL AND REVISION.—No appeal lies from a decree based upon judgment pronounced in accordance with an award. No appeal lies on the ground that the award was invalid and therefore no valid decree could be based upon it. 12 R. 675=156 I.C. 414=1935 R. 94. See also 152 I.C. 838=1935 P. 16; 1936 R. 240=163 I.C. 590. A revision is however competent. 39 P.L.R. 51. No appeal lies from a decree made in accordance with an award; it is immaterial whether the validity of the award is challenged on the ground of the illegality of the procedure of the arbitrator or on account of the invalidity of the reference which constitutes the foundation of his authority. 13 L.

528=136 I.C. 11=1932 L. 239. But an appeal will lie from a decree passed in accordance with an award if such decree has been passed without allowing to the parties the time prescribed for filing objections. 29 A. 584. Appeal will also lie where the Court did not pronounce judgment in accordance with award, but in accordance with its modification of the award. 153 I.C. 764=1935 P. 109. Although the intention of section 17 is to give finality to decrees passed in accordance with the decision of the arbitrator yet it cannot be said that in no possible case can a revision be entertained against such decrees. If for instance it can be shown that the lower Court acted altogether without jurisdiction in passing a decree in terms of the award, it would be permissible to entertain a revision under section 115. 146 I.C. 582=10 O.W.N. 1196=1933 O. 547. The words of para. 16 of Sch. II, to C. P. Code, are perfectly clear and it would be doing violence to the plain language and the obvious intention of the Code if it were held that an appeal lies from a decree passed upon a judgment pronounced according to an award except in so far as the decree may be in excess of or not in accordance with the award. Paras. 14 and 15 of Sch. II, C. P. Code, enable the Court to which an award is submitted to refuse to give effect to the award if in its opinion it is either void, or invalid or illegal. If however, the award is accepted, it means that in the opinion of the Court it is neither void nor invalid, and the opinion of the Court cannot be challenged in appeal. Para. 16 merely gives effect to the principle of finality of awards, and the intention of the Legislature evidently is that an award should be subjected to the scrutiny of one Court only, namely, the Court through whom reference is made to arbitration, and not that Court and an appellate Court. No appeal can therefore be maintained from the decree based on an award on the ground that the award upon which the decree is based is invalid. 18 Pat. 193=1939 P.W.N. 591=A.I.R. 1939 Pat. 526. Where a decree has been passed in accordance with the award, it cannot be interfered with in revision unless the decree discloses some excess or defect of jurisdiction or irregularity in the exercise of jurisdiction. If the award is incomplete, it is the duty of the objector to apply to have the award remitted. But where the objector failed to object to award in trial Court, the High Court cannot in revision interfere with the decree passed in accordance with the award. 38 L.W. 330=1933 M. 697=65 M.L.J. 376. Where the Judge refuses to consider the objections to an award on the ground that they were time-barred, and a decree is passed in accordance with the award, no appeal lies and an application for revision is competent. 142 I.C. 835=1933 R. 38. Where an award is made according to law no appeal lies. 29 B. 285. See also 14 I.C. 455=9 A.L.J. 258. No appeal lies from a decree purporting to follow an award except on the



appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award.

## NOTES.

ground that it is not based on an award or in other words there is no award. 12 Lah.L.J. 89; 36 C.W.N. 1069=138 I.C. 848. *See also* 31 P.L.R. 81=1930 L. 219; 10 L. 871=31 P.L.R. 165; 31 P.L.R. 337=120 I.C. 673=1930 L. 219. (No second appeal lies). 52 C.L.J. 298. No appeal lies from a decree which is in accordance with an award made by the arbitrator. The mere fact that the validity of the reference is impeached by a party on the ground that she was not a party to the reference does not take the case out of the ambit of the rule. 12 L. 408=32 P.L.R. 44=1931 L. 126. This section contemplates an award made in a case where there has been a valid submission to arbitration. Where the reference itself is impugned for want of consent of the parties interested an appeal will lie against the decree passed on the basis of the invalid award. (25 C.W.N. 832. Relied on.) 34 C.W.N. 813. *See also* 58 C. 628=35 C.W.N. 238=1931 C. 211. There must be strict conformity with the provisions of this section. 49 A. 178=24 A.L.J. 1036. Matters outside the arbitration proceedings are open to appeal. 39 M. 853=32 I.C. 881=30 M.L.J. 465; 52 C.L.J. 298. Where Court did not pronounce judgment according to the award but in accordance with its modifications of the award, an appeal will lie from such a decree. 153 I.C. 764=1935 P. 109. Decree on an award overruling the objections of a party without giving him an opportunity to substantiate them by evidence is revisable but not appealable. 3 L.L.J. 487=20 P.L.R. 1922; 37 I.C. 400=3 O.L.J. 583. A second appeal is maintainable when the Court of first instance sets aside the award and passes a decree on the merits and the lower appellate Court sets aside that decree and passes a decree in accordance with the award. 4 O.W.N. 1085 (F.B.). *See also* 153 I.C. 764=1935 P. 109. An appeal lies from an order directing a private award to be filed even though Court has passed a decree on its basis. 38 A. 380=35 I.C. 833=14 A.L.J. 481. But where Court had granted frequent adjournments on the ground that the dispute had been referred to an arbitrator, such orders amount in substance to a reference by Court and no appeal will lie. 39 A. 401=15 A.L.J. 452. An order refusing to file an award is a decree and is appealable. 27 M. 255. Where the validity of the award is in question an appeal lies. 11 C. 37 (41); 49 I.C. 262. Also when award is shown to be illegal and void *ab initio*. 24 C. 469 (472); 1903 A.W.N. 159. But no appeal lies after passing a decree, even though award could have been set aside by objections being raised under section 30. 39 C. 822=18 I.C. 69. *See also* 18 C.L.J. 35=18 C.W.N. 626; 19 I.C. 405; 29 C. 167; 18 M.L.T. 34=31 I.C. 206. Cases where no appeal or revision will lie. *See* 25 I.C. 583=1914 M.W.N. 865; 38 M. 256=25 M.L.J. 507; 34 I.C. 845=9 S.L.R. 183; 104 I.C. 202=1927 L. 362. When objections are

overruled, no appeal lies. 1 P.L.J. 306=35 I.C. 358. An order determining that there has been no valid reference to arbitration is a decree. 25 C. 757 (F.B.); 18 A. 442 (F.B.); 18 M. 423 (F.B.); 8 C.W.N. 916; 29 C. 167; 33 C. 899. Where after the matter in dispute in suit was referred to arbitration and an award passed, the objections of the petitioner were rejected and Court proceeded under to pronounce judgment according to the award, *held*, that the order was of an interlocutory nature and incapable of being revised. 143 I.C. 309=34 P.L.R. 651=1933 L. 692. Where there is no valid submission, there could be no award on which a decree could be made by the Court and if it is so made it is passed on something which is not an award and is therefore appealable. 174 I.C. 766=1938 O.W.N. 475=A.L.R. 1938 Oudh 154. An appeal against a decree on an award is incompetent under the clear provisions of Sch. II, Cl. 16 of the Code, if the decree is not in excess of or contrary to the award. A revision is, however, competent. 35 P.L.R. 51.

REVISION.—As to cases where no revision lies, *see* 29 C. 167; 26 O.C. 107=74 I.C. 401; 134 I.C. 30=1931 A.L.J. 906. But *see* 9 M. 475. Revision lies on the ground of material irregularity. 11 P.W.R. 1916=31 I.C. 700. *See also* 31 I.C. 458 (M.). As to when such decree is liable to be set aside on revision, *see* 2 L.L.J. 487 and 37 I.C. 400.

AGREEMENT TO REFER.—SEVERAL DEFENDANTS REPRESENTED BY SAME COUNSEL.—AGREEMENT SIGNED BY PLEADER.—VALIDITY.—APPEAL.—Under Sch. II, para. 16 (2), what is open to challenge is not the award but the decree, and an appeal lies only if the decree is in excess of or not in accordance with the award. Where three defendants are represented by one and the same pleader, whose *vakalatnama* authorises him to compromise the suit, and he signs the agreement of reference to arbitration as pleader, it has to be assumed that he signs it on behalf of all the defendants who have engaged him, unless he states that he so signs it only on behalf of some only or any of the defendants take any objection to the arbitration proceedings. All the defendants are, therefore, parties to the reference, which is valid and binding on all. The award cannot be challenged and no appeal, therefore, lies from the decree passed therein. 152 I.C. 838=1935 P. 16.

PRACTICE.—When objections are filed to an award, Court ought to give a chance to the party of proving his objection by evidence, and to deal with the objections judicially. Court ought to accept the award of the arbitrator as final as regards any statement made by him in the award as to the conduct of proceedings, without taking evidence in the matter or finding that the evidence adduced in support of the objections is insufficient. 152 I.C. 157=40 L.W. 364=1934 M. 619=67 M.L.J. 377.



18. (1) Notwithstanding anything contained in section 17, at any time after the filing of the award, whether notice of the filing has been served or not, upon being satisfied by affidavit or otherwise that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed

### NOTES.

CASES UNDER OLD ARBITRATION ACT (1899).—When the legislature provided that an award on being filed was enforceable as if it were a decree of Court, its intention was that all the provisions of the C. P. Code applicable to the execution of decree should apply to an award so filed. 27 C.W.N. 666=1924 C. 117; section 47, C. P. Code is applicable for purpose of appeal. 1929 L. 228. (See also 31 C.W.N. 1097=104 I.C. 808=1927 C. 853; 56 M.L.J. 35; 1939 Cal. 482; 1938 Lah. 177; 1937 A.L.J. 1141; 1938 All. 232; 41 C.W.N. 1198; 1938 Pesh. 3; 1937 A.L.J. 1141 and *Statement of Objects and Reasons*.) Where Court is itself appointed to act as arbitrator, no separate award need be passed inviting objections. The award is itself a decree. 26 I.C. 355 (M.). Even after an award is enforced under the Arbitration Act, it is open to a party affected by it to sue for its being set aside on the ground that the arbitrator had acted wholly without jurisdiction. It follows, therefore, that the mere pendency of proceedings to set aside the award under the Arbitration Act is no bar to a suit for a declaration that the award is null and void and for a perpetual injunction to restrain the defendants from executing it. 1935 Lah. 76. See also 1935 Sind 184.

Per *Niyogi, A.J.C.*—Where an award filed by a party under section 15, Arbitration Act, is registered as such in the High Court of Bombay and the Court on basis of the award, passes an order purporting to mortgage certain property owned by the other party situate beyond its jurisdiction, the order is valid in so far as it records under O. 21, r. 2, C. P. Code, an agreement between the parties although the High Court has no jurisdiction to entertain a suit to enforce the mortgage. The order is operative as mortgage of the property specified in it, but although binding on the parties as an agreement it cannot be enforced by the Bombay High Court as a decree as it has no jurisdiction to entertain a suit on the mortgage. 159 I.C. 739=1935 N. 250 (F.B.).

LIMITATION.—For purposes of execution of an award filed in Court it is governed by the period of limitation prescribed for execution of decree by that Court. 1927 C. 853. So, award filed in a High Court is governed by Art. 183, Limitation Act. 1927 C. 853. An award made on a reference under the Arbitration Act becomes enforceable as a decree only when it has been filed, and it is only then that the execution can arise. Consequently an application to execute an award more than three years from the making of the award is not barred by limitation, if it is within three years from the date of the filing thereof. There is no provision of law which bars an application

to file an award presented more than three years after the making thereof. 61 C.L.J. 515.

NATURE OF PROCEEDING.—A proceeding under the Act is not a suit and does not end in a decree. The Act does not provide for the Court making an order filing or refusing to file an award. The award is filed by the arbitrators and unless it is remitted to them or set aside, it becomes enforceable as if it were a decree of Court. 10 I.C. 211=5 S.L.R. 61. Provisions of C. P. Code, if apply. 77 I.C. 868=1924 C. 117.

STAY OF EXECUTION.—Stay of execution of award cannot be ordered. 12 Bom.L.R. 860=8 I.C. 179. (See also notes under section 19, *infra*.)

FILING OF AWARD.—(i) Procedure for filing award. 15 C.L.J. 110; 13 C.W.N. 63. (ii) Effect of filing award. 40 C. 219. (iii) Effect of not filing award. 5 I.C. 425. Cost of the filing award is in discretion of Court. 27 I.C. 526=8 S.L.R. 136. Conditions under which award can be made rule of Court. See 56 M.L.J. 35.

ESTOPPEL.—If a part of an award is found to be invalid as being in excess of the arbitrators' powers and is separable from the rest, the remainder of the award being good can be maintained and acted upon, while the excessive part of the award can be declared to be unenforceable. But if a party has taken advantage of the invalid part of the award he is estopped from setting up that this clause of the award is invalid. 1935 Rang. 34.

APPEAL.—No appeal lies against an order under the Arbitration Act as the orders are neither decrees nor appealable orders under sections 104 and 146 of the C. P. Code. There can be only a revision under section 115 of the C. P. Code. 10 I.C. 211; 19 I.C. 405 (Cal.). The proceedings for enforcement of an award under section 15, Arbitration Act, are governed by section 47, C. P. Code, and an appeal is competent from an order rejecting such application. The fact that an objection was raised that the award was given without jurisdiction does not preclude the applicability of section 47. 151 I.C. 881=1934 Lah. 49=35 P.L.R. 635.

SEC. 18.—"In following the C. P. Code, section 17 seeks to amend the existing law in places where the 1899 Act is in force in another manner. At present under that Act, an award is immediately enforceable as a decree, and one High Court has held that it may be executed under section 15 (1) of that Act, even though the notice of filing under section 11 (2) has not been given. This position is at variance both with the Code, and with the English Law and it is now proposed to make the decree only after



upon the award, or that speedy execution of the award is just and necessary, the Court may pass such interim orders as it deems necessary.

(2) Any person against whom such interim orders have been passed may show cause against such orders, and the Court, after hearing the parties, may pass such further orders as it deems necessary and just.

19. Where an award has become void under sub-section (3) of section 16

Power to supersede arbitration when award becomes void or is set aside.

or has been set aside, the Court may by order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred.

### CHAPTER III.

#### ARBITRATION WITH INTERVENTION OF A COURT WHERE THERE IS NO SUIT PENDING.

20. (1) Where any persons have entered into an arbitration agreement

Application to file in Court arbitration agreement.

before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agree-

ment applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

#### NOTES.

the time for challenging the award has expired or when such a challenge if made has been rejected. This section taken from the English rules of Court, is a corollary to section 17 in the sense that it enables the Court to counter in the interval any action designed to defeat the subsequent execution of the decree." (*Statement of Objects and Reasons.*)

SEC. 19.—Provides that where an award becomes void or is set aside, the Court may supersede the reference and order that the agreement shall cease to have effect with respect to the particular difference referred. The clause generalize the provisions of paragraph 15 (2) of the Second Schedule to the C. P. Code. (*See notes under sections 16 and 17, supra.*)

SEC. 20.—Is based upon paragraph 17 of the Second Schedule to the C. P. Code. It allows the parties to an arbitration agreement or any of them to initiate the reference proceedings with the assistance of the Court. (*Statement of Objects and Reasons.*)

CHANGES BY THE SELECT COMMITTEE.—The change made in sub-clause (5) applies such of the other provisions of the Act, as may be applicable to the arbitration proceedings under this chapter and not merely the provisions of Chapter II. (*Rep. of Sel. Com.*).

CASES UNDER OLD ACT, C. P. CODE, SCH. II: SCOPE OF SECTION.—*See* 137 I.C. 198 = 1932 A.L.J. 331. The use of the word "may" in the rule shows that the provisions of the section are permissive and not mandatory. 8 O.W.N. 71. An application under section 20 asking the Court to file an agreement to refer a dispute to arbitration does not amount to a suit within the meaning of section 80 of the Code. 13 L. 672. Section 20 does not apply where there is a

pending suit which affects the subject-matter of the reference to arbitration. 30 C. 218 (226); 115 P. R. 1912=15 I.C. 140. *See also* 17 P.R. 1911=9 I.C. 195; 40 I.C. 38=4 O.L.J. 131; 54 B. 197=31 Bom.L.R. 1403=1930 B. 98. Where there is no matter of difference between parties there can be no reference. 30 C. 831; 21 B. 335 (342); 2 A.L.J. 493; 11 C.W.N. 1152. No reference in anticipation of future differences. 12 I.C. 639=5 S.L.R. 92. Where an agreement relates to the division by metes and bounds of revenue-paying land wherein there is also a dispute between parties as to title, the lands concerned can be validly made the subject-matter of an award and a decree. 122 I.C. 724.

APPLICABILITY OF SECTION.—Where a contract of insurance between the parties is finally accepted in a presidency-town and a clause in the contract provides for a reference to arbitration in case of a dispute arising as to any right or liability of either party, the provisions of the Indian Arbitration Act would be applicable. 1937 A.L.J. 98=1937 A. 208. Where an award is made by arbitrators under the Arbitration Act, under an agreement contained in a contract between the parties, an application to file such an award cannot be made. An agreement of that kind falls under section 20, and the proper procedure is to apply to the Court for enforcing that agreement, and the Court is then to make an order of reference. 38 Bom.L.R. 607=1936 B. 401.

ESSENTIALS OF A VALID AGREEMENT TO REFER.—Agreement should be in writing. It is not necessary that it should be in form of written contract signed by parties so as to be an instrument or document. But it is necessary that there should be some writing which should embody the whole of the agreement. 1935 A.L.J. 998=1935 A. 886. The agreement to refer must clearly define the



(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

#### NOTES.

powers of the arbitrators. 16 C. 482; 11 C. 232. Section 20 does not require that arbitrators should necessarily be named, in the agreement. 35 P.R. 1911=9 I.C. 655. Arbitrators who are left for future election cannot be said to be "named" in the agreement. 20 B. 232 (236). The application need not be made by the parties in person or by their respective pleaders specially authorized in writing in this behalf. See 24 C. 459. The application is not a suit though it has to be registered as a suit. 61 I.C. 390=6 P.L.J. 287.

**ALL THE PARTIES INTERESTED.**—The parties who are materially interested in the suit should join in the application. 10 W.R. 171; 17 C. 37; 4 C.L.R. 65; 24 A. 229. An award on a reference not agreed to by all the parties interested is invalid in law. 9 C.W.N. 873. See also 17 M.L.J. 394. But see 33 C. 899 and 11 C.W.N. 1152. The agreement for reference must be executed by all the interested parties. 38 I.C. 577=9 Bur.L.T. 253. In a suit for winding up a partnership, a petition to refer the suit to arbitration must meet with the consent of all the parties. 26 M. 47; 22 A. 135. The father of a joint Hindu family in his capacity of managing member can refer to arbitration the partition of joint family property. 16 A. 231. Mother though *de facto* guardian of Muhammadan minors is not competent to agree to reference to arbitration affecting minor's property. 47 C. 713=26 C.W.N. 246. The guardian mother of minor has authority to agree to refer the disputes that have arisen inside the family to the decision of arbitrators under para. 17 (1), if she finds that it is for the benefit of the minor. A.I.R. 1939 Cal. 557. Where one of two appointed guardians consents to the agreement to refer to arbitration subsequently but not at the time of agreement, the agreement is not valid. 47 C. 713=57 I.C. 945.

**REFERENCE TO ARBITRATION AFTER SUIT—PROCEDURE.** See 45 B. 245=59 I.C. 53=22 Bom.L.R. 1048. If parties to a pending suit agree to refer the matter to arbitration and to withdraw the suit then pending, and the suit is subsequently withdrawn in pursuance of such agreement, the agreement can be filed under this section. 152 I.C. 614=1935 L. 59. See also 18 Lah. 433=1937 Lah. 843.

The words "sufficient cause" occurring in para. 17 (4) of Sch. II, C. P. Code, cover all the grounds of justice, equity and good conscience on which a Court thinks an agreement should not be ordered to be filed. If the circumstances show that even if the arbitrators be not partial to the plaintiff, they cannot command the confi-

dence of the defendant, it would be wholly inequitable to compel the defendant to submit himself to their arbitration, and there is, therefore, sufficient cause for the Court to refuse to order the agreement to refer to arbitration to be filed. 170 I.C. 490=1937 O.W.N. 792=A.I.R. 1937 O. 437. Where the arbitrator is fully aware of the terms of the order of reference, accepts the office of the arbitrator and actually decides the controversy between the parties by giving an award, the mere fact that the order of reference was not formally communicated to him is a mere trifling irregularity, and would not vitiate the arbitration. 167 I.C. 171=1937 A.L.J. 29=1937 A. 141 (F.B.). So also where the order of reference itself does not fix the time within which the award should be filed, but the Court subsequently fixes a time-limit and calls upon the arbitrator to file an award within that time and the award is filed. (*Ibid.*) Unless there has been such a delay as to lead to the inference that the parties had abandoned the reference to arbitration, anything short of that inference cannot cut down the statutory period of limitation and the right to have the agreement of reference filed in Court. 1933 L. 18. See also 1933 R. 331. Where the conduct of the parties, coupled with the long and unexplained delay of six years amounted to a cancellation of the agreement to refer their disputes to arbitration the agreement could not be filed. 54 I.C. 126. The Court has no discretion to refuse to make the reference to the arbitrators nominated by the parties. 61 I.C. 390=6 P.L.J. 287. Court has no jurisdiction to make the order of reference except to all the specified arbitrators. An agreement to refer becomes void if any one of the arbitrators die or refuse to act. 42 I.C. 911 (1)=11 Bur.L.T. 160; 44 I.C. 866=71 P.R. 1918. See also 1933 L. 18; 1933 R. 331. But see 40 I.C. 38=4 O.L.J. 131. (Court can substitute another in his place see section 9, *supra*). Court will refuse to file an agreement in case the arbitrators named in it decline to act. 12 Beng.L.R. App. 13. See also 19 Pat. 927. But where there is a distinct provision by which a party is authorised to appoint another in the place of the one refusing to act, the agreement to refer would still hold good. 155 P.R. 1919=51 I.C. 636. The effect of the refusal to act of the sole arbitrator named by the parties on the agreement to refer to arbitration is a question of intention in each case, depending on whether the dominant intention of the parties was that the matter should be referred to arbitration, the personnel of the arbitrator being merely a subsidiary question or whether the essence of the agreement



## NOTES.

was to refer the matter to the arbitration of a particular person and him alone. The fact that the arbitrator is named in the same or a subsequent agreement is by no means conclusive. 1933 L. 18. Court cannot give a direction that in case of difference of opinion, the opinion of the majority must prevail. 1926 M. 1183=51 M.L.J. 440. Where the order of reference itself does not fix the time within which the award should be filed, but the Court subsequently fixes a time limit and calls upon the arbitrator to file an award within that time and the award is filed, the irregularity, if any, would not affect the validity of the award. 167 I.C. 171=1937 A.L.J. 29=A.I.R. 1937 All. 141 (F.B.). Where the arbitrator is fully aware of the terms of the arbitrator and actually decides the controversy between the parties by giving an award, the mere fact that the order of reference was not formally communicated to him is a mere trifling irregularity and would not vitiate the arbitration. 1937 A.L.J. 27=1937 All. 141. Court acts with material irregularity if it does not strictly comply with the terms of the agreement to refer to arbitration. 35 P.R. 1911=9 I.C. 655. On this sub-clause (4), *see also* 122 I.C. 237=3 P. 443.

**REVOCATION OF AGREEMENT.**—A party to a reference can only revoke his submission on good grounds. 17 C. 200. *See also* 20 A. 145; 27 M. at 115. The cause for revoking submission should be urged when a notice is issued under section 20 and need not be deferred till the award is completed. 1933 Sind 68. Consent to reference being obtained by misrepresentation is ground for revocation. 50 I.C. 637. So also relationship of arbitrator to one of the parties. 1933 Sind 68. A reference once made cannot be arbitrarily revoked. 29 A. 49; 20 A. 145; 27 M. at 115. *See also* 39 I.C. 349=12 P.R. 1917. \* As to what is good cause for revocation, *see* 10 B. 381; 17 C. 200; 29 C. 278. If one party to a submission has been guilty of such laches as to entitle the other party to repudiate the submission, the latter will not be deprived of his right to repudiate merely owing to the absence of formal legal notice of revocation. 134 I.C. 733=33 Bom.L.R. 1022=1931 B. 529. Parties prosecuting case before arbitrators cannot afterwards challenge the award on ground of jurisdiction. 42 A. 661=18 A.L.J. 644. After reference is made the suit cannot be withdrawn. 9 A. 168. A Judge can act as arbitrator by consent of the parties. 26 M. 76; 23 B. 752. When he so acts, no appeal will lie from his decree. 10 C.W.N. 835; 4 A.L.J. 89.

**UMPIRE.**—As to the power of Court to appoint an umpire, *see* 8 A. 64. As to validity of appointment of umpire as sole arbitrator by Court, *see* 134 I.C. 733=33 Bom.L.R. 1022=1931 B. 529 (2). *See also* section 8, *supra*.

C. C. M.—14

**APPEAL.**—A decision passed under this section is a decree and an appeal lies therefrom. 22 M. 229. An order refusing to file an agreement is not appealable. 5 A. 333 (F.B.). But *see* 9 M.L.J. 10. Where an agreement to refer to arbitration was filed but, on the arbitrators failing to act, Court revoked the order of reference and dismissed the suit, *held*, the order of revocation was not appealable. 48 A. 27=23 A.L.J. 891. No appeal lies from a decree passed on an award arrived at under para. 17 except in so far as it is at variance with the award. 160 I.C. 1075=1936 L. 617.

**PLEADER'S FEE IN OUDH.**—Proceedings before an arbitrator and proceedings subsequent to the award are all proceedings in the matter of an application made by a party and according to R. 289 (6) of the Oudh Civil Rules only one-fourth of the fee payable to pleaders in the case of suits decided on merits on contest can be taxed. 7 O.W. N. 97=1930 O. 89.

**CASES UNDER OLD ACT, C. P. CODE, SCH. II, PARA. 20.**—The arbitrators need not be made parties to an application under this para. 14 P. 855. This section was devised for the purpose of enabling any Court having jurisdiction, where the subject-matter of the award lies within more than one jurisdiction, to direct the award to be filed. 37 B. 442=15 Bom.L.R. 362. In order that a Court may order an award relating to immovable property to be filed, it is necessary that Court must have jurisdiction over the whole of the subject-matter of the award. And it is not open to it to pass a decree in terms of a portion only of the award. (55 M. 689, Rel.). 55 A. 542=143 I.C. 571=1933 A.L.J. 741=1933 A. 380. There is no law preventing an applicant to file an award made without the intervention of the Court, from objecting to a portion of the award. At the same time there is no provision entitling an applicant to ask the Court to file a part of the award. 38 P.L.R. 86=164 I.C. 543=1936 L. 682. Whether it is open to a Court to separate a portion of the award from the rest of it and proceed to pass a decree only in respect of a part? 16 P. 34=17 P.L.T. 835=1937 P. 214. But *see* 39 Bom.L.R. 159; 9 R. 480 (485)=1931 R. 252 (F.B.) (noted *infra*, under heading 'jurisdiction'). A private award partitioning the joint property by metes and bounds including agricultural land cannot be filed in Court as part of the award relates to the partition of agricultural land, over which the Civil Courts have no jurisdiction under section 158 (2) (xvii) of the Punjab Land Revenue Act. (22 I.C. 381, Foll.) 143 I.C. 143 (1)=34 P.L.R. 454=1933 L. 732 (2). *See also* 17 R.D. 36=14 L.R. (Rev.) 35. Para. 20, C. P. Code, unlike paras. 1 and 17, does not require that the reference should be in writing. The language of that paragraph does not require that there should be a written reference. All that is necessary is that the Court must be satisfied that the



## NOTES.

matter had been referred to arbitration, that an award had been made thereon and that there was no ground or proof which would vitiate the award. 133 I.C. 531=1931 A. 751. See also 33 P.L.R. 934. An award after dealing with certain ornaments which were ordered to be distributed among the parties stated: "or if any one desires to purchase them the market price of all these ornaments should be assessed and deducting the amount of his own share distribute the balance equally among the other sharers." So also in respect of a house it was provided that it should be sold to one of the sharers, and that he should pay the other sharers their shares in the sale price. *Held*, that the provisions in the award could not be held to be bad for indefiniteness and that the award was not invalid on that account. The most that could be said was that the award was only declaratory in that respect but that was no reason for refusing to file it. 39 Bom.L.R. 159=I.L.R. 1937 Bom. 338. Where in an application to file an award, a prayer is added that a portion of the award is invalid and therefore in the final decree that may be passed on the award that portion should not be included, the application is competent as the main prayer to file the award is in accordance with law, and the Court could either ignore the subsequent illegal prayer or allow the applicant to amend his application by deleting such prayer. 38 P.L.R. 86=1936 L. 682. The powers of Court in a proceeding under this rule are exhausted as soon as it decides either to file the award or refuses to file it. 47 I.C. 960=5 O.L.J. 471. The provisions of this section are not superseded by section 47 of the Dekhan Agriculturists' Relief Acts. 8 B. 20. There is no provision in the Land Revenue Act, or in the C. P. Code, which would give a Court hearing cases under the Land Revenue Act, jurisdiction to entertain an application under this section. 14 L.R. 35 (Rev.)=17 R.D. 36. The word "matter" is not wider than the expression "matter in difference" in section 21. 12 I.C. 639=5 S.L.R. 92. Where a dispute in regard to money obtained by bribes taken dishonestly from the public is referred to an arbitrator and an award is made, the award cannot be filed in Court nor can a decree be passed thereon. 149 I.C. 396=1934 A.L.J. 1256=1934 A. 493.

**SETTING ASIDE EX PARTE PROCEEDINGS.**—Where in an application to file an award objections to the award were filed but the application was adjourned twice, the Court being busy with other work, and on the second adjourned date the objector was absent and *ex parte* proceedings were taken against him and the case was postponed to another date, and no replication was filed by the applicant up to that date, and the objector appeared on that date and asked for the setting aside of the *ex parte* proceedings, *held*, that the objector having appeared be-

fore any final order was passed against him, except an order to proceed *ex parte* against him, he was entitled to the proceedings being set aside on an application to that effect being made. 40 P.L.R. 233=1938 Lah. 486.

**AWARD.**—An award made out of Court becomes effective from the date when it is made and not from the date when Court orders it to be filed in Court. 166 I.C. 947=1937 Sind 7. A document although headed an award and signed by the arbitrators, which merely recommends a solution of the questions referred, will not be treated as an award, 11 C. 356. A settlement recorded by a person asked to act as mediator and agreed on by the parties, is not an award and if at all it is operative it is so only as a contract as between those who have signed it. 53 I.C. 283 (M.); 48 P. L.R. 1915=28 I.C. 298. Where in a partition through arbitrators appointed without the intervention of Court the procedure of the arbitrators was in accordance with the express wishes of the parties and this was strongly corroborated by the fact that the parties attested the award, even though some of the property was not partitioned, it cannot be said that the award was incomplete. 150 I.C. 288 (2)=1934 L. 305 (1). When an award has been lost, a Court can take secondary evidence of its provisions and pass a decree. 15 M. 99. See also 1 L. 45=55 I.C. 845. An award which is partly within and partly exceeds the terms of the submission to arbitration cannot be enforced. 3 M. 68. An award may be delivered bit by bit where the agreement to refer provides for it. 4 C.L.R. 92. See 22 A. 224. A suit for a declaration that an award was fraudulently passed does not lie. 20 M. 89. If there was no matter in difference between the parties, there could be no reference and award. 30 C. 831; 16 C. 482; 31 C. 203; 29 M. 44; 27 A. 526; 9 Bom.L.R. 259. But see 9 Bom.L.R. at 888. A Court should refuse to file an award which deals with the matters not referred to arbitration. 29 M. 303. See also 16 Pat. 34=1937 Pat. 214 (as to whether it is open to the Court to separate a portion of an award from the rest of it and proceed to pass a decree in respect of a part). An order rejecting an application to file an award is not a decision that the award is bad in law. 43 A. 108=18 A.L.J. 960; 22 Bom.L.R. 1377=45 B. 329. The rejection of an application to have an award filed in Court is no bar to a regular suit to enforce the rights created by the award. 55 M. 689=139 I.C. 877=62 M.L.J. 550. If a party to an arbitration proceeding fails to take an objection to the absence of one out of several arbitrators, he will be deemed to have waived his right to take objection to the whole of the irregularity caused thereby and the award must be filed. 67 I.C. 866=1922 C. 181 (1). So also where in an application under this section the value for the purpose of jurisdiction is fixed. The valuation can-



## NOTES.

not be questioned in execution proceedings when the objection is not taken in the award proceedings or in any appeal arising therefrom. 1936 L. 63. Where a dispute between a Company and two others was referred to arbitration and a decree was based on the basis of the award but an objection was taken in execution on the ground that the parties had not agreed to be bound by the procedure under the Arbitration Act, *held*, (1) that the decree was not on the face of it a nullity; (2) that in any case the objection was not one which could be entertained by the executing Court. 140 I.C. 180=1933 L. 46. A plaintiff who has not carried out what he was directed to perform under the award cannot sue to enforce that part of the award which is favourable to him. 22 C.W.N. 66=27 C.L.J. 486. Where a person consents to be bound by an award although it is made during the pendency of the suit, the award is binding on the parties. (3 L. 296, Rel. on.) 131 I.C. 126=1931 L. 594. On a private reference to arbitration an award which is passed by the arbitrators and which does not partition agricultural land but only settles the shares of the parties can be validly filed in the Civil Court. 81 P.W.R. 1918=45 I.C. 166. *See also* 1933 Lah. 732=34 P.L.R. 454; 17 R. D. 36. Award alleged invalid—Decree on original cause of action may be granted. 33 I.C. 494=68 P.W.R. 1916. Section 20 does not limit the time for the issue of notice thereunder. 21 I.C. 298=310 P.L.R. 1913. An application to file an award under this para. is a suit within the meaning of section 16 of the Provincial Small Cause Courts Act. 158 I.C. 1102=1935 S. 208. It is not within the jurisdiction of a Small Cause Court to file an award which, though it directs payment of money within the limits of its pecuniary jurisdiction, goes on to declare the dissolution of marriage between the parties. *See* section 40, *infra*. A Civil Court can accept the award passed on reference to arbitration by parties in a dispute as to the demarcation of boundaries under section 41, U. P. Land Revenue Act, 1901. 50 I.C. 193=6 O.L.J. 84. The expression "subject-matter of the award" means the whole matter dealt with and decreed by the award and not any particular portion. 51 I.C. 53=10 L.W. 57; 12 I.C. 639. A suit lies on an award even though it has not been filed in Court under section 20 within six months as required by Art. 178 of the Limitation Act. 2 L.W. 230=29 I.C. 49; 42 I.C. 116=4 O.L.J. 487; 27 I.C. 31=7 Bur.L.T. 279. Where an award has been made, it is not compulsory under para. 20 of Sch. II, C. P. Code, to refer it to a Court for making it a rule of the Court: it is optional to do so. It can be used as an instrument of title. 1940 R.D. 20=1940 A. W.R. (B.R.) 16. Where an award is not acted upon by parties, it does not bar a suit regarding the original rights of the parties. 29 Bom.L.R. 301=101 I.C. 398=1927 B.

237. Arbitrators need not even give reasons for their decision and are not even bound to record anything of the proceedings. They may even ignore any position advanced by the parties, as an award is not a judicial decision. 17 I.C. 33=1912 M.W.N. 1076 (23 M.L.J. 290; 38 C. 143, Ref.). Nor are they bound to decide a point if the parties show by their conduct that they did not want a formal decision thereon. 17 I.C. 33=1912 M.W.N. 1076. But they are bound to decide all matters in dispute in their award and their failure to do so cannot be condoned because the Court does not sustain a contention not dealt with by them. 17 I.C. 33=1912 M.W.N. 1076. Where arbitrators were appointed to partition certain property but they did not divide the debts outstanding but directed one party to pay the other a lump sum as the cash equivalent of his share, *held*, that the arbitrators had travelled outside the provisions of the submission and that the award could not be filed. (27 A. 526, Ref.) 137 I.C. 198=1932 A.L.J. 331=1932 A. 348. An award partitioning joint family property, made on reference by only some members of the joint family is a valid award which can be filed under this para. and is binding on those members who actually join the reference and can be enforced against them. The mere fact that some members of the joint family do not join, does not make the award invalid. The award may or may not be set aside at the instance of third person but that it is not a matter which enters into consideration in proceedings under section 20. 1936 Pesh. 96. A person who is a stranger to the submission to reference and under no obligation to abide by the award could not avail himself of it and could not be said to be a person interested in the award. 69 I.C. 714=26 O.C. 1. A Court is competent to pass a decree on an award as modified by a lawful compromise filed by the parties and that from a decree so passed no appeal lies except in so far as the decree is in excess of or not in accordance with the award so modified. 25 O.C. 213=68 I.C. 209 (31 C. 516; 45 B. 245; 37 B. 693; 2 L. 114; 27 A. 526; 29 M. 303; 4 Pat.L.J. 394; 30 P.R. 1914; 21 C.L.J. 248, Ref.). An award made in arbitration cannot be remitted to the arbitrators without the intervention of the Court. 7 Bur.L.T. 287=24 I.C. 132. A settlement made by arbitrators cannot be reopened in order to show errors in the account except on the ground of fraud. 38 M.L.J. 247=43 M. 429. On this rule, *see also* 23 S.L.R. 349=116 I.C. 102=1929 Sind 107; 7 O.W.N. 815=1930 O. 432. Where a party agreed to be bound by the decision of a Committee and although the Committee had no power to delegate its power of disposal to a new tribunal, it left the matter to some of its members; *held*, that the award of the members to whom the matter was delegated was not binding on the party. 133 I.C. 531=1931 A. 751.



(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

#### NOTES.

SEC. 20 (3).—See 8 A. 340 (351); 6 B. 663 (666); 28 B. 287; 16 A. 231.

FILING AWARD—REPRESENTATIVE ACTION—FORM OF NOTICE.—Where an application has been made for filing an award notice must be given to the parties to the arbitration other than the applicant. In the case of a representative action it is not necessary to give separate notices under C. P. Code. Order 1, rule 8 and under section 20 of this Act. 149 I.C. 324=35 Bom.L.R. 1101=1934 B. 6.

JURISDICTION.—The words 'Court having jurisdiction over the subject-matter of the award' occurring in para. 20 of the second schedule to the C. P. Code, do not mean that the Court must have jurisdiction over the whole of the subject-matter of the award. The question of the existence or absence of jurisdiction should be decided in accordance with the general provisions in the body of the C. P. Code. The result would be, that if a suit to enforce the award would lie then an application for the award to be filed will also lie. A liberal construction could be given to the provisions in the second schedule of the Code for filing an award. Where the award referred to properties both within and without British India, it was held that the Court, to the extent to which it would in virtue of section 17, C. P. Code, have jurisdiction, had power to file the award and to give judgment accordingly. I.L.R. 1940 Nag. 225=1940 N.L.J. 71=A.I.R. 1940 Nag. 191. Per *Page, C.J.*, and *Mya Bu, J.*, in the order of reference.—Where a part of an award made in an arbitration without the intervention of Court deals with property outside the jurisdiction of the Court which is requested to file it, if that part is separable without disturbing the basis and equilibrium of the award as a whole, the Court may delete that part of it and order the rest to be filed. Merely because the award deals with some matters which are not within the jurisdiction, it does not follow that the award cannot be filed. 39 Bom.L.R. 159; 9 R. 480=1931 R. 252 (F.B.). See also 158 I.C. 60=1935 Sind 184; 1936 L. 794; 55 M. 689=62 M.L.J. 550. See also 1938 Sind 59. Award allotting business to one partner and directing others to pay dues and execute release deeds to the former in fixed time—Provision for payment of fixed amount of damages on default—Legality—Enforceability of award—Power of Court to modify. See 1940 M.W.N. 879. If parties to an agreement to refer a dispute to arbitration leave a contingency unprovided for, the Court will not be proceeding consistently with the agreement if it makes a provision for such contingency. The lacuna, if any, is to be filled by parties themselves, and not by the Court.

Where therefore parties agree to refer their dispute to arbitrators nominated by each party but the agreement does not make any provision for the nomination of an arbitrator in case any arbitrator already nominated refuses to act, and one of the nominated arbitrators refuses to act, the Court has no power to make the necessary appointment so as to make the agreement operative and effectual. A.I.R. 1938 Lah. 859. The question whether the charge over immovable property was or was not the subject-matter of the reference is not material in considering whether the Court has jurisdiction to entertain an application under this section. If the subject-matter of the award refers to a charge on immovable property outside the jurisdiction of a Court to which an application is made under this para., it *prima facie* ousts the jurisdiction of that Court in view of the provisions of C. P. Code, section 16. (51 C. 361 (P.C.), Rel. on; 30 M. 478, Expl. and Dist.) 25 S.L.R. 204. On the question of jurisdiction, see 51 I.C. 53=10 L.W. 57; also 136 I.C. 445=13 Pat.L.T. 169. (Agreement to refer under section 152, Companies Act). The refusal to refer to arbitration on the part of the other party is a fundamental part of the cause of action in an application under section 20 to have the agreement filed in Court. So where such refusal took place in Lahore, Courts in Lahore have jurisdiction to entertain the application, though the proposed arbitrator might have resided elsewhere and the cause of action relating to other reliefs arose elsewhere. 1933 L. 18. Jurisdiction—Agreement for reference—Application for filing—Refusal by some arbitrators to act—Power of Court to order agreement to be filed. See 11 O.W.N. 1188; 11 O.W.N. 12=1934 Oudh 67. An agreement for reference to arbitration cannot be filed in a Civil Court under para. 17, Sch. II, C. P. Code, if some of the matters included therein are within the jurisdiction of the Revenue Court only and there are actually suits pending in such Court with respect to some of them. 40 P.L.R. 966.

RES-JUDICATA.—The contention that a decree passed not in a suit but in proceedings under Sch. II, C. P. Code, does not operate as *res judicata*, has no force. The decree gives effect to the award and must be held to be as binding on the parties as any other decree passed in a suit whether with or without consent. 42 P.L.R. 77=A.I.R. 1940 Lah. 107.

"PERSON INTERESTED IN AWARD".—The arbitrator is not "a person interested in the award" within the meaning of this section. Therefore an application presented by him for filing the award cannot be treated as one under section 20. 1935 L. 134.



## NOTES.

**STAMP.**—In proceedings under section 20 an unstamped award may be admitted in evidence and filed in Court after paying the penalty under the Stamp Act. 66 P. R. 1913=20 I.C. 491. (12 M. 331, Dist..)

**COURT-FEE.**—This is the same as that for an application. 10 C. 11. An order directing an award passed in an arbitration out of Court to be filed is neither a decree nor an order having the force of a decree. An appeal therefore need only be stamped with a Court-fee of Rs. 2 under Art. 11, Sch. II of the Court-Fees Act. It need not be stamped *ad valorem* on the value of the appeal. 25 A.L.J. 741; 9 L. 380, Foll.; 33 C. 11, Dist.) 6 Luck. 703=139 I.C. 622=9 O.W.N. 800. See also 5 All. 333.

**REGISTRATION.**—An award affecting immovable property which by law requires registration cannot be filed unless registered. See I.L.R. 1939 Nag. 607=1939 N.L.J. 375=1939 Nag. 233 (F.B.); 1940 Lah. 107; 1935 O.W.N. 1141; 1932 All. 154; 1938 All. 88; 1937 Cal. 201.

**LIMITATION.**—Six months from date of award which is the time when it is given to the parties. 9 C. 575. Applicant cannot claim the benefit of section 6 of the Limitation Act. 1 R. 256=76 I.C. 493=1923 R. 226. Under special circumstances section 5 and section 14 of the Limitation Act may be applied. 38 A. 85=31 I.C. 899=13 A.L.J. 1115. Application under this section is not the only remedy open to a person in whose favour award is made. He can file regular suit, and Art. 178, Limitation Act, will not apply. 1936 L. 134. Where in an application for filing an award one of the party respondents in whose favour also the award had been made applied to the Court to be transposed as applicant but it appeared that the period of limitation for his filing an application had already expired, *held*, that the Court could transpose the party and that the mere transfer did not amount to a fresh application so as to create a bar of limitation against him. 133 I.C. 410=1931 A.L.J. 863=1931 A. 725.

**APPEAL.**—The order refusing to file an award is a decree from which an appeal lies. 29 C. 167 (P.C.); 27 M. 255 (F.B.); 29 M. 303. But see 31 C. 757 (F.B.). See also 11 C.W.N. 220. Reference to arbitration out of Court pending suit—Application to make award rule of Court—Objection to procedure on appeal—Sustainability. 142 I.C. 195=34 P.L.R. 340=1933 L. 746.

**REVISION.**—An order of refusal is subject to revision. 8 Bom.L.R. 570.

**WITHDRAWAL.**—An application under this section can be withdrawn. 31 C. 516; 4 C. L.J. 162. See also 18 C. 414; 28 A. 621; 29 B. 621 (F.B.); 16 M.L.J. 474; 29 M. 303. The law prohibits proceedings either under para. 17 or para. 20 only in cases where a suit is pending with regard to the same subject-matter at the time of the presentation of application and not otherwise. Where

therefore in a pending suit, the parties referred the matter in dispute to arbitration out of Court, an award was passed and after the suit was allowed to be withdrawn with the consent of the parties, one of them applied under para. 20 to have the award made a rule of Court, there being no suit pending at the time the application is made, Court has jurisdiction to admit the application and pass a decree in accordance therewith. (51 B. 908, Foll.; 54 B. 197, Diss. from.) 141 I.C. 83=1933 Pesh. 18. As to relative applicability of paras. 17 and 20, see *supra*, 38 Bom.L.R. 607=1936 B. 401 (noted under para. 17 under heading 'applicability of para.'). Section does not apply where the matters referred to arbitration are already the subject-matter of a suit between the parties to the reference. 45 B. 245=22 Bom.L.R. 1048. There is no distinction between an award which deals *solely* with disputes which are the subject-matter of a suit and that which *inter alia* deals with disputes which are not the subject-matter of a suit except in the case of an award in which the decision in respect of such disputes which are not the subject-matter of the suit is separable from that which deals with the matters which are in the suit. If the award could be separated, that part of the award which deals with extraneous matters may be enforced as a decree. 158 I.C. 60=1935 S. 184. The fact that the agreement of reference was written after the arbitrator had looked into the *bahis* of the plaintiff is no ground for the Court to refuse to file the award and pass a decree thereon. 37 P.L.R. 491. Where the arbitrators deliver a unanimous oral award, but on its being reduced to writing subsequently, one of the arbitrators resiles and refuses to sign the award, it is nevertheless competent to the Court to give effect to the award. The oral award is complete without the writing and the refusal on the part of one of the arbitrators to sign it when reduced to writing does not make it invalid. 44 L.W. 32=1936 M. 713=71 M.L.J. 342. Award accepted and signed by parties—Enforcement as compromise. See 31 P.L.R. 225. An award made without the intervention of the Court, which is partly invalid, can be made a rule of the Court if the invalid portion is separable from the valid portion. If it is so separable, then there is no objection to making the award a rule of the Court. If it is not so separable, then as the Court has no power to remit the award to arbitrators appointed without its intervention or to correct the award itself, the award cannot be made a rule of the Court. Where by the terms of the reference the arbitrators are empowered to decide what is the property belonging to the parties jointly, the mere fact that they have wrongly decided that certain property is not joint and in addition have gone further and held it to belong to a third party does not make the award invalid, for the portion which assigns title in the property to a third party can easily be separated from



## NOTES.

the rest of the award, which divides the property after finding what is the joint property of the parties. 188 I.C. 477=A.I.R. 1940 Lah. 24. Where disputes between the parties are referred by agreement to arbitration and the arbitrator files the award in Court and no order is made for remitting the award to the consideration of the arbitrator nor is the award set aside, the award remains filed in Court and it is enforceable as if it were a decree of the Court. The Arbitration Act does not contain any provision for making a decree on an award such as is contained in section 20, and if such a decree is made, it is one without jurisdiction and therefore a nullity. But a party to the arbitration is however entitled under the Act to enforce the arbitrator's award through the Court in exactly the same way as if it was a decree. 60 I.A. 71=60 C. 670=64 M.L.J. 341 (P.C.). Section does not lay down any particular form of order. All it states is that the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. All that is necessary is that the mandatory direction which constitutes the order must be present somewhere. Where the Judge, instead of passing a separate order with respect to the filing of the award, and then a judgment in terms of the award followed by a decree, combined the order for filing the award and judgment into one; *held*, that the procedure was not irregular. At any rate, even if it was an irregularity, it did not mislead either of the parties and hence would be curable under section 99. 1936 N. 246. The arbitrators are Judges of law as well as Judges of fact, and an error in law or error in fact or in arithmetic cannot vitiate an award, unless the error or mistake is so palpable and gross as would afford strong evidence of misconduct. I.L.R. (1936) N. 44=1936 N. 197. A Court to which an application is made to file an award made by arbitrators should not arrogate to itself the functions of a Court of appeal from the arbitrators. Before it can interfere with the award, a great deal more than mere error on the part of the arbitrators has to be shown. (*Ibid.*) See also 7 O.W.N. 1095=1931 O. 6 (5 O.W.N. 1001, Foll.; 23 A. 383, Dist.) Court can determine the genuineness or validity of the award filed. 20 M. 89. A Court must, before enforcing award, satisfy itself that it is enforceable in the same way as a decree would be enforceable if it were a decree. 42 A. 525=18 A.L.J. 652. See also 12 I.C. 639=5 S.L.R. 92. An award of three arbitrators made without final discussion with the fourth arbitrator and in his absence and to which he does not agree is not an award by a majority of four arbitrators. The three arbitrators must be regarded as having been guilty of misconduct in drawing up the final award without consulting the fourth one at all and the award is consequently vitiated. 7 R. 715=121 I.C. 801=

1930 R. 136. But where there is a reference to five arbitrators one of them was not present at the meeting but the parties, however, orally agreed that the remaining four arbitrators should proceed with the case and dispose of the matter, *held*, that though the subsequent oral agreement was hit at by section 92, Evidence Act, the defendant himself having agreed to the procedure, it was not a proper case for interference in revision. 135 I.C. 230=1931 A.L.J. 1087; 130 I.C. 156=1931 N. 66. A direction in the award to the parties to modify the decree duly passed by Courts of law does not amount to an ousting of the jurisdiction of the Court. The award is an adjustment of decrees under order 21, rule 2. 48 A. 475=24 A.L.J. 480=95 I.C. 416=1926 A. 501. In the absence of a contrary provision, parties, agreeing to settle their differences by the judgment of a body made up of an uneven number of persons, are presumed to imply that they would accept the decision of the majority. 42 B. 669=19 Bom.L.R. 618. When a defendant denies a reference to arbitration the jurisdiction of the Court is not taken away. 25 C. 757 (F.B.); 17 A. 21 (F.B.); 20 M. 89. Generally a person who is not a party to or properly represented in any proceedings should not be bound by those proceedings. 26 C.W.N. 804=1922 C. 226. But proceedings before arbitrators are not intended to be carried on according to the rules of procedure contained in the C. P. Code. It will suffice if there is a substantial representation of the different interests before the arbitrators. (*Ibid.*) If there has been a substantial representation of the interests of the legal representatives by the other parties on the record and if the enquiry is full and fair, the award will be binding and a decree could be passed thereon. 26 C.W.N. 804=1922 C. 226. (31 A. 572=15 C.L.J. 360, Dist.) A father in a joint Hindu family in his capacity as managing member, can refer to arbitration the partition of family property. 16 A. 231; 19 C. 334. The award of an arbitrator on a question of partition when all the members of the joint family are not parties to it is invalid. 48 I.C. 953=1919 P.H.C.C. 141. It is competent for the arbitrators to decide whether or not an alleged interpolation was in the contract as originally made. 59 I.C. 439=24 C.W.N. 567. The arbitrators can construe the terms of a will with reference to the circumstances of the case. 6 P. 556. A party relying on an award must prove that he has abided by its conditions. 41 I.C. 245. Where parties have consented to an award, they cannot be allowed to object that the award is partial or incomplete. 32 P.L.R. 754. (12 L. 65, Foll.) Capacity to make a submission to an arbitrator is co-extensive with capacity to contract. 19 C.W.N. 948=21 C.L.J. 273. As a submission only refers to the arbitrator, questions between the parties, the moment he touches the interest of strangers, he exceeds his



(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.

#### NOTES.

authority and his award is void. (*Ibid.*) Submission to an arbitration does not operate as a waiver of an extrinsic objection that the award is illegal because based on an illegal act or subject-matter. 19 C.W.N. 948=21 C.L.J. 273. Under section 20, a Court can direct a private award to be filed if the ground mentioned in sections 16 and 30 are not established. If such grounds are established the Court must refuse to file the award. 21 C.L.J. 248=19 I.C. 941. A Court has no power to direct the filing of an award which is open to attack in part. 15 C.L.J. 110; 13 I.C. 118=16 C.W.N. 256. It is permissible to separate such portion of the award as goes beyond the powers of the arbitrator, and to maintain the remainder if good. 53 I.C. 992. Where award related both to movable and immovable properties and the portion relating to the latter was invalid for want of registration, it is open to the Court to reject that portion in the application and grant with reference to the movables. 158 I.C. 812=1935 O.W.N. 1141. But see 135 I.C. 230=1931 A.L.J. 1087=1932 A. 154. See also 1939 N.L.J. 375=1939 Nag. 233 (F.B.); 1938 All. 88; 42 P.L.R. 77; 1937 Cal. 201; 1940 Lah. 107. Although an award is not admissible in evidence for want of proper stamp and registration, a decree based on the award is admissible in evidence. If the decree does not reproduce the terms of the award but only makes a reference to the award, a copy of the award is admissible in evidence to understand the terms of the decree. 42 P.L.R. 77=A.I.R. 1940 Lah. 107. Award made after long delay and under suspicious circumstances—Right of parties to call upon arbitrator to decide within time. 52 I.C. 847=71 P.R. 1919. A private award which decides matters not referred to arbitration cannot be filed and no decree can be passed thereon though such matters are separable from the rest of the award. 30 P.R. 1914=23 I.C. 422. Compromise during suit—Court's duty to inquire if parties are bound by compromise set up by one of them. 63 P.L.R. 1912=15 I.C. 478. The parties to an arbitration filed the award in Court for a decree to be passed on it. One of the parties filed a solenamah in the Court and prayed that a compromise decree should be passed. By the solenamah one party had given up his rights under the award and had made amicable arrangement of all disputes. The Court refused to pass a compromise decree. *Held*, that the Court rightly refused to pass such a compromise decree in pro-

ceedings under Sch. II. 1937 C. 201=171 I.C. 507. On an application for the filing of an award the only form which such a decree should take was an order that an award should be filed, and as the parties did not unite in praying that the application should be dismissed it was the duty of the Judge to proceed to consider whether the award which had been submitted should be filed. The Court therefore in its order refusing to pass a decree in terms of the compromise and in the subsequent order for filing the award did not act without jurisdiction, nor did it act irregularly in the exercise of its jurisdiction. (*Ibid.*) An award by arbitrators may be either oral or in writing, and both are equally binding on the parties. 45 I.C. 813=34 M.L.J. 184. See also 12 P.L.T. 733. (26 B. 132, Foll.) An award is sufficient to pass title to property. The Transfer of Property Act is not exhaustive of the modes of transfer. 45 I.C. 813=34 M.L.J. 184. An award is not in the nature of a foreign judgment and a Court is therefore not entitled to go into the merits of the same. 29 I.C. 49=2 L.W. 320. Where a person was a party to arbitration but was not a party to the decree which followed upon the award he could not enforce the decree. 52 I.C. 849=6 O.L.J. 322. See also 1937 A.L.J. 1133=1937 All. 46. Court cannot refuse to file an award by imposing conditions beyond those mentioned in para. 21 (1). 33 I.C. 67=19 M.L.T. 228. See also 4 B. 1; 33 C. 757; 13 M.L.J. 275. Parties signing the award should not be allowed to pick holes in it. I.L.R. (1940) Lah. 599=188 I.C. 493=A.I.R. 1940 Lah. 73. When an application is made for filing an award passed on a reference out of Court, Court should in the first instance pass an order that the award be filed and then proceed to pronounce judgment according to the award. It is necessary and important that two orders should be passed, because whereas an appeal directing an award to be filed is appealable under section 104 (1) (f), an appeal from the decree based on the award can be challenged only so far as it is not in accordance with the award. 1933 A.L.J. 40=1933 A. 166.

**JURISDICTION.**—Where it is not alleged that the decree of the Court was in excess of or not in accordance with the award, an appeal attacking the validity of the award itself on the ground that one of the parties to the reference was acting not for himself but merely on behalf of a minor and that the award had gone beyond the terms of



## CHAPTER IV.

## ARBITRATION IN SUITS.

21. Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred

Parties to suit may apply for order of reference.

to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an

order of reference.

## NOTES.

reference, is incompetent. 190 I.C. 713=A.I.R. 1940 Rang. 238.

APPEAL.—Order filing award—Appeal lies. 60 I.C. 590. See also 134 I.C. 474=8 O.W.N. 789; 55 M. 689=62 M.L.J. 550. Where a decree has been passed in accordance with the award, the objection that the reference to arbitration was invalid could only be decided by the trial Court and no appeal would be maintainable on that ground. 189 I.C. 812=A.I.R. 1940 Lah. 123.

PARA. 21 (2).—18 A.L.J. 78=54 I.C. 44; 123 P.R. 1912=10 I.C. 512; 10 I.C. 454=13 C.L.J. 399. An order refusing to set aside an *ex parte* decree passed in accordance with an award is appealable. 38 A. 297=14 A.L.J. 332. A decree passed under Sch. II, para. 21 (2) is a "decree" and the provisions of rule 13 of order 9 apply to it. 62 I.C. 927.

REVISION.—A decree based on a private award filed in Court is not open to revision. 23 I.C. 950=114 P.L.R. 1914; 49 I.C. 979=31 P.W.R. 1919; 7 P.W.R. 1911=9 I.C. 38.

APPEAL TO PRIVY COUNCIL.—The provisions of para. 21 (2) do not affect the right of applicant to go in appeal to the Privy Council. 15 I.C. 2=15 O.C. 55. If a suit is filed before the award is made and the award is attacked as invalid, if the objections fail, the suit must be dismissed, and the plaintiff cannot claim a decree on the basis of the award. 13 S.L.R. 75=53 I.C. 337. (6 Bom.H.C.R. 231, Ref.; 11 M.I.A. 7, Foll.). The scope of section 21 of the Specific Relief Act is limited by C. P. Code, Sch. II, para. 22. 64 I.C. 204. See also 9 Bur.L.T. 98=35 I.C. 710.

SECS. 21 TO 23 reproduce substantially paragraphs 1 to 3 of the Second Schedule of the C.P. Code. They set out the initial steps to be taken for arbitration in a suit. (*Statement of Objects and Reasons*. See Notes to C.P.C. Sch. 11, paras. 1 to 3.).

CHANGES MADE BY SELECT COMMITTEE.—"The section as drafted contemplated an agreement in writing to be followed by a subsequent application which must also be in writing. We have provided that there need not necessarily be a preliminary agreement in writing so long as the intention of the parties is exhibited in writing to the Court." (*Rep. of Sel. Com.*).

"In section 22 we have omitted the words 'to the arbitration agreement' as being unnecessary in view of the wording of section 21." (*Rep. of Sel. Com.*).

CASES UNDER THE OLD ACT—C.P.C. SCH. II: APPLICATION TO ENFORCE AWARD—APPLICATION TO RECORD COMPROMISE—DISTINCTION.—When Court is asked to enforce the decision of another voluntary tribunal, the conduct of the tribunal should be under its guidance and subject to its control, and also subject to the special provisions laid down in the Act. If parties come to the Court with a cut and dried statement that the matters in dispute between them have been adjusted, O. 23, R. 3, will apply; but if they state that though they have referred their disputes to arbitration they do not agree mutually to accept the decision of the arbitrator, then the matter is not governed by O. 23, R. 3. In that case, there being no agreement, the matter must be governed by the Arbitration Act. An agreement to go to arbitration and accept the award is not of such a nature that a decree can be passed in accordance therewith, and the award ultimately made by the arbitrator is in no sense a part of the agreement, as contemplated by O. 23, R. 4. 14 P. 799=16 Pat.L.T. 280=1935 P. 243. See also 1939 Rang.L.R. 280=1939 Rang. 300.

PROCEDURE GOVERNING ARBITRATION IN PENDING SUITS.—This Act contemplates two classes of arbitration, (1) those in pending suits, and (2) those regarding matters which are not the subject of pending suits. So far as pending suits are concerned, the parties must apply to the Court in which the suit is pending for a reference to an arbitrator; the Court is then required to proceed to appoint an arbitrator and direct a reference to him. 14 P. 799=16 Pat.L.T. 280=1935 P. 243. An award made on a reference in a pending suit without the intervention of the Court cannot be treated as a compromise under C. P.C. O. 23, r. 3. 1939 Rang.L.R. 280=1939 Rang. 300 (F.B.). See also 1937 Rang.L.R. 225=1937 Rang. 459. Act does not apply to the award of an arbitrator under R. 22 of the Bengal Government Rules framed under section 43 of the Co-operative Societies Act. 60 C. 906=37 C.W.N. 649=1933 C. 595 (2). See now section 46 *infra*. Provisions of the Act should be strictly complied with. 49 I.C. 262=1923 A. 65. But see also 49 M.L.J. 812 (P.C.); 1931 O. 127; 27 A.L.J. 31. They are permissive and not mandatory. 131 I.C. 443=8 O.W.N. 71=1931 O. 127. A party to an agreement after the arbitrator proceeds to evidence cannot withdraw from the arbitration. Court cannot compel a private arbitrator to arbitrate against his will. 43 A. 101=



## NOTES.

18 A.L.J. 952. There is no provision in old C.P.C., Sch. II, meeting an agreement to refer to arbitration which sets forth that any matters which might in future arise between the parties might also be referred to the decision of the arbitrators on application of the parties. 1930 A. 319 (2). In order to ascertain whether an award can be set aside or not, it is necessary to refer not to R. 1 of Ch. XXIII of High Court Original Side Rules, but to the substantive provisions of the Code. 38 C.W.N. 784. Charges of misconduct levelled against the arbitrator in making award can be enquired into only when the award has been filed in Court. 58 C. L.J. 234. The rule of English Common law that a submission to arbitration stands revoked by the death of a party is not applicable to India. In every case it is a question of the intention of the parties as to whether it is intended that they alone or their representatives also are to be bound by the decision. Though if a party dies before the completion of the hearing, it would be necessary to make the representatives, parties to the submission, where the death occurs after the termination of the hearing and just before the delivery of the award, the delivery of the award without the addition of the representatives is none the less binding on the representatives and is quite valid. 174 I. C. 369=1938 O.W.N. 480=1938 O. 125.

FORM OF REFERENCE.—All parties interested must join in the application. See 47 C. 555; 27 C.L.J. 339; 42 M. 632=36 M.L.J. 538; 44 M.L.J. 359; 1929 L. 477=119 I. C. 235; 1930 M. 646=126 I.C. 735; 56 M.L.J. 35=1929 M. 31; 1941 Rang. 22. Any agreement to refer to arbitration should clearly set forth in the form of issues the matters in difference between the parties on which the arbitrators are required to arbitrate. 1930 A. 319 (2). A reference is bad even if one interested party does not join. 17 M.L.J. 394; 29 A. 423; 64 I.C. 221; 79 I.C. 48. See section 24 *infra*. It is open to parties to refer to arbitration only some of the disputes in a presiding suit and the expression of all parties interested can only refer to the parties interested in the subject-matter of the arbitration and not on the subject-matter of the whole suit where the two are not identical. 104 I.C. 342=1927 Sind 239. Where one of the defendants who remained *ex parte* did not sign the reference to arbitration, the very foundation of a reference to arbitration is absent and hence there is no valid submission. An award on such a reference is equally invalid. 1938 O.W.N. 475=A.I.R. 1938 Oudh. 154. Where the agreement to refer the matter to arbitration, which is embodied in the statement made by the parties' counsel, was not supported by the consent of several parties who were interested, the reference is invalid and could not give the Court jurisdiction to refer the matter to arbitration. A.I.R. 1939 A.

C. C. M.—15

49=1938 A.L.J. 1044. See also 1938 Pesh. 47=177 I.C. 285. The provision requiring application to be in writing is directory and not mandatory. 105 I.C. 105. See also 131 I.C. 443=1931 O. 127; 155 I.C. 290=1935 O.W.N. 642; section 2 (a) and section 21 *infra*. The record of an agreement to refer to arbitration in the Court's proceedings, which are signed by both the parties and their respective pleaders, constitutes sufficient compliance with the requirements of law even though there is no written application to the Court by the parties. 1935 O. W.N. 1069=1935 O. 499. A verbal submission to arbitration is valid even though there is a likelihood of a question of title to immovable property being affected. 11 I.C. 481=14 C.L.J. 188; 34 I.C. 741=3 L.W. 375; 46 A. 208; 78 I.C. 378. When a reference to arbitration in a suit is a general one of the whole case the power of dealing with costs rests with the arbitrator. 46 I.C. 182. The parties could ratify a reference to arbitration though the procedure laid down has not been strictly followed by appearing before the arbitrator and giving evidence. 9 I.C. 412. A person having an option to avoid an award is deemed to have consented to it if he voluntarily submits to proceedings before arbitrators. 19 I.C. 374=6 S.L.R. 146; 9 I.C. 522. A Court executing a decree cannot refer a matter in the execution proceedings. 52 C. 559=87 I.C. 633.

ORAL APPLICATION.—A written application to refer to arbitration is not necessary. See now section 21 *infra* which requires application in writing; also section 2 (a). If both parties consent to a reference to arbitration and the Court passes an order of reference to arbitration in their presence, though not upon a written application the order cannot be superseded and an award made thereon is valid and binding. 1933 R. 407=12 R. 1.

AGREEMENT TO REFER—PRESENTATION TO COURT.—A commissioner was appointed for the examination of witnesses; and on the day fixed for appearance before the commissioner, the parties presented to the commissioner an application addressed to the Court stating that they had agreed to refer their disputes to arbitration. Thereupon the Court made a reference. *Held*, that the application to the commissioner was proper presentation to the Court and that the order passed thereon was correct. 10 O.W.N. 1102=1933 O. 521=147 I.C. 855. As to the presiding officer of Court being appointed arbitrator, see 1937 Oudh 224=1937 O.W.N. 223.

EXECUTION PROCEEDINGS.—Sec. 21 lays down that all the parties interested in a suit may agree to a reference to arbitration. An execution proceeding is not a suit and therefore it does not entitle the parties to an execution proceeding to file an application for a reference to arbitration. Therefore, such arbitration proceedings are invalid and the Court is not entitled to enforce them. 1935



## NOTES.

A. 125=4 A.W.R. 1366. See also 152 I.C. 397=1934 A. L. J. 1181=1935 A. 34; 1938 Pesh. 80; 38 Bom.L.R. 1303; 42 Bom.L.R. 867. The decision by the Court although in the alleged capacity of an umpire, cannot be said to be non-appealable but it must be held to be a decision of the executing Court appealable under section 47, C.P. Code. I.L.R. 1937 B. 144=38 Bom.L.R. 1303=1937 B. 111. As to applicability of this section to objections under O. 21, r. 58, see 58 A. 797=1936 A. 378=1936 A. L. J. 142.

**INSOLVENCY PROCEEDINGS.**—A Court cannot refer to arbitrators a proceeding in insolvency. (88 P.R. 1887, Ref. to.) 50 P.R. 1916=34 I.C. 549.

**OMISSION TO SIGN THE PETITION.**—An order of reference to arbitration should necessarily be signed by the parties to the suit agreeing to the reference. 43 C. 290=43 I.A. 1=20 C.W.N. 137=30 M.L.J. 67 (P.C.); 11 I.C. 481; 34 I.C. 741; 46 A. 208; 78 I.C. 378; 48 A. 237=24 A.L.J. 235=1926 A. 238; 1929 A. 763=52 A. 84; 56 M.L.J. 35; 38 I.C. 226; 133 I.C. 606=1931 A.L.J. 904. See also 1933 R. 407=12 R. 1. Where nobody signs on behalf of a party and nobody professes to verify the petition before the Court on his behalf, he is not a party to the reference to arbitration. 130 I.C. 291=1931 A.L.J. 100=1931 A. 242 (1).

**MINOR PARTIES.**—Where one of the parties to a suit was an infant, the agreement to refer was signed by the adult parties and by the guardian *ad litem* of the infant, and all the parties, including the guardian, appeared before the Judge and he thereupon made an order of reference, the order was proper and the award thereon was not vitiated. 43 C. 290=43 I.A. 1=30 M.L.J. 67 (P.C.). See also 18 Pat. 271=1939 Pat. 278. Para. 1 is subject to the provisions of O. 32, rule 7. Where one of the parties to the suit is a minor, the leave of the Court for the agreement to refer the suit to arbitration should be obtained before an application for an order of reference is made. Such leave cannot be granted by the Court after the award has been delivered. 1936 A.L.J. 1333=1937 A. 65 (F.B.). See also 18 Pat. 281=1939 Pat. 278; 1939 Cal. 500; 1939 Pat. 387; 1939 Lah. 308=41 P.L.R. 201; 1940 Pat. 343; 41 Bom.L.R. 485=1939 Bom. 296. The omission of the next friend or the guardian *ad litem* of the minor to obtain leave of the Court does not render the order of reference and the award void, but only voidable at the option of the minor as against all the parties. Such an order of reference and the award can be assailed by the minor either in the suit itself or by a separate suit. (*Ibid.*) But see *contra*. 36 A. 69 (F.B.); 1936 A.L.J. 53=1936 A. 740. See also 41 Bom. L. R. 1208; 1939 Bom. 296; 1939 Pat. 278; 1939 Pat. 387; 1939 Cal. 500. When a guardian *ad litem* has been appoint-

ed for a minor it is the guardian alone who can represent the minor in all proceedings in that suit and where the Court refers the matter to arbitration, it must ascertain if the guardian agrees to such a course. 1930 A.L.J. 923=1930 A. 646. A natural guardian can, on behalf of a minor, enter into an arbitration so as to be binding on the minor if it is proper, reasonable and for the benefit of minor. 44 B. 202=22 Bom.L.R. 266, 11 I.C. 481=14 C.L.J. 188; 56 I.C. 593; 29 I.C. 800=8 Bur.L.T. 122. A minor is bound by an agreement of arbitration entered into by his predecessor-in-title. 50 I.C. 879=23 C.W.N. 293; 11 I.C. 481=14 C.L.J. 188. Where a minor, party to a reference, is not properly represented and his guardian fails in his duty to protect his interests, the award is not binding on the minors. 56 I.C. 593. Where some of the parties to a reference to arbitration are minors, it is the duty of the Court to ascertain if the reference is for the benefit of the minors. 15 S.L.R. 165=64 I.C. 50. As to arbitration in *scheme suit*, see 30 S.L.R. 478. The question whether a person should be given a decree for restitution of conjugal rights against his wife is a matter in difference between the husband and wife in suits for *restitution of conjugal rights* and there is nothing in Sch. 2, C. P. Code, to prevent a reference of the whole suit for restitution of conjugal rights to arbitration and to a decree being passed in accordance with the award. A.I.R. 1941 Pesh. 43.

**AUTHORITY OF PLEADERS.**—Pleader must be expressly authorised to refer a matter. 36 C.W.N. 8=1932 C. 343; 29 A. 492. Unless he is authorised, his signature will not bind his client. 29 A. 423. See 104 I.C. 202=1927 L. 362. One pleader appearing for another pleader cannot make a valid reference. 96 I.C. 277=1926 L. 563. The authority need not be in writing of the parties consenting to the reference. 23 B. 629. If a party knows about it and acquiesces in it, he cannot afterwards raise objection. 29 A. 429.

**PARTIES—EFFECT OF NON-JOINDER OF SOME PARTIES.**—When some of the defendants to a suit do not join in a reference to arbitration, Court should examine the facts of each case before coming to the conclusion that the arbitration is invalid. 39 A. 489=15 A.L.J. 427; 11 C. 37. See also 122 I.C. 100=1930 L. 523; 118 I.C. 906; 117 I.C. 783. See now section 24 of this Act. Where an award is declared invalid because one of the parties to the proceeding did not joint in the reference the award cannot be upheld in part if the decree is a joint one. 130 I.C. 291=1931 A.L.J. 100=1931 A. 242 (1). (2 P. 777, Dist.) But see 133 I.C. 31=1931 A.L.J. 442=1931 A. 453. In making a reference to arbitration, if the parties against whom proceedings have been taken *ex parte* or who did not appear at the trial have not joined, the reference to arbitration is invalid and the award is wholly void. 119 I.C. 235=1929



## NOTES.

L. 477. See also 1933 Oudh 384=10 O.W.N. 790; 42 M. 632; 31 Punj.L.R. 55=121 I.C. 378; 1930 M. 646; 56 M.L.J. 35. Objections to award on the ground of invalidity from any cause whatever should be decided by the Court which has made the order of reference to arbitration and by no other Court. 39 A. 489.

UNNECESSARY PARTIES.—A Hindu widow in possession of property in lieu of maintenance is not a necessary party to a suit for partition, and her not joining in a reference to arbitration in such a suit does not vitiate the award. 35 A. 107=11 A.L.J. 66.

NON-CONTESTING PARTIES.—A reference to arbitration between the plaintiff and the contesting defendants is not rendered invalid by reason of the non-concurrence therein of a non-contesting defendant. Further, where the non-contesting defendant has by his subsequent conduct consented to the reference by being present throughout the whole of the arbitration proceedings, it is not open to him or to the plaintiffs to maintain that he was not a party to the arbitration. 148 I.C. 1168=1934 A.L.J. 694=1934 A. 658.

DEATH OF A PARTY.—The death of one of the parties to an arbitration does not necessarily revoke the authority of the arbitrator. 33 A. 645=8 A.L.J. 678; 14 C.L.J. 188=11 I.C. 481; 15 C.L.J. 360=13 I.C. 161. Whether death of the parties who had signed a reference to arbitration is itself enough to bring their agreement to an end. See 143 I.C. 635=1933 Sind 68.

WHO IS AN INTERESTED PARTY.—See 24 A. 229; 32 A. 657; 39 A. 489; 27 C.L.J. 939; 25 C.L.J. 339; 1929 A. 763=52 A. 84. A reference to arbitration by parties who are interested in the subject-matter in difference between them is a good reference, and the award made thereon is a legal one. In order to find out whether the parties have interest in the subject-matter in difference it is necessary to see the nature of the suit in which that question is raised and not the possibility of their having any interest in a future litigation which may arise as the result of the decree in the suit. 148 I.C. 512=1934 P. 19.

Where a person is merely a *pro forma* party to the suit and has no dispute either with the plaintiff or defendant he is not a party interested in the suit within the meaning of Sch. II, Para. 1 and hence his agreement to reference is not necessary. 190 I.C. 399=A. I. R. 1940 Lah. 186. If all the parties interested at the time of the reference have not joined in the reference the reference is invalid. 8 A. L. J. 645=10 I.C. 559; 71 I.C. 326=1924 C. 353; 21 C.W.N. 387; 102 I.C. 26. Subsequent consent cannot always make the reference valid. 48 A. 239=24 A.L.J. 235=1926 A. 238. A matter was referred to arbitration by some of the defendants and plaintiff. The other defendants who did not join in the reference were *ex parte* but were highly interested parties. Held, that the Court had no jurisdic-

tion to make the reference and that the award and decree passed thereon were invalid. 10 O.W.N. 790=147 I.C. 189=1933 O. 384; 1929 Lah. 477. The fact that a defendant to a suit has not appeared and that the suit has been ordered to proceed *ex parte* is a question of fact to be considered when the question of his interestedness, in the case of a reference of the subject-matter of the suit to arbitration, is to be considered; but it is not necessarily in itself a final and conclusive answer. Where the Court treats such circumstances as final and conclusive on question of interestedness, there is a failure to exercise jurisdiction which is open to revision. 159 I.C. 188=1935 Sind 212. A suit was filed against two persons described as owners of a firm. The summons issued to them was taken by a son of one of them who was managing the firm, and written statement was filed by him on their behalf. The case was referred to arbitration at the instance of plaintiffs and this person and award was made. Held, that though the son had no power to refer to arbitration and as such the reference was not proper, still as he was managing the business, substantial justice was done and that the award could not be interfered with. (1926 A. 238, Ref.) 1933 A. 924=147 I.C. 746. The plaintiff brought a suit for recovery of Rs. 210 on foot of a promissory note alleged to have been executed by the first defendant in favour of the second defendant from whom the plaintiff took an assignment of his rights under the promissory note. The relief claimed against defendant No. 2 was that in case defendant No. 1 be found to have made any payment to the second defendant in respect of the promissory note, a decree may be passed for that amount against defendant No. 2. When the suit was pending, a reference to arbitration was made by the plaintiff and the first defendant only and an award was passed. Held, that the second defendant was not a *pro forma* defendant; he was as much interested in meeting the defence of the first defendant as the plaintiff himself, because if the first defendant's plea prevailed, the second defendant would be exposed to a claim for damages by the plaintiff. So the reference to arbitration in which the second defendant who continued to be a party to the suit did not join and the award passed in pursuance thereof were invalid. 1933 A.L.J. 402=1933 A. 739. A reference, however, made by father of a joint Hindu family is binding on sons unless fraud is proved. 104 I.C. 202=1927 L. 362. See also 12 Pat.L.T. 733. Where a claimant objects to the attachment of property in execution of a decree and the matter is referred to arbitration judgment-debtor is a necessary party to the reference. 64 I.C. 469. A person who is not a necessary party is not a person interested under this section. 42 M. 632=36 M.L.J. 538. A Court has no jurisdiction to make an order of reference without consent of all the parties, and an award made on such refer-



## NOTES.

ence is illegal. 55 I.C. 747=47 C. 555=31 C. L.J. 150; 43 I.C. 169=27 C.L.J. 339; 25 C. L.J. 339=21 C.W.N. 387; 61 I.C. 221; 9 C.W.N. 873; 61 I.C. 451; 45 I.C. 321; 49 A. 812=25 A.L.J. 606=1927 A. 563. It is not part of the authority of one partner of a firm to refer a suit to which the firm is a party to arbitration. 36 C.W.N. 8. (48 A. 239). A partner of a firm cannot enter into an agreement to refer on behalf of a firm unless all the parties join. 133 I.C. 558. See also 148 I.C. 1080=34 P.L.R. 417=1934 L. 483; 34 Bom.L.R. 1112. If some of the partners do not join in submitting a dispute to arbitration the award does not become invalid or ineffectual as between the persons making the reference. It is binding on them especially when it has been acted upon. 134 I.C. 99. See now section 24, *infra*. Whether an order of reference to arbitration made by the Court on application of the plaintiff and one of the defendants is legal, see 44 I.C. 480. A defendant who is *ex parte* may be a party "interested". 42 M. 632=36 M.L.J. 538; 22 L.W. 395=1925 M. 1209=50 M.L.J. 100; 96 I.C. 273 (1)=23 L.W. 769. An award is not invalid because certain defendants having no interest in the suit or only nominally on the record do not join in the reference to arbitration by the other parties. 36 M. 353=21 M.L.J. 990; 76 I.C. 2=5 Pat.L. T. 239=2 P. 777; 48 A. 239=1926 A. 238=24 A.L.J. 235. But see 48 M.L.J. 142=1925 M. 621. A person having a limited interest in the land cannot by a reference to arbitration confer on the arbitrator an authority to alienate a more extensive interest than he himself has. 25 I.C. 949.

PRIVATE TRUST.—Where two parties were litigating in their own right, claiming that each of them was of right entitled to the muth, and there was nothing to suggest that the muth was of the nature of public charity and that income was to be spent on public purposes and was neither a religious order nor confined to the benefit of a group of persons belonging to that order and the parties did not ask the Court to appoint a trustee on the supposition that the office was vacant, *held*, the dispute must be deemed to be of a private nature and reference to arbitration of such a dispute was neither illegal nor forbidden by law or contrary to any well-known rule of public policy. 151 I.C. 148=1934 A.L.J. 711=1934 A. 368. Suit under section 92, C.P. Code. Matters of public right cannot be decided by arbitration, though they arise in a suit which primarily relate to private property. Matters in difference between parties to litigation which affect private rights only may be referred to arbitration. A suit under S. 92, C.P.C. is not one for determination of private rights. 30. S.L.R. 478=1937 S. 174. But a declaration that a certain property is trust property in the award of arbitrations does not offend against law. 1937 Sind 174.

RESTITUTION OF CONJUGAL RIGHTS.—There is no provision of law which excludes a suit for restitution of conjugal rights from the purview of the Act. Though it is entirely within the discretion of the Court to grant or refuse to grant a decree for restitution of conjugal rights, there is no warrant for holding that such a suit does not come within the ambit of the Act and that such a suit cannot be referred to arbitration even when all the parties interested agree to have the dispute settled by arbitration. 152 I.C. 90=11 O. W.N. 1203=1934 O. 494.

PRIVATE REFERENCE.—Parties can refer disputes to private arbitration though a suit between them is pending. They need not apply to Court for the purpose. 33 I.C. 67=19 M.L.T. 328; 23 M.L.J. 290=16 I.C. 478. See also 27 A. 53. But see 30 C. 218 37 C. 63; 29 C. 167. But the same arbitration cannot relate to matters within and without jurisdiction between parties and non-parties and partly under agreement and partly under order of reference. 53 C. 258=53 I.A. 1=92 I.C. 633=1925 P.C. 293 (P.C.). Though some of the parties have not joined in the reference of the dispute to arbitration, the award does not become invalid or ineffectual as between the persons making the reference. The award is binding on them especially when it has been acted upon. 71 I.C. 860; see section 24, *infra*.

REFERENCE TO COURT.—When a suit is not maintainable under the law an agreement by a party to abide by the decision of the Court cannot be binding. 21 I.C. 958=19 C.W. N. 1141. The parties may appoint Court as arbitrator and if the Judge accepts, his award is final and is not open to appeal. 26 M. 76; 23 B. 752; 37 M.L.J. 100; though the Government orders prohibit such acceptance. 44 M.L.J. 258; 43 A. 266. See also 42 M. 625; 38 C. 421. In case of reference to Chamber of Commerce, Rules of the Chamber are binding on the parties. See 30 I.C. 681=42 C. 1140=19 C.W.N. 820.

SUBJECT OF REFERENCE.—"Matters in difference"—Meaning of. See 33 Bom.L.R. 51=130 I.C. 588. A portion of the claim under reference to an arbitration cannot be withdrawn without the consent of the other party. 46 I.C. 477=28 C.L.J. 275. The jurisdiction of Courts to refer to arbitration is confined to matters in difference in the suit itself. 14 L.W. 666=65 I.C. 92. An award under an invalid reference being itself invalid gives no rights either as an award or as a compromise. 14 L.W. 666. Where parties apply to Court to refer to the arbitration of a particular person the words used in the application should not be interpreted in a narrow sense but should be taken to mean that the parties are desirous of having the whole dispute settled by the arbitrator and therefore he could also award damages. 15 I.C. 321.

JURISDICTION.—Where jurisdiction to decide a particular matter is given by law to a specific tribunal only, determination of that matter



## NOTES.

by other tribunals is excluded. 1937 Sind 174. Where an appellate Judge properly seised of the appeal and competent to make the reference to arbitration, has made reference to arbitration the mere fact that the award directed that the sum payable by one party to the other was more than the pecuniary jurisdiction of appellate Court would not retrospectively, render all previous proceedings invalid. 190 I.C. 399 = A.I.R. 1940 Lah. 186. See also 1940 Nag. 191.

VALIDITY OF REFERENCE.—Validity of reference—Pending reference to High Court—Jurisdiction—No separate suit lies. 19 A. L.J. 876=44 A. 91. Award—Reference to three persons one of whom was authorized to report decision to Court—Statement filed by one, is an award. 1933 A.L.J. 149. The provisions of the section must be strictly complied with in order that there might be a valid reference. 25 C.W.N. 832. See also 60 I.C. 195=24 C.W.N. 775. Where a pleader signed a reference on behalf of a party but his vakalatnama did not contain a power to refer to arbitration, held, the reference was not valid so far as that party is concerned. 25 C.W.N. 832. Successive disputes as they arise may be referred, and successive awards passed. 60 I.C. 195=24 C.W.N. 775. To constitute a valid reference to arbitration it is enough if all the parties to suit interested in the subject-matter agree to the reference. 44 M.L.J. 359=17 L.W. 424=1923 M. 502. Not only the writing out an application to refer a pending suit to arbitration but the presentation of it must have the concurrence of all parties concerned. In other words, the parties interested must not only agree to refer the matter in difference between them to arbitration but they all must also apply to Court for making an order of reference. 142 I.C. 678=34 P.L.R. 247. High Court will not interfere in revision with an award on the ground that certain exonerated defendants were not parties to the reference when no such objection had been taken to the award in the Court below. 44 M.L.J. 359, *supra*. Absence of one of the arbitrators at one of the meetings at which, it is shown that nothing material was done, does not make the award invalid. 12 L.W. 505=60 I.C. 181.

REVOCATION OF REFERENCE.—It is within Court's jurisdiction on equitable grounds to restrain defendant from proceeding to arbitration when an action brought impeaches the instrument containing the agreement for reference. 70 I.C. 864=15 S.L.R. 5. Where parties have once agreed to a submission to arbitration the agreement is binding and enforceable and cannot be annulled except for some such reason as that the agreement had been obtained by fraud, coercion or undue influence. He cannot revoke it at his sweet will and pleasure. The fact that one of the arbitrators figured as a witness for the prosecution in a security proceeding

against the party is no ground for its revocation. 137 I.C. 198=1932 A.L.J. 331=1932 A. 348. See also 1932 All. 348; 1934 All. 95. It is not open to a party to an agreement of reference to revoke the submission to arbitration except for good cause. "Sufficient cause" is not confined to cases of fraud, coercion and undue influence. The fact that the arbitrator is related to one of the parties as the brother of his son-in-law does afford a real likelihood of an operative prejudice on his part, and the existence of such relationship with one of the parties unknown to the other disqualifies him from acting as an arbitrator. (1925 Sind 150, Rel. on.) 143 I.C. 635=1933 Sind 68. After agreeing to refer, either party has a *locus penitentie* to withdraw before the order of reference is made and he may take advantage of it. 142 I.C. 678=34 P.L.R. 247. See also 27 I.C. 424; 29 C. 278; 27 M. 112; 4 P.L.J. 394; 1933 Sind 68; 25 Cal. 141; 1937 A. W.R. 1083=1937 A.L.J. 1163. In order that a reference may be made all parties must join in the application to Court. It is not enough if the petition is signed by all. 17 P.R. 1911=9 I.C. 195. In selecting arbitrator good faith is essential. 1933 S. 68. In cases of arbitration where a person is appointed by two parties to exercise judicial duties there should be *uberrima fides* on the part of all parties concerned in relation to his selection and appointment and every disclosure which might in the least affect the minds of those who are proposing to submit their dispute to the arbitrament of any particular individual, as regards his selection and fitness for the post ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made. (25 C. 141, Foll.) 143 I.C. 635=1933 S. 68. The Commissioner merely submits his report for the approval of the Court and he has no greater power than what the parties and the Court choose to give him. 25 I.C. 227. Where the same matter comes before two tribunals, a public tribunal appointed by the Sovereign and a domestic forum chosen by the parties, and no order is made staying the proceedings either under section 19, Arbitration Act, or under Para. 2 of Sch. II, C.P. Code, before the one or the other, the public tribunal alone must decide that matter and cannot be hampered by any adjudication thereupon made by the private tribunal. Neither can that adjudication be pleaded as a bar to the action nor can it be allowed to affect the merits of the decision given by the public tribunal. Thus the effect of the institution of the suit is that all proceedings before the arbitrators subsequent to the institution of the suit are invalid. But if after the institution of the suit a party still wishes to proceed with the arbitration, his remedy is to apply for stay, which the Court will grant, unless there are weighty reasons to the contrary, leaving the parties to proceed with the arbitration from



## NOTES.

the stage at which the proceedings were on the date of the institution of the suit. A. I.R. 1937 Lah. 851. Where the parties to a suit presented an application saying that they were desirous of leaving the matter entirely in the hands of the presiding officer, and that they would be bound by whatever decision he should arrive at after making a local inspection. *Held*, (1) that although the word 'arbitrator' was used by the parties in their application, the agreement was no more than to abide by the decision of the Court, arrived at as the result of a local inspection, without recording any evidence, and there was nothing against the validity of such an agreement and that the parties did not mean to appoint the presiding officer as an arbitrator in the case, (2) that the provisions of Sch. II, C. P. Code, did not apply to cases in which the parties to a suit wanted to appoint the presiding officer of the Court, in which the suit was pending, as an arbitrator, (3) that it was not incumbent upon the presiding officer under the law to record notes of his local inspection. 166 I.C. 853=1937 O.W.N. 223=A.I.R. 1937 Oudh 224.

PARA. 3: MATTER IN DIFFERENCE.—When the order states that "all matters in difference in the suit are referred," the arbitrators should ascertain upon what points the parties are at issue. 2 N.W.P. 150; 33 Bom. L.R. 51. If Court wants to appoint an arbitrator in a pending suit it is bound to pass an order to that effect and fix a date for return of award and also for objections being filed. 1929 M. 789. After Court has, on the application of parties, referred a pending suit to arbitration, its power to further deal with the case is of a very limited nature, as for example, if there is no occasion to remit the award under section 16 and if a party's application to set aside the award is dismissed, Court can act, if at all, under section 15 to correct or modify the award. 1930 L. 26. Where reference to arbitration was made by the parties after the suit was disposed of by trial Court and before appeal was filed, *held*, that the award was immune from the objection that unless proceedings before arbitrators are stayed there might be a clash between the decision of the Court and of the arbitrators. The award is enforceable if appeal is subsequently withdrawn. 7 O.W.N. 815=1930 O. 432. Where a dispute is referred to arbitrators through Court, the scope of their enquiry is the scope of the suit itself as disclosed by the pleadings and they have no jurisdiction to extend it either as regards the subject-matter or the persons affected by it. Both the arbitrators who so exceed their duties and the Court itself which nevertheless passes a decree in terms of the award are acting in excess of their jurisdiction. 38 L.W. 927=1933 M. 862=65 M.L.J. 755. The decision of arbitrators upon a matter not in difference between the parties and not referred to them, is null and void. 15 W.R. 172. Arbitrators

have no implied power to deal with question of costs. 9 B. 82. *See also* 54 A. 122=136 I.C. 789=1932 A. 183 and section 38 *infra*. Court will not confirm an order made by arbitrators making payment of their fees a condition precedent to hearing their reference. 6 C. 809. On this rule, *see also* section 38 *infra*. 1929 B. 51=114 I.C. 262=30 Bom.L.R. 1588. Suit cannot be dismissed for default for plaintiff's absence on the day fixed for submission of umpire's report. 1937 Pesh. 49.

MAKING OF THE AWARD.—The word "making" has been instituted for the word "delivery" to give effect to the decisions in 22 M. 22; 26 A. 105. *See also* 13 B. 119. The parties to a partition suit made a statement in Court to the effect that three persons named by them should decide the case and that the case might be referred to them. They further said that any one of the three gentlemen might come to Court and state what was the decision arrived at by the three gentlemen to whom the case was referred. This was done and accordingly one of the three gentlemen appeared before the Court and made a statement on oath and he stated that he had consulted his other colleagues and had taken their signatures also on the written judgment. *Held*, that this was a reference to arbitration and that the statement of the person was an award and not merely a statement made under Oaths Act. 145 I.C. 403=1933 A.L.J. 149=1933 A. 313.

PARA. 3 (2).—Clause (2) has the effect of rigidly restricting Courts to the exact procedure laid down in this schedule. 10 B. 381. After a matter is referred to arbitration, the Court has no jurisdiction left to try the suit without superseding the arbitration or without setting aside the award on any of the grounds set forth in para. 15 (1) of Sch. II, C.P. Code. An order of Court setting aside an award and taking cognizance of the suit without coming to a finding whether or not any of the grounds specified in para. 15 (1) existed but merely on the ground that one of the parties applied to have the award set aside and the other did not object to it, offends both against that para. and para. 3 (2) of Sch. II and is consequently illegal. 1937 O.W.N. 1002=A.I.R. 1937 Oudh 507.

PRACTICE AND PROCEDURE.—Court has power to refer a question of jurisdiction, namely, whether the cause of action arose in one place or another, to the arbitrator. 54 A. 297=1932 A. 665. It is the duty of Court to appoint a date within which to make the award. 46 I.C. 324=5 O.L.J. 205. *See also* 13 A. 300; 18 M. 22. Where Court had fixed no time for making award but had fixed one for filing it, *held*, that the award filed before the latter date is not invalid. 20 I.C. 773=16 O.C. 233. *See also* 46 I.C. 324=5 O.L.J. 205; 37 I.C. 844. Where a matter is referred to arbitration, the Court has only to proceed according to the provisions of Sch. 2, or, in the alternative, to supersede the arbitration and then call on the



22. The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

Appointment of arbitrator.

23. (1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall in the order specify such time as it thinks reasonable for the making of the award.

Order of reference.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Act, deal with such matter in the suit.

24. Where some only of the parties to a suit apply to have the matters in difference between them referred to arbitration in accordance with, and in the manner provided by, section 21, the Court may, if it thinks fit, so refer such matters to arbitration (provided that the same can be separated from the rest of the subject-matter of the suit) in the manner provided in that section, but the suit shall continue so far as it relates to the parties who have not joined in the said application and to matters not contained in the said reference as if no such application had been made, and an award made in pursuance of such a reference shall be binding only on the parties who have joined in the application.

Reference to arbitration by some of the parties.

25. The provisions of the other Chapters shall, so far as they can be made applicable, apply to arbitrations under this Chapter:

Provision applicable to arbitrations under this Chapter.

Provided that the Court may, in any of the circumstances mentioned in

#### NOTES.

parties and act under the sections and rules embodied in the C. P. Code. The matter in suit was referred to arbitrators, and upon difference of opinion between the arbitrators, the parties agreed to abide by the opinion of an umpire. A day was fixed for the umpire's report but on that day the plaintiff was absent and so the suit was dismissed for default. *Held*, the Court could not dismiss the suit for default under O. 9, rule 8 on a day when the umpire was expected to file his report. 168 I.C. 866=A.I.R. 1937 Pesh. 49. Where costs incurred prior to reference to arbitration were also referred but arbitrators in delivering award did not deal with the question of costs, *held*, that Court could not subsequently deal with the question of costs because once the reference was made, Court became *functus officio* regarding that matter. 54 A. 122=1931 A.L.J. 1155=1932 A. 183. See new section 38, *infra*. Time for submission of award—Extension by arbitrators themselves—Propriety of. 27 C.W.N. 420=1923 C. 410. See now section 28, *infra*. Where the whole case is referred to the arbitrator and he is called on to decide all questions that were in dispute between the parties, the fact that the Court failed to frame issues noting the points in dispute between the parties and refer them specifically does not matter. 54 A. 297=1932 A. 665. The law gives parties the right to have the matter submitted to arbitration at any time before the judgment is pronounced. 24 I.C. 610. A party cannot resile from a reference to arbitration at his sweet will and pleasure. 17 O.C. 386=27 I.C. 424. See also 137 I.C. 198=1932 A.L.J. 331=1932 A. 348. If parties agree

that a reference be withdrawn and if the arbitrator also agrees, Court should supersede the arbitration. The fact that subsequently plaintiff and arbitrator reconsidered their previous resolve in concurrence with the defendants cannot revive the reference which has come to an end. Nothing short of a fresh agreement to refer can invest the arbitrator with power to decide the controversy between the parties. The authority of arbitrator, having been revoked by both the parties with his consent, cannot be reconferred upon him by only one of the parties and the Court. Any award made in such circumstances cannot be upheld as a valid award. 150 I.C. 222=1934 A.L.J. 473=1934 A. 95. By adding a new para. 2 to section 23, the legislature did not deprive the Court of all its powers over an arbitration proceeding under its order. On the other hand, the Court has jurisdiction, in a proper case, to grant leave to revoke an arbitration on good cause being shown, although such jurisdiction has to be exercised with great care and caution. 36 Bom.L.R. 827=1934 B. 388. The appropriate time for entertaining charges of misconduct against an arbitrator is when the award has been filed. 27 C.W.N. 420=1923 C. 410.

SECTION 24 is a new provision. It is possible that some parties only to a suit may be agreeable to having the differences between them settled by arbitration. This section will permit this to be done provided that those differences can be separated from the rest of the subject-matter of the suit. (*Statement of Objects and Reasons*).

SEC. 25 applies with necessary modification certain other provisions of the Act to arbitrations in suits.



sections 8, 10, 11 and 12, instead of filling up the vacancies or making the appointments, make an order superseding the arbitration and proceed with the suit, and where the Court makes an order superseding the arbitration under section 19, it shall proceed with the suit.

## CHAPTER V.

### GENERAL.

26. Save as otherwise provided in this Act, the provisions of this Chapter shall apply to all arbitrations.

Application of Chapter.

Power of arbitrators to make an interim award.

27. (1) Unless a different intention appears in the arbitration agreement, the arbitrators or umpire may, if they think fit, make an interim award.

(2) All references in this Act to an award shall include references to an interim award made under sub-section (1).

28. (1) The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.

Power to Court only to enlarge time for making award.

### NOTES.

CHANGES BY SELECT COMMITTEE.—“The alteration made is like that made in sub-clause (5) of section 20 for the purpose of applying to arbitrations under this chapter such provisions of the Act as may be properly applicable.” (*Rep. of Sel. Com.*)

SEC. 27 is a new provision, based on the 1934 Act of Parliament and conferring on arbitrators the power to make an interim award.

SEC. 28.—Under the 1899 Act the arbitrators or umpire can themselves enlarge their time for making an award, though it seems that they must do so before the time actually expires. Under the Code it is the Court which has this power. The clause proposes that the power should in all cases vest in the Court only, who may extend the time whether the time has expired or not or whether the award has actually been made or not.

CHANGES MADE BY THE SELECT COMMITTEE.—“We have revised sub-clause (2) so as to allow of provision being made in an arbitration agreement for enlargement of the time for making the award where all the parties consent to such enlargement.” (*Rep. of Select Committee.*)

POWER OF COURT TO EXTEND TIME.—Under the Act, the Court has power to extend the time though the time for making the award is over. The Appellate Court can extend the time under O. 41, R. 33 of C. P. Code. 40 C. 1059. See also 1935 Sind 30; 19 I.C. 374; 1926 Sind 8; 54 M.L.J. 49 (F.B.) (18 I.A. 55, Dist.); 1935 Lah. 191. Extension of time for making the award under section 12 of the Arbitration Act is a matter entirely within the discretion of the Court. There is nothing in the section to suggest that the Court should not exercise this power to extend the time unless it had been expressly asked by a party to do so. 1937 M.W.N. 518=45 L.W. 405=A.I.R. 1937 Mad. 405. Before extending the time the Court is bound to consider whether the case is a fit one for the

grant of the indulgence asked for and is not confined merely to the consideration of the question whether or not, the arbitrator had been diligent. 22 I.C. 16=8 S.L.R. 269. See also 78 I.C. 521. Appeal against order refusing extension of time, 46 C. 1059. When time is not extended and the award is not made within time, the award is worthless. 64 I.C. 706 (A.).

CASES UNDER OLD ACT, C. P. CODE, SCH. II, PARA 8.—The time for filing an award may be extended by Court either before or after the expiration of the period fixed for the making of the award. But the extension must be made before the award is delivered. 45 B. 1071=23 Bom.L.R. 614; 9 I.C. 241; 14 A. 343. See also 52 L.W. 537=(1940) 2 M.L.J. 481. The Court has power to extend time for the filing of the award even after the award had actually been made. I.L.R. (1938) 2 Cal. 482=42 C.W.N. 883. Where the arbitrator returned the papers to Court stating his inconvenience to proceed with the matter on the due date but he never declined to arbitrate, *held*, that Court had jurisdiction to send the papers back to arbitrator and extend the time. 54 A. 297=1932 A. 665. Application for extension of time must be made in writing. 3 M. 59. Power of extending time is permissive and discretionary, and the provision does not negative the right to extend time by agreement and acquiescence of parties. 50 I.C. 52=4 P.L.J. 265. An order of a Court permitting the arbitrator to enlarge time for making an award is not *ultra vires* and there is no objection to Court's delegation with consent of parties, functions regarding enlargement of time. 31 I.C. 597=19 C.W.N. 165. Such a consent would be inferred from the fact that the parties conducted the case and took a willing part in the proceedings before the arbitrator, though the date fixed for the filing of the award had expired. (50 I.C. 52 Foll.) 163 I.C. 380=1936 L. 466. Where Court leaves it to the discretion of arbitrator to complete the award within a reason-



(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

29. Where and in so far as an award is for the payment of money the Court may in the decree order interest, from the date of the

Interest on awards.

decree at such rate as the Court deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree.

Grounds for setting aside award.

30. An award shall not be set aside except on one or more of the following grounds, namely:—

#### NOTES.

able time and he does so, it cannot be said that there has been substantial miscarriage of justice merely because Court did not fix any time within which award was to be submitted. 163 I.C. 590=1936 R. 240. An award not delivered within the time fixed by Court is a nullity. 55 I.C. 221. But see 27 I.C. 233=18 C.W.N. 325. Award filed after the time fixed—Not a nullity. 34 I.C. 177=56 P.L.R. 1917. See also 52 I.C. 352. On an application for extension of time, Court is entitled and bound to take all the circumstances of the case into consideration, including allegation of misconduct of arbitrators, without deciding whether those allegations are true or not, and also whether any good could be gained by giving further time or whether the arbitration is to be superseded. 146 I.C. 1081=1930 P. 566. If arbitrators do not submit their award within time, Court may supersede the arbitration and proceed with the suit. 57 I.C. 890. When the Court without extending the time for submission of an award proceeded to deal with the suit, there was in effect an order superseding arbitration and no formal order to the effect was necessary. 21 I.C. 558=1913 M.W.N. 863. See also 5 P.L.J. 672=57 I.C. 473. An order of supersession should be made only at the expiry of the time fixed for the filing of the award and not at the stage of the reference itself. An order passed by Court in the middle of the hearing of a suit making a reference, and providing in anticipation that if the award is not filed by a particular date, the trial must go on that day, is not one in accordance with law. 44 L.W. 608=71 M.L.J. 648. Where an order of supersession was passed on the date fixed but the award reached the Court the same day after passing of the order the Court would be justified in setting aside its order of supersession. 17 I.C. 320=16 O.C. 94. Date fixed for filing of award—Non-appearance of parties—Dismissal of suit is bad. 3 Pat.L.T. 346=65 I.C. 144. Where parties submit their difference to arbitration, they cannot be allowed to revoke or withdraw from the submission except for very good cause. 48 I.C. 711=4 P.L.J. 394. Delay in making an award by the arbitrators caused by the voluntary absence of one of the parties who now seeks to impugn the award is not enough to justify the Court in refusing to file the award on the ground

C. C. M.—16

of delay. (*Ibid.*) See now section 28 (2). Where the arbitrators have made the award in time, but not filed it in Court within the time fixed, Court has ample jurisdiction to extend the time for filing it, which is merely a ministerial act. 152 I.C. 1068=36 Bom. L.R. 831=1934 B. 398.

SEC. 29 makes necessary provision as to interest when the award makes no provision therefor. It is based on a similar provision in the 1934 Act of Parliament (section 11). (*Statement of Objects and Reasons.*)

CHANGES MADE BY SELECT COMMITTEE.—“Instead of fixing by the Act the rate of interest which an award shall bear and enacting that interest shall run from the date of the award, we have provided in accordance with the analogous provisions in the Code of Civil Procedure that the Court may fix the rate of interest, but we have made the date from which the interest shall run the date of the decree.” (*Report of Select Committee.*)

SEC. 30 follows paragraph 15 of the Second Schedule to the Code in setting out the grounds on which the award may be set aside.

CHANGES MADE BY SELECT COMMITTEE.—We have omitted ground (b) which specified fraudulent concealment of a matter which ought to have been disclosed because we consider that this ground is adequately covered by the ground which now appears as ground (c) in the clause as revised by us. (*Rep. of Sel. Com.*)

CASES UNDER OLD ACT—C. P. CODE, SCH. II, PARA. 15.—An arbitration award cannot be upset except on the specific grounds given in the section. If this is not done, it could not be avoided by raising a plea that it had become infructuous. 1940 A. W. R. (B. R.) 16. The provisions of this section and section 17 are also applicable to appellate Courts. 10 A. 8. Objection on the very merits of the question adjudicated upon by the arbitrators is beyond the scope of this section. 7 Bom.L.R. at p. 797. No objection can be raised as to the form of the proceedings anterior to the reference or to the form of issue. 43 A. 305=19 A.L.J. 33. (*Per Sulaiman, C. J., Harries, J. and Iqbal Ahmad, J. contra*):—An objection to the validity of reference to arbitration comes within the purview of para. 15 of Sch. II, C. P. Code. 167 I.C. 99=1936 A.L.J. 1333=I.L.R. (1937) All. 317=A.I.R.



## NOTES.

1937 All. 65 (F.B.). An order on the objections to an award of an arbitrator should comply with the provisions of O. 20, R. 5 and the Court should state its finding or decision with the reasons therefor upon each separate issue. 1935 A.L.J. 309=154 I.C. 310=1935 A. 519. Paragraph 15 of Sch. II of C. P. Code does not provide for the Court setting aside an award in part only. The fact that the consequence of setting aside the award is an order superseding the arbitration is a strong indication that the whole award must be set aside. 1939 A.M.L.J. 15.

**OBJECTION WHEN TO BE RAISED.**—Objection to irregularity may be waived by party. 1 R. 15=74 I.C. 6=1923 R. 187. See also 119 I.C. 529=1929 S. 200; 27 A.L.J. 540=117 I.C. 361=1929 A. 521. A Court does not act without jurisdiction in passing an order superseding a reference to arbitration made by it on the ground that some of the arbitrators have since been discovered to be indebted to one of the parties, and proceeding with the trial of the suit, especially when its order is made without any protest from the parties. 179 I.C. 161=A.I.R. 1939 Pat. 170. Even where an award has been made by arbitrators whose powers have been revoked by cancellation of order of reference, the award is not void *ab initio* but has to be set aside. If no application is made to set aside the award, it remains in force and may be filed. 1941 M.W.N. 780=(1941) 2 M.L.J. 395. There is nothing wrong in parties agreeing to abide by the award of a majority of arbitrators even where one of the parties is a minor represented by a guardian. 114 I.C. 367=1929 M. 144; 9 P.R. 1913=16 I.C. 996; 51 I.C. 53=10 L.W. 57. Where the parties agree to be bound by the unanimous opinion of the arbitrators or by the opinion of the majority in case of difference, the Court has no power to force upon the parties the award of the umpire alone. 134 I.C. 30=1931 A.L.J. 906. Agreement not to object to award does not preclude parties from objecting on the ground of fraud or bad faith. 107 P.W.R. 1916=34 I.C. 192. The parties cannot raise objection to jurisdiction after having submitted to jurisdiction of the arbitrators. 42 A. 661=18 A. A.L.J. 644. Objection to be taken only in the trial Court, not in appellate Court. 36 A. 69=12 A.L.J. 57 (F.B.). Award when not binding on minor. 34 M.L.J. 71=45 I.C. 763. An objection that an award is vague and illegal, is itself a vague objection and does not deserve any consideration. 1941 R.D. 284.

**AWARD WHEN CAN BE SET ASIDE.**—An award cannot be set aside under this section on the ground of irregularity of the reference. 11 C.W.N. 1152. See also 1933 A. 294. Award should not be set aside on account of technical error. 91 I.C. 659 (2)=1925 R. 383. The same presumption which attaches to proceedings before a

Court of Justice should attach to proceedings before arbitrators. 18 A. 422 (F.B.). In case of an arbitration out of Court, an error in calculation, unless so palpable and gross as to afford strong evidence of misconduct, is no ground of interference by Court. Court has no power either to correct such errors or to eject an award which contains them. 133 I.C. 522=1933 M. 619=34 L.W. 507. Arbitrator having personal interest, unknown to one of the parties cannot act as such. 31 I.C. 597=19 C.W.N. 165. Award after supersession by Court can be set aside. 21 M.L.J. 263=9 I.C. 173 (F.B.). Award otherwise than in accordance with the order of reference is otherwise invalid, within section 15. 53 C. 258=53 I.A. 1=1925 P.C. 293 (P.C.); 50 A. 955; 34 C.W.N. 813. As to the meaning of the words "or otherwise invalid" 58 C. 629=35 C.W.N. 238; 52 C. L. J. 298. See also I.L.R. (1940) Kar. 22. An award cannot be set aside on the mere surmise that the arbitrator had been partial. 7 A. 273. Or on the ground that the arbitrator's decision is against the written statement of defendant. 7 W.R. 28. Award made out of time is not void but voidable. 50 I.C. 52=4 P.L.J. 265. When there is provision for extension of time, it is not sufficient ground for refusing to file the award. 55 P.W.R. 1919=51 I.C. 636. But where time has not been extended, an award given after time fixed in the agreement is not valid and binding on the parties. 1933 L. 173=145 I.C. 129.

**MISCONDUCT.**—If Court finds that the award of arbitrator has been arrived at by action which amounts to misconduct, the only course open to it is to set aside the award altogether. It is not empowered to sit in appeal on an arbitrator. It cannot disallow or set aside a part of it and pass an order dismissing the suit; it must supersede the arbitration and dispose of the suit on the merits. 1936 A.M.L.J. 54. "Misconduct" means neglect of duties or judicial misconduct; it does not necessarily mean moral turpitude. 9 A. 253; 30 C. 397. See 93 I.C. 446 (2)=1926 O. 307=1 Luck. 139; 1930 S. 103. "Misconduct" means misconduct in carrying out terms of reference. Acting beyond powers is acting without jurisdiction. 49 M.L.J. 529. Court has inherent jurisdiction to deal with allegations of misconduct of arbitrator, even though the award is not made. 146 I.C. 1081=1933 P. 566. Legal "misconduct" ensues where the arbitrator's or umpire's procedure is so irregular as to be opposed to the principles of natural justice. Where an opportunity is afforded to one side to get an advantage with the arbitrator over the other, either by lack of notice, or by the absence of the other side, and where there is even a remote possibility of the advantage so obtained unconsciously influencing the mind of the arbitrator, the proceedings are vitiated by a breach of the principles of natural justice. Where an umpire sends



## NOTES.

for one of the parties alone and asks him to sort the papers and re-arrange the records and to find out certain exhibits in the case for him, he is not guilty of misconduct, as the act is a mere ministerial act and does not vitiate the award of the umpire. 59 B. 268 = 155 I.C. 669 = 37 Bom.L.R. 69 = 1935 B. 127. There is a duty upon the arbitrator to disclose material facts which might reasonably be held to have prevented any of the parties to the arbitration agreeing to his appointment as arbitrator. An arbitrator failing to disclose such facts is guilty of misconduct. But the failure of an arbitrator to disclose the fact of his indebtedness to the father-in-law of one of the defendants would not amount to misconduct where the debt due by the arbitrator is an ordinary business debt. 4 A.W.R. 852 = 148 I.C. 1168 = 1934 A.L.J. 694 = 1934 A. 658. Perversity is misconduct. 14 I.C. 978 = 5 Bur. L.J. 55. Error of law, if misconduct. 42 A. 277 = 18 A.L.J. 241 = 58 I.C. 585. Not hearing parties is misconduct. 25 Bom.L.R. 392 = 1924 B. 149. Irregularities in procedure may amount to misconduct. 36 A. 336 = 12 A.L.J. 537 = 27 M.L.J. 181 (P.C.); 85 I.C. 424 = 1924 B. 149; 130 I.C. 833 (Taking third party's opinion). 130 I.C. 833 (Omission to examine necessary witness). 1930 M. 645 (Receiving evidence of one party in absence of other party). Where the terms of reference to arbitration do not authorize the making of private enquiries, an arbitrator making private enquiries, is guilty of legal misconduct. 4 A.L.J. 159; 20 A.L.J. 117 = 65 I.C. 779. See also 26 O.C. 107 = 74 I.C. 401; 10 I.C. 450 = 13 C.L.J. 399; 49 I.C. 303 = 9 P.W.R. 1919. But if the parties had expressly bound themselves to abide by his decision in whatsoever manner he might see fit to arrive at, he cannot be said to be guilty of such misconduct. 20 A.L.J. 125 = 64 I.C. 934; 29 O.C. 258 = 94 I.C. 162 = 1926 O. 383; 119 I.C. 529 = 1929 S. 200. Where certain proceedings were referred to three arbitrators and it appeared that the parties knew that arbitrators might be examined as witnesses and two of them were so examined subsequently each on one side, held, that the award and decree were not vitiated. 34 C.W.N. 689. There is no doubt that if the arbitrators use knowledge or information derived from other sources and if they fail to communicate to the parties what they so know and if the party making objection is prejudiced, the award would be invalidated. But where an arbitrator has been selected because of his personal knowledge of the matters in dispute, it would not be misconduct on his part to use his personal knowledge in coming to a certain decision, although in such cases it is desirable that he should tell the parties what his personal knowledge is and give an opportunity to them to adduce evidence sufficient to vary his views. 41 L.W. 104 = 1935 M. 152 = 155 I.C. 1059 = 69 M.L.J. 558. Where an

award has not been substantially affected by any knowledge or information possessed or obtained by the arbitrator and parties are not prejudiced by such an error on the part of the arbitrator, the Court will not interfere. 69 M.L.J. 558. An arbitrator should proceed in his investigation in a proper manner and take evidence in the presence of the parties. Whether his conduct amounts to "misconduct" so as to vitiate the award is a question to be decided by the Court. Simply because the arbitrator asks a person certain questions relating to accounts in the absence of parties, it cannot be said that he misconducts himself. 1935 P. 16. Where it appears from the award that the arbitrator in arriving at the decision was influenced by secret inquiry about the case made by him after recording the evidence and by the opinion of third persons about the merits of the case, his conduct amounts to judicial misconduct and vitiates the award. 1931 L. 111. Private enquiries when justifiable. 67 I.C. 866 = 1922 L. 480; 1936 A.M.L.J. 55; 1936 N. 291. The extent to which an arbitrator may seek outside advice upon matters of law is difficult to prescribe in general terms. Where the language of the award indicated no more than that the umpire took advice upon the general rules of law bearing upon the case and did not mean that he left to an outsider the burden of deciding any issue in the case instead of exercising his own judgment thereon, the umpire cannot be said to be guilty of misconduct and the case against him in this respect is not strengthened merely because the umpire in the exercise of his discretion refused to state a special case. 134 I.C. 1080 = 35 C.W.N. 1287 = 1931 P.C. 289 = 61 M.L.J. 623 (P.C.). See also 145 I.C. 329 = 1933 L. 538. Refusal to call witnesses produced by either party. 12 C.W.N. 569. The failure to hear the parties and, if necessary, their witnesses, unless absolved therefrom by the terms of submission amounts to misconduct on the part of the arbitrator within the meaning of Para. 15. 162 I.C. 772 = 1936 R. 191. See also 39 P.L.R. 582. Also hearing one side and declining to hear the other side. 27 M. 255; 9 A. 253. But when an arbitrator communicates the private information to the other arbitrators and parties who can check the information and contradict it, the award will not be vitiated. 41 M.L.J. 276. Examining witness in the absence of parties and making enquiries behind their back. 44 M.L.J. 263 = 73 I.C. 470; 8 L. 329 = 101 I.C. 153 (1) = 1927 L. 425; 1930 M. 646; 1936 N. 291. See also I.L.R. (1937) 2 Cal. 465. Examining the witness of one party in the absence of the other party is an irregularity which amounts to misconduct. 34 C.L.J. 39. See also 133 I.C. 522 (2) = 1931 M.W.N. 451 = 1931 M. 619. But such an irregularity can be cured by waiver. 1931 M. 619. Private communication with parties is misconduct. L.R. 3 A. 84.



## NOTES.

*Ex parte* procedure, if misconduct. 33 I. C. 467. Arbitrators when justified in hearing case *ex parte*. 47 C. 29=56 I.C. 325; 53 I.C. 337=13 S.L.R. 75; 27 I.C. 526=8 S.L.R. 136. Decision without taking evidence is fatal to the award in the absence of agreement that an arbitrator should decide a dispute on his own knowledge of the facts. 42 A. 185=18 A.L.J. 78=54 I. C. 443. See also 49 M.L.J. 115=1925 M. 1086. Delegation of functions is misconduct. 31 I.C. 33=22 C.L.J. 237. Just as a Court cannot be held to blame if it alters a rough draft of its judgment before pronouncing it, similarly an arbitrator cannot be condemned for altering what he had not finally decided and pronounced. Hence change of previous intention before the award is made is not misconduct. 158 I.C. 379=1935 L. 491. The absence of an arbitrator cannot be deemed to amount to misconduct, where it is clear that no business of a disputed character was gone into during the absence of the arbitrator and where the decision of the arbitrators is that of all the arbitrators. (2 C.L.J. 61, Rel. on.) 34 C.W.N. 689. Where the parties agreed that the case should be decided by three arbitrators, but the enquiry was made and the award given by two arbitrators alone, and where the parties never agreed to accept the decision of two arbitrators alone, held that the action of the two arbitrators in proceeding alone in such way was undoubtedly misconduct. 1936 N. 291. An award given without applying the mind to the question really involved in the case is not binding. 34 M. 453=38 I.A. 169=21 M.L.J. 1110 (P.C.). Leaking out of contents of award before pronouncement, when arbitrator had not taken any of the parties into his confidence would not constitute misconduct. 125 I.C. 552=1935 O.W.N. 582=1935 Oudh 349. Nor the writing of part of the award by a third party at the dictation of the arbitrator. 1935 O. 349. An arbitrator can conduct business in any way he thinks best and is not fettered by rules of practice or procedure obtaining in Courts. 13 I.C. 520=14 O.C. 308. See also 113 I.C. 785=1929 O. 1. Arbitrators can use their personal knowledge of trade usages. 41 B. 518=37 I.C. 271=18 Bom.L.R. 532. See also 28 Bom.L.R. 986=97 I.C. 673=1926 B. 527; 114 I.C. 367=1929 M. 144. But see 57 I.C. 604. In practice it is advisable that the arbitrator should acquaint the parties of his personal knowledge, so that the parties may alter his opinions by adducing evidence, if necessary. 28 Bom. L.R. 986=1926 B. 527. An honest admission of evidence in violation of rules of evidence is no ground for setting aside an award. 38 B. 60=15 Bom.L.R. 392. Admitting in evidence and absence of inquiry regarding legality of vouchers passed by minors, when not objected to by parties in the course of arbitration proceedings, would not vitiate the award. 164 I.C. 296=1936

L. 492. Nor refusal to summon witnesses cited by party. 39 I.C. 767. What is necessary in the case of arbitration is that once an arbitrator is appointed, the parties to the arbitration are entitled to insist that the arbitration should be proceeded with reasonable speed and if there is any unexplained or unreasonable delay, the parties will be justified in revoking the reference, and if the award is given after long delay, they will be entitled to ask the Court not to file the award. Unreasonable delay on the part of the arbitrator amounts to legal misconduct. I.L.R. (1940) Nag. 659=1940 N.L.J. 393=A.I.R. 1940 Nag. 386. When an award is set aside on the ground of misconduct, the Appellate Court cannot pass a decree in terms of the award. 4 A.L.J. 256. Failure of a party to disclose to the opposite party his relationship and monetary dealings with arbitrator amounts to fraudulent concealment, and would be good ground for setting aside award. 155 I.C. 522=1935 O.W.N. 582=1935 Oudh 349. Where the opposite party coming to know of such relationship omits to object to the arbitration in ignorance of his right to revoke, the omission does not operate as waiver, as there can be no waiver without full knowledge of one's legal rights. 1935 O. 349.

**AWARD OUT OF TIME—VALIDITY OF.**—The time fixed in the agreement for giving the award can be orally extended. But where the time has not been extended, an award given after the time fixed in the agreement is not valid and binding on the parties. 145 I.C. 129=1933 L. 173. In an arbitration under the orders of Court, it is sufficient if the award is made, that is, completed and signed by the arbitrators, within the time fixed by Court, it is not necessary that it should actually reach the hands of Court within such period to make it valid. There is nothing in C. P. Code, Sch. II, para. 15 to indicate that there is any necessity for the award being submitted or delivered or filed in time in order to maintain its validity. "Made" in the rules does not mean delivery, because "making" and "delivery" indicate different stages. 38 C.W.N. 784. The fact that an award has been filed beyond the period allowed by Court may be only a ground for setting it aside, and obviously, if not set aside, it is a valid award. And Court has jurisdiction to refuse to set aside an award, even where it is made after the expiration of the period allowed by it. The jurisdiction will be exercised on the ground of justice, equity and good conscience. 10 O.W.N. 1177=1933 O. 563.

**EXCEEDING TERMS OF REFERENCE.**—An award of the arbitrators travelling beyond the reference and not warranted by the terms of reference is unenforceable. 151 I. C. 338=1934 A. 117. Its validity can be challenged under this section. 1935 O.W.N. 1036=158 I.C. 11.

**EXCESSIVE COSTS AWARDED BY ARBITRATOR.**—An arbitrator who was asked to decide a suit was authorized to deal with costs as



## NOTES.

they would be dealt with by Court. The arbitrator dismissed the plaintiff's suit but under the circumstances of the case allowed him costs to the extent of Rs. 2,000 even though the ordinary costs in the suit were only about Rs. 100 and even though the plaintiff had not claimed any special costs either in the suit or before arbitrator. *Held*, that the part of the award dealing with costs was not separable from the rest and that the whole award should be set aside. 146 I. C. 439=27 S.L.R. 327=1933 S. 295.

ARBITRATOR FILING AWARD WHICH ONE OF THEM REFUSED TO SIGN.—The failure of one of several arbitrators to sign an award may have a different effect in different cases, but if one of the arbitrators withdraws from the arbitration altogether and refuses to co-operate with his colleagues, and they nevertheless proceed to give an award without his help, that must amount to misconduct. But if the arbitrators had arrived at a decision but merely waited to sign the award, and in the interval between the decision and the signing of the award, one of them changed his mind and refused to sign it, it does not necessarily follow that the arbitrators have been guilty of misconduct in framing the award and filing it in Court. 152 I.C. 929=1935 A. 90.

COMPROMISE BY PARTIES ACCEPTED BY ARBITRATORS WITHOUT SANCTION OF COURT.—Where a partition suit is referred to arbitration and the arbitrators accepted a compromise consented to by all the parties and by the guardians on behalf of the minors but without sanction of the Court under O. 32, R. 7, the absence of the Court's sanction does not render a decree passed on the compromise void, but only voidable at the option of the minor; and no other party can call it in question except the minor on attaining majority or before then through a next friend. But the very guardians, who had consented to it, cannot subsequently plead that their consent will not affect the right of the minors. (58 C. 628 and 29 C. 167, Ref.) 38 L.W. 927=1933 M. 862=65 M.L.J. 755.

ARBITRATORS TAKING FEES FROM ONE SIDE ONLY—OTHER SIDE UNABLE TO PAY.—It has to be emphasised that though the arbitrators in proceedings referred to them are entitled to payment of their fees in respect of the award they make, yet they should avoid altogether a method of collecting their fees which lays them to imputations of corruption, or at any rate, prejudice—however unfounded such imputations might prove to be on close examination. It is generally undesirable, not to say improper, for arbitrators to take money from one side only before the award is actually made. Such taking of money from one of the parties singly before the making of the award would be sufficient cause to set aside the award. Where the whole sum of money was in the first instance paid by one of the parties, but half of it was provided by way of accommodating the

other as the latter was unable to pay his half-share, and the latter did not object to this, and it also appeared from the minutes of the proceedings that the whole matter of payment of fees was one of mutual arrangement between the contending parties, it cannot be said that the arbitrators were guilty of misconduct or were influenced in their decision by the manner in which their fees came into their hands. Though it would have been wiser for the arbitrators, when one of the parties was not in a position to pay his share, to have proceeded and completed their award and then retained their award until such time as their fees were paid by the party in whose favour it was in fact made, the arbitrators are not guilty of such misconduct as would require the setting aside of their award. 38 C.W. N. 784.

REFERENCE OF CROSS-SUITS.—Agreement of parties that proceedings in one may be used to determine questions in the other—Arbitrators proceeding on that basis—Omission to set out issues—Award not invalid. 38 C.W.N. 784. It is only one Court, namely the Court which refers the case to arbitration, that should finally decide the question whether the award is invalid, not only for the reason specifically mentioned in cl. (b), but on other grounds also. 163 I. C. 380=38 P.L.R. 725=1936 L. 466.

CL. (c): "OR BEING OTHERWISE INVALID"—INTERPRETATION OF.—The grounds of invalidity of an award contemplated in Para. 15 (c) refer to those matters which apparently go to the root of the award and matters which merely pertain to procedure and have not been agitated before the arbitrator are not covered by it. 40 P.L.R. 972=1938 Lah. 604. The words "or being otherwise invalid" in section 16 (c) cannot be construed as being *ejusdem generis* with the two preceding grounds of invalidity. The legislature by inserting those words intended and provided that every ground upon which the validity of the award in law could be challenged should fall within the ambit of the section and could be relied on as a ground for setting aside the award. 12 R. 675=156 I.C. 414=1935 R. 94. There is nothing in the words "or being otherwise invalid" themselves or in their context to limit their operation to cases where an award is invalid only on the ground of something done after the reference and not before or in the reference itself. The words "or being otherwise invalid" include within their meaning questions relating to the validity of a reference. Hence it is open to the trial Court in considering objections to an award under para. 15 of Sch. II to consider and decide objections raised to the validity of the reference. It makes no difference if thereby a Judge may find that his own order of reference is invalid or find that he must thereby reconsider any previous order he has passed on this question. It also makes no difference if thereby the Judge must decide questions which affect



## NOTES.

his own jurisdiction. 183 I.C. 724=1939 Sind 241 (F.B.). The words "or otherwise invalid" occurring in para. 15 are comprehensive enough to include all kinds of objections. Where the objection that the arbitrator exceeded his powers in drawing an award, is not taken before the Court passing the decree upon the award under para. 15 of Sch. II, a separate suit will not lie to set aside the decree on that ground. 183 I.C. 79=41 P.L.R. 380=1939 L. 69. The last ground in cl. (c) is not to be taken *ejusdem generis* with the grounds mentioned before. It need not be some ground akin to corruption or misconduct of the arbitrator. 150 I.C. 222=1934 A.L.J. 473=1934 A. 95. A reference was made to arbitration in certain disputes between parties, but criminal proceedings were pending at the time of reference between some of the parties for non-compoundable offences and on application by a party, the District Magistrate withdrew the prosecution before an award was made. On an objection by a party that the award was illegal, one of the considerations being stifling of prosecution. *Held*, that as an independent and responsible authority, such as a District Magistrate, had intervened and discharged the duty imposed upon him by law, it could not be said that the fact that he acted on the request of one of the parties to a reference made that reference or the award upon it unlawful on the ground that the consideration was immoral or against public policy. 31 S.L.R. 8=169 I.C. 479=A.I.R. 1937 Sind 156. Where an arbitrator supplied the litigant appearing as a party before him with details of the claim against him and proceeded to give his award on the same day. *Held*, he should have given the party further opportunity to meet the case set up against him. But his failure to do so does not amount to judicial conduct, where the party has not been ignorant of the nature of the claim when he appeared before the arbitrator. Ordinarily a litigant appearing as a party before an arbitrator is entitled to know the details of the claim which has been preferred against him. 171 I.C. 361. An objection to the validity of reference to arbitration comes within the purview of cl. (c). 1936 A.L.J. 1333=1937 A. 65=167 I.C. 99 (F.B.) (1935) A.W.R. 1182=159 I.C. 441=1935 A. 1014 *overruled*.)

**APPLICATIONS TO SET ASIDE AWARD.**—An application to set aside an award falls within section 30 and does not include proceedings under sections 15 and 16. 1913 M.W.N. 338=24 M.L.J. 483. *See also* 10 P.L.T. 53=115 I.C. 680; 7 P.L.T. 644. No form is prescribed for an application to set aside award. 45 B. 1071=23 Bom. L. R. 614. Para. 15 (1) of Sch. II, C. P. Code, is imperative and takes away the jurisdiction of the Court to set aside an award on any ground other than those specified therein. Therefore an order of Court setting

aside an award merely on the ground that one of the parties applied to have the award set aside and the other did not object to it, offends against para. 15 (1), C. P. Code and is consequently illegal. 171 I.C. 172=1937 O.W.N. 1002=A.I.R. 1937 Oudh 50. When an objection was taken to referring Court's jurisdiction to entertain suit but no objections to award were filed by either of parties, the Court has no option but to give a decree in accordance with the award, and it is not open to either party to object to the validity of the award on any ground by appeal or by revision. A.I.R. 1937 Lah. 268.

**APPEAL FROM DECREE ON AN AWARD.**—An appeal lies on the ground that the so-called award was never delivered by the arbitrator and was in fact and in law no award at all. 29 A. 439. No appeal lies from a decree on the sole ground that the arbitrator was guilty of misconduct. 29 A. 457 (F.B.). *See also* 36 Bom. L.R. 1222; 45 A. 441=21 A.L.J. 326; 65 I.C. 50=15 S.L.R. 165=1922 Sind 1. No appeal lies against an order setting aside an award. 28 A. 408; 11 C. 172. But *see* 37 A. 456=13 A.L.J. 653; 34 I.C. 192; 15 I.C. 928=236 P.L.R. 1912. (Award can be restored by Court of appeal.) Appeal from order superseding award. *See* 55 I.C. 1. Judgment partly based on award and partly on findings of fact is appealable. 24 A.L.J. 705=96 I.C. 531=1926 A. 567. Where a decree is passed on an award and it is found that part of the decree was in excess of the award, that portion of the decree which has exceeded the award, cannot be supported in appeal and is liable to be set aside. 1941 R. D. 284.

**REVISION.**—An order setting aside an award on the ground of misconduct is not liable to revision. 26 B. 551; 6 O.W.N. 816=1929 O. 493; 34 Bom. L. R. 376=1932 B. 232. But *see contra* 27 A.L.J. 918=1929 A. 743; 51 A. 1010. *See also* 5 A. 293; 47 A. 916=1925 A. 566. As to finality of award, *see also* 17 O.C. 33=18 C.W.N. 426=27 M.L.J. 128 (P.C.); 27 A.L.J. 918=1929 A. 743. Where only some of the arbitrators take part in the hearing, but no objection is then taken and the merits of the award are not affected thereby, an order confirming such award is not open to revision on this ground. 38 L.W. 927=1933 M. 862=65 M.L.J. 755. Where the validity of an award is impugned on the ground that the arbitrator held his enquiry in the absence of the objector and the latter applies to Court to summon the arbitrator as a witness to substantiate his allegation, the refusal of Court so to do is not only a material irregularity but is an illegality and the order passed by the Court filing the award and passing a decree on its basis is improper. 145 I.C. 329=34 P.L.R. 397=1933 L. 538. *See also* 1933 O. 327. The object of this section is to give finality to a decree passed in accordance with the decision of the arbitrator. If the party concerned fails to impeach



## NOTES.

the award before the Court making the reference or if his objection to the validity of the award is disallowed and a decree is passed in accordance therewith, the award becomes final and the decree passed upon it is not open to appeal or revision. 152 I.C. 90=11 O.W.N. 1203. See also 1933 A. 924. If objection to an award is disallowed and a decree is passed on the award the award becomes final and the decree cannot be challenged either in appeal or revision. The interference in revision by the High Court is discretionary and such power should not be exercised in such cases. (1932 O. 156, Rel. on.) 10 O.W.N. 669=1933 O. 327. But the order made by the Court, where it has acted illegally or with material irregularity in the exercise of its jurisdiction, can be challenged by way of revision though not by way of appeal, whether the illegality or irregularity was committed before the reference to arbitration or after the receipt of the award. 167 I.C. 99=1936 A.L.J. 1333=1937 A. 65 (F. B.). Clause (c) shows that all objections against the validity of an award can be brought in the Court making the reference, the words "or being otherwise invalid" being wide enough to cover all kinds of objections to an award. When once a decree is passed in terms of an award, an appeal is not competent against the decree on the ground that the reference to arbitration was invalid as all the interested parties did not join in making the reference, and revision will be more objectionable than an appeal. 159 I.C. 1041=1936 O.W.N. 16; 163 I.C. 380=38 P.L.R. 725=1936 L. 466.

**RIGHT OF SEPARATE SUIT.**—Where the proceeding has assumed the character of a reference to arbitration it is governed by this Act and the party cannot institute a separate suit. It cannot be said that there cannot be arbitration proceedings until a valid reference has been made. Court has jurisdiction to entertain objections to the validity of the award and a separate suit for that purpose will not lie. The remedy lies under section 30. 32 Bom.L.R. 389. Where a power of attorney did not authorise the agent to refer to arbitration but nevertheless the agent referred a pending suit to arbitration and an award was passed, the principal who was not aware of the reference and came to know of it only after the proceedings were over, is entitled to institute a suit challenging the validity of the award. He need not file a petition to excuse the delay and urge his objections under section 30. 1933 M.W.N. 1475. When the question raised relates to the validity of the reference itself, the validity of an award following upon the reference can be challenged by a suit. The party so objecting is not bound to take proceedings under section 30. 1935 A.M.L.J. 89.

**LIMITATION.**—See section 37, *infra*. The Limitation Act is certainly applicable to arbitration proceedings but it does not ne-

cessarily follow that awards which have not been decided in accordance with the Limitation Act are on that account invalid. In any case, where the defendant raised no such plea before the arbitrators or in the subsequent negotiations and the violation of the law of limitation does not appear "upon the face of the award" there is no ground for setting it aside. 133 I.C. 522 (2)=1931 M. 619. See also 9 C. 36; 29 C. 106.

**CASES UNDER OLD ARBITRATION ACT (1899).**—See 38 Bom.L.R. 380=60 Bom. 645=1936 Bom. 259. The Courts will make every reasonable intendment in favour of an award being a final, certain and sufficient termination of the matters in dispute, and unless and until the contrary is shown, the Court will presume that the arbitrator has determined only such matters as were in dispute and were referred to him, and that the burden of proving that the arbitrator has awarded on matters not within the submission or has failed or omitted to award on matters which were within the submission lies upon the party who seeks to impeach the award. 174 I.C. 334=A.I.R. 1938 Sind 59. Section 14 of the Act applies not only in cases where there has been misconduct on the part of the arbitrators but it also applies to cases where the arbitration itself has been improperly or illegally procured. 1932 Lah. 378. See also 60 Bom. 645=1936 Bom. 259; 157 I.C. 607=41 L.W. 261=1935 M. 349=68 M.L.J. 537. The words of section 14 are sufficiently wide to cover an enquiry into and a decision on the question of the validity of the submission. As the basis of an arbitration is the submission, the improper procuring of an arbitration, which is covered by section 14 must include the question of the validity of the submission. 31 S.L.R. 55=169 I. C. 623=A.I.R. 1937 Sind 110. An objection alleging that consent to a submission has been obtained by misrepresentation would come within the purview of the section. 1930 S. 195. An objection that an award out of Court is invalid for want of jurisdiction may be taken by way of a notice of motion under section 14 of the Act and a separate suit is not necessary. 121 I.C. 760. The fact that an arbitrator fixed the damages for breach of contract at a particular figure though, in his opinion, there were no sufficient materials to assess the damages, is no ground for holding that there is an objection to the legality of the award apparent on the face of it. 122 I.C. 516. The arbitrators must in general have a wide discretion in selecting their method of valuation for purpose of compensation but where they have considered two methods and two methods only and have chosen one of these methods and have rejected the other, it becomes a question of law whether, having regard to their terms of reference their decision can be justified. 169 I. C. 562=A. I. R. 1937 P. C. 214. Where several persons joined to give one reference in very wide terms in favour of a set of arbitrators referring all the disputes to them arising out of



## NOTES.

different contracts which formed a chain of contracts between them and the arbitrators gave their award, *held*: that an objection to the award on the ground of multifariousness could not be taken under section 14 of the Act. 1930 S. 170.

WHAT AMOUNTS TO 'MISCONDUCT'.—"Legal misconduct" on the part of an arbitrator does not necessarily involve moral turpitude or dishonesty on the part of the arbitrator. It is misconduct in the judicial sense of the word and has been described generally to mean an erroneous breach of duty on the part of the arbitrator, however honest, which causes miscarriage of the justice. It has also been described as such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice. Misconduct is a question of fact in each case and has to be ascertained from the facts of the entire proceedings before the arbitrator. It really lies in the conduct of the arbitration proceedings and the onus of proof lies on the party who alleges it. If a material piece of evidence is tendered and rejected, it may amount to misconduct entitling a party to have the award set aside. 171 I.C. 470=39 Bom.L.R. 476=A.I.R. 1937 Bom. 410. The failure on the part of an arbitrator to give a reasonable opportunity to one of the parties to appear before him amount to *misconduct*. Misconduct does not necessarily involve any moral turpitude, dishonesty, partiality or bias on the part of the arbitrator. 1924 S. 132. An arbitrator who does not give a party an opportunity to put his case before him and does not decide all points of dispute, is guilty of legal misconduct. 41 C. 313. Where the arbitrators held their sittings for about 14 or 15 months and every opportunity was given to the parties to place their case before the arbitrators and to adduce their evidence, *held*: that the arbitrators are not guilty of misconduct in giving time to a party to produce their witnesses or in deciding the matter on such evidence as was placed before them. 1933 Sind 300. See also 12 Mys. L. J. 81=39 Mys. H. C. Rep. 263. It is imperative that arbitrators should always scrupulously avoid any course of action which even remotely bears the completion of their having put themselves into a position where it might be said against them that they had received a pecuniary inducement which might have had some effect on their determination of the matters submitted to their adjudication. They ought altogether to avoid a mode of collecting their fees which might lay them to imputations of corruption or prejudice—however unfounded such imputations might prove on close examination. 38 C.W.N. 784. The failure of an arbitrator to sign the award is legal flaw, but when his refusal to sign was at the instance of one of the parties though he had agreed to the award, that party cannot take advantage of the flaw. 20 A.L.J. 392. Arbitrators not acting to-

gether—Award not legal. 74 I.C. 299. See also 2 Bur.L.J. 229=1924 Rang. 153; 1930 Cal. 255; 65 I.C. 339=1922 Oudh 108; 30 I.C. 384. Award is vitiated by the legal misconduct of the umpire, if he proceeds with the reference without giving any notice to the parties of the enquiry by him. 70 I.C. 353=16 L.W. 657=1923 Mad. 232. An award given in the absence of one of the parties and without any notice as to the time or the place where the arbitrators would sit to decide the dispute is illegal. 65 I.C. 577. See also 13 C.W.N. 63. Failure of umpire to take fresh evidence. 27 C.W.N. 601. Irregularities in procedure which amount to no proper hearing of the matters in dispute may amount to misconduct enough to vitiate the award. 66 I.C. 349=34 C.L.J. 39. An award passed on reference by a guardian and based on information received in the absence of the parties or on the arbitrator's own knowledge of the facts in regard to the matters in issue between the parties would be invalid. 44 M. L.J. 263. But parties who are *sui juris* may agree to a reference that the arbitrator shall decide the dispute on his own knowledge or that there is no need for him to take any evidence: and they will be bound by such a reference and no legal misconduct can be imputed to the arbitrator, if he based his award on such materials. (*Ibid.*) See also 42 All. 185. Where arbitrators have allotted through error of judgment an asset of uncertain and fluctuating value upon the basis of a gross over-valuation, to one branch of the family instead of to all the branches according to their respective shares, this does not amount to misconduct within the meaning of the law of arbitration. 184 I.C. 553=1939 Cal. 500. Award—Criminal complaint of misappropriation—Disputes between parties referred to arbitration—Criminal Court not compounding case—Award acquitting accused holding that there was no misappropriation not valid. 176 I. C. 490=1938 S. 130. Where it is alleged that there was a submission of a specific question of law, it must be such that it can be fairly construed to show that the parties intended to give up their rights to resort to the King's Court, and in lieu thereof to submit that question to the final decision of a tribunal of their own. Where circumstances are not such, then the Court is entitled to interfere with the decision of the arbitrator. I.L.R. (1938) 2 Cal. 349=A.I.R. 1938 Cal. 705.

OBJECTIONS TO AWARD.—Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought no doubt to be taken by motion to set aside the award: but where it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought, for that purpose. 50 C. 1=44 M.L.J. 758=49 I.A. 366 (P.C.). An award which goes beyond the terms of the reference would be set aside. 1937 Cal. 341. Order that arbitrator should make a



(a) that an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;

(c) that an award has been improperly procured or is otherwise invalid.

31. (1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.

(2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed, and by no other Court.

(3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed, and to no other Court.

#### NOTES.

physical partition—Award directing sale of property and diversion of sale proceeds not good and would be set aside. 1938 Sind 59. Where an award by arbitrators is based on grounds, some of which did not justify the exercise of their jurisdiction, and the Court cannot hold with certainty that the arbitrators were exclusively within their jurisdiction the award is null and void. 66 I.C. 342=34 C.L.J. 253. As to objecting to award on the ground of incompleteness or indefiniteness of the award, see 1930 Lah. 425 and cases referred to therein; see also 1930 I.C. 110=59 M.L.J. 336 (P.C.). An award by umpire—Appeal to Board of Directors under bye-law—Composition of Board changing from time to time during hearing—Validity of award. See 36 Bom. L. R. 1005=1934 Bom. 476.

AWARD WHEN CAN BE SET ASIDE.—The Court never sits in appeal from the award of an arbitrator. Its function is to see whether the grounds of misconduct alleged have been strictly proved. In order that the Court may set aside the award on the ground of irregularities in the proceedings, the irregularities must be of such a nature as to amount to no hearing at all. Parties cannot get out of an award upon objections which do not affect the substantial justice of the case. 171 I.C. 470=39 Bom.L.R. 476=A.I.R. 1937 Bom. 410. A party to an arbitration can get an *ex parte* award passed against him set aside by a Court if he shows sufficient cause for non-appearance. 27 I.C. 135 (2). See also 29 Bom.L.R. 1087. The Arbitration Court has exclusive jurisdiction to adjudicate on matters arising under section 14. 76 I.C. 953. Where an agreement to refer to arbitration is impeached, an injunction may be issued to restrain arbitration proceedings. But when the agreement is not impeached, and a suit covering the matter referred to arbitration is pend-

ing, injunction ought not to be issued. 9 I.C. 707. The principles under which the validity of an arbitration should be judged are more rigid than those which apply to a case of family agreement. Where the parties to it were under a misapprehension as to their legal position and right, the award is bad. 2 Pat. 554. Where charges of misconduct and corruption are levelled against an arbitrator, he should be given an opportunity to explain, the charges being put fairly and squarely before him. (113 I.C. 360) and the onus is upon the party to prove the charges. 64 I.C. 706 (All.) In case of an agreement to allow the disputes to be tried by another tribunal, the Court will take into consideration all those grounds as in a case of submission to arbitration. 15 S.L.R. 88. Setting aside award for patent error of law, see 1924 S. 75; for collusion, 46 M.L.J. 334 (P.C.). Error of law or fact by itself no ground. 3 Pat. 443. Nor is the fact that the award is not in accordance with the law of limitation a sufficient ground for setting the award aside, when party took no objection at the time. 1931 M. 619. An agreement that neither party shall take objection to the award or file an appeal cannot control the unrestricted discretion vested in a Court by a statute to set aside the award when it is sought to be filed. The question is not whether a party shall be compelled to carry out the terms of the contract but whether the Court would be exercising a proper discretion in conferring on the award the efficacy of its own decree. 42 I.C. 706.

SEC. 31.—Sec. 31 deals with jurisdiction. It provides that all the matters relating to a single reference shall be before the same Court, and that where there is a choice of forum, it shall be determined by the first application made to a Court in relation to a reference. (*Statement of Objects and Reasons*.)

CASE UNDER THE OLD ACT.—Though section 2, Arbitration Act (1899) does not expressly



(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court.

32. Notwithstanding any law for the time being in force, no suit shall lie on Bar to suits contesting any ground whatsoever for a decision upon the existence of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act.

33. Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits: Arbitration agreement or award to be contested by application.

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.

#### NOTES.

refer to the provision of the law contained in section 16, C. P. Code, the implication is obvious when it states where the suit could be instituted. Where mortgaged property which was involved in the award is situated at Sialkot, the Court of the District Judge at Amritsar has no jurisdiction to make an order filing the award, inasmuch as if the subject-matter submitted to arbitration were the subject of a suit, the suit could not be instituted at Amritsar. 178 I.C. 240=40 P. L.R. 598=A.I.R. 1938 Lah. 226.

SECS. 32 and 33.—Secs. 32 and 33 provide that an arbitration agreement or award shall be contested only by application and not by suit. This proposal was made by the Civil Justice Committee and is in consonance with the general principle that the law of arbitration should provide a simple, speedy and cheap settlement of differences. (*Statement of Objects and Reasons*.)

Having regard to section 32 of the Arbitration Act, 1940, a suit for a declaration that a certain contract containing an arbitration clause is by way of gaming and wagering and as such void and for an injunction to restrain the Tribunal of Arbitration from proceeding with the arbitration is not maintainable. The proper procedure is to make an application to the Court under section 33 of the Act to be decided on affidavits, or on other evidence if deemed expedient by the Court. 45 C.W.N. 881=A.I.R. 1941 Cal. 527.

SEPARATE SUIT WHEN CAN LIE CASES UNDER OLD ACT.—A person dissatisfied with an award, made without the intervention of a Court of justice, is entitled to bring an action to set it aside on the ground that no contract providing for a reference to arbitration was made or that the contract if made was cancelled before the reference in favour of the arbitrator had been executed. 81 I.C.

782=1924 S. 25. Where a party to an award has not merely signed it as an award but understood it, agreed with it, accepted it and acted on it, and took possession of the property dealt with in it, he is estopped from challenging it. It is not open to the Court to go into evidence which has for its object the impugning of that award. (24 A. 164, foll.). I.L.R. (1937) Nag. 449. It is not open to a party to move a Court to set aside an award only on some of his objections and to reserve other objections falling within the scope of section 14 for a separate suit. The principle of constructive *res judicata* in section 11, Expl. IV, C. P. Code, will apply. 76 I.C. 953. There is no appeal against an order refusing to set aside an award. 17 I.C. 902; 1922 C. 73. Where an award is challenged on the ground that there was no submission to arbitration by the parties, the remedy lies in regular suit and not in an application under section 14. 47 C. 806. See also 32 Bom.L.R. 389. Where a party objects to a reference and award on grounds which go to the very root of the reference, it is open to him to file a suit to set aside the reference and award. 1930 S. 170; 31 C.L.J. 283=56 I.C. 541=24 C.W.N. 454. Award is no bar to a suit is not stayed under para. 18, C. P. Code, Sch. II or section 19 of this Act. See 1926 Sind 86. When an award under the Act has been made and filed, a party affected thereby can maintain a suit to impeach it on grounds not included within section 14. Law does not permit the same question to be decided by a Court of law as well as by an arbitrator and it is only when the dispute before two tribunals is identical that the decision given by the arbitrator must be treated as *ultra vires*. But where the dispute before arbitration and Civil Court is not the same the jurisdiction of the arbitrator is not ousted. 117 I.C. 74=1929 Lah. 564. A suit to set aside an



34. Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and

## NOTES.

award made by an arbitrator on a reference by the Registrar of Co-operative Societies on the ground of a patent error of law on a question of limitation, is maintainable. 1940 Rang.L.R. 739. The dispute between A and B regarding boundary line between two territories was referred to arbitration. The agreement referring the dispute to arbitration was contained in a document written in English. A who was ignorant of English affixed his mark to the document which was not explained to him so as to make him understand its true import. *Held*, that the award was not binding on A and was no bar to the subsequent suit by A against B regarding the same cause of action. 170 I.C. 423=A.I.R. 1937 P.C. 274 (P.C.).

SEC. 34.—Sec. 34 deals with the staying of a suit where a reference concerning the subject matter of the suit and between the same parties is pending. It continues the existing law contained in section 19 of the 1899 Act and paragraph 18 of the Second Schedule to the C. P. Code. (*See also* Notes under C. P. C. Sch. II para. 18).

One A was appointed the medical referee of an insurance company under a written agreement which provided that A should diligently and faithfully examine medical reports submitted to him by the company. It was also provided that the company would be entitled to terminate the agreement in case of gross negligence of work on the part of A. Lastly, there was an arbitration clause which provided that any dispute arising between parties concerning their rights, liabilities or duties under the agreement would be referred to arbitration. Subsequently the company charged A with gross negligence in respect of a medical report and terminated his services. A thereupon brought a suit for remuneration and damages for the wrongful conduct of the company. *Held*, that as A was suing for his rights under the agreement and for the damage he had suffered owing to the wrongful termination of it before its expiry, the company had the right to have the suit stayed under section 34. 1941 Cal. 503.

SEC. 34. CASES UNDER OLD ACT—C.P.C. SCH. II, PARA. 18—SUIT IN CONTRAVENTION OF AGREEMENT.—Court can stay such suit. 61 I.C. 322; 66 I.C. 43=2 L. 335=1922 L. 353; 2 L. 19=60 I.C. 776; 39 I.C. 508=92 P.R. 1913; 68 I.C. 235=25 O.C. 63=1922 O. 158. There is a complete machinery under the C.P. Code for enforcing the

agreement of parties to refer a matter in dispute between them to arbitration, and once the machinery is provided the choice to have the dispute so settled by arbitrators is left to the parties. If any party who has contracted to settle a dispute by arbitration backs out of it and institutes a suit in disregard of that contract, the Court is given the discretion to stay the suit at the instance of the other party. But if neither party wishes to resort to arbitration, the ordinary Courts of law have jurisdiction to decide the matters in dispute between them. It cannot therefore be said that a suit is not maintainable at all. If one party institutes a suit it is open to the other party if he wants to bind the plaintiff to his contract for having the matter settled by arbitration, to apply to the Court for stay before the settlement of issues. When he does not do that, he cannot in appeal object to the decree passed against him on the ground that the suit is not maintainable as being in violation of the arbitration clause in the contract. 17 Pat. 293=1938 P.W.N. 138. *See also* I.L.R. (1940) Bom. 249=4 Bom. L.R. 1293=1940 Bom. 93. The power vested in a Court to stay a suit is purely discretionary and can be exercised only on an application made for that purpose by one of the parties to the suit at or before the settlement of issues. 22 I.C. 811=92 P.R. 1913; 68 I.C. 235=25 O.C. 63. *See also* 1930 M.W.N. 1028. Discretion should not be exercised unjudicially or capriciously. 1937 L. 20.. The existence of the award is a complete bar to the suit until the award is set aside by a Court of competent jurisdiction. 57 I.C. 894. An award extinguishes all claims embraced in the submission and afterwards furnishes the only basis on which the rights of the parties can be determined, and constitutes a bar to any action on the original demand. 25 I.C. 220=7 Bur.L. T. 308. In case of an agreement to allow disputes to be tried by another tribunal, Court will take into consideration all those grounds as in a case of submission to arbitration. 15 S.L.R. 88. Where after a reference to arbitration one of the parties brings a suit against the other and the latter deliberately refrains from applying for stay of the suit he must be deemed to have waived his right to arbitration. 44 A. 292=20 A.L.J. 128. A party to an agreement to refer a dispute to arbitration is not debarred from bringing an independent suit on



that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.

## NOTES.

title. 24 I.C. 490=12 A.L.J. 757. This section does not apply if an order for stay of a suit is vacated owing to the refusal of one of the arbitrators to act and the suit is proceeded with. 50 I.C. 879=23 C.W.N. 293. Where in spite of an agreement to refer to arbitration the plaintiff filed the suit and one of the arbitrators refused to act, *held*, that the plaintiff was entitled to a removal of the stay. The suit was not barred by the agreement to refer to arbitration. 64 I.C. 289=23 Bom.L.R. 511; *see also* 60 M.L.J. 676. Where a suit has been stayed the Court must first remove the stay order before reviving the suit. 171 I.C. 625=1937 Sind 247. Suit in contravention of agreement to refer dispute to arbitration—Suit not stayed—Award during its pendency—Validity. 157 I.C. 867=1935 L. 916. Proper course of the party relying on award. (*Ibid.*) Agreement to refer to arbitration after institution of suit. If adjustment within the meaning of O. 23, r. 3—Stay of suit. 38 B. 687=16 Bom.L.R. 653. When parties have deliberately made contracts with an arbitration clause and chosen to select their own *forum*, there is *prima facie* duty upon Court to respect the agreement. If difficult questions of law are likely to arise such as would inevitably entail a special case being prepared and reference to Court made by an arbitrator the Court may in the exercise of its discretion refuse to stay. So also, if a question of law would arise which is clearly outside the purview of the arbitration clause and other questions though within it, are so intimately connected with the prime question that a more convenient course would be to try the whole action in Court, a stay may be refused. Stay refused in the particular case. 58 C. 1107=35 C.W.N. 514=53 C.L.J. 321=1931 C. 772; *see also* 70 C.L.J. 148=43 C.W.N. 879. Where a contract between plaintiffs and defendants, providing for reference to arbitration in case of disputes arising out of the contract, is impeached by a suit by the plaintiffs on equitable grounds, arbitration proceedings which had commenced should be stayed pending the disposal of the suit. 46 I.C. 173=22 C.W.N. 535; *see also* I.L.R. (1939) 2 Cal. 181=43 C.W.N. 879. The fact that a small portion of the relief claimed is not within the scope of the arbitration clause is not in itself a sufficient reason for refusing to stay proceedings where the main subject of the action is within the clause. 58 C. 1107=134 I.C. 529=35 C.W.N. 514.

The stay of a suit under para. 18 of Sch. II, C.P.Code, as also under section 19 of the Arbitration Act is made by the

Court only with a view that the parties may go to arbitration in accordance with their agreement. The stay of a suit will have, therefore, to be refused if there could not be an arbitration at all. An arbitration pre-supposes a dispute or difference between the parties and if no dispute or difference arises before the institution of the suit, there is no occasion for an arbitration, and a pending suit between the parties ought not to be stayed in such cases. I.L.R. (1939) 2 Cal. 181=70 C.L.J. 148=43 C.W.N. 879; *see also* 42 P.L.R. 48=1940 Lah. 180. The fact that a defence was raised in the written statement that under the agreement between the parties, the parties are bound to appoint arbitrators is not tantamount to an application for stay under para. 18, but is only a defence to the suit. 1938 Mad. 205=(1938) 1 M.L.J. 38. Although a Court has a discretion to stay or to refuse to stay a suit under para. 18, Sch. II, C.P.Code, it is its duty to act upon the agreement to refer to arbitration unless it sees sufficient reason why the dispute should not be referred. Where the lower Court held that there was no valid submission and that there was no contract regarding arbitration between the parties and in its discretionary power did not stay the suit. *Held*, that it could not be said, that the lower Court exercised its discretion in an unjudicial manner or capriciously. 39 P. L. R. 423=A.I.R. 1937 Lah. 206. Where the Court refers the suit to arbitration in accordance with the agreement between parties to refer to arbitration under para. 18 of Sch. II, C.P.Code, an order adjourning the suit *sine die* is not proper and the proper order is to adjourn the suit for a definite period. 177 I.C. 440=1936 M.W.N. 1124 (2)=A.I.R. 1938 Mad. 205=(1938) 1 M.L.J. 38. The provisions of para. 8, Sch. II of C.P.Code, the mandatory and an application under that section for stay should be made at the earliest possible opportunity. Where a suit was filed in August, 1933, and the issues were framed in December of that year, but an application to stay the suit was put in only in 1936 and that at the instance of the Court. *Held*, that it could not be said that the provisions of para. 18 of Sch. II of the C.P.Code have been complied with. 1938 M. 205=(1938) 1 M.L.J. 38.

APPLICABILITY: CASES UNDER SEC. 19 OLD ARBITRATION ACT (1899).—The section does not apply when there is no dispute between the parties, and the mere failure to pay what is admittedly due does not amount to dispute. 1931 B. 164. Where a party to a contract containing arbitration clause brings a suit to impeach the validity of that



## NOTES.

clause it is not a suit in respect of "any matter agreed to be referred to arbitration" and so the section does not apply. 58 I.C. 790 (S.); 61 I.C. 141 (S.). Before the jurisdiction of a Court to make an order for stay under section 19, can be invoked, it must be established beyond doubt that there is a valid submission. It cannot be said that an arbitration clause is an ordinary incident of a contract for the sale or purchase of goods, and such a clause cannot be incorporated into a contract by reference to another contract between one of the parties and a third party. 38 C.W.N. 737=61 Cal. 702=1934 Cal. 796; *see also* 41 C.W.N. 563; I.L.R. (1940) Bom. 249=41 Bom. L.R. 1293=1940 Bom. 93. Where a party seeks to avoid the contract for reasons dehors it the arbitration clause cannot be resorted to by him. In other words a party cannot rely on a term of the contract to repudiate it and still say the arbitration clause should not apply. 53 Bom. 573. If in consequence of misrepresentation or other circumstances the clause for reference is invalid, if there is a binding contract at all between the parties, such questions do not constitute disputes arising out of a contract so that when such questions are raised in a suit, section 19 has no application and the Court has no power to stay. 82 I.C. 81 (S.); 44 All. 472 at 480; but *see* 24 C.W.N. 567; 41 C.W.N. 563.

MEANING OF TERMS.—Where an arbitration clause in a contract provide for a reference to arbitration of any dispute whatsoever arising in or out of the contract the question whether there has been an interpolation in the terms of the contract falls within the arbitration clause and must be decided by arbitrators. Consequently a suit is not maintainable on that ground. A.I.R. 1941 Cal. 415. Where a contract contains an arbitration clause and one party to it alleges breach by the other of its provisions and claims to have rescinded the contract on that ground, the dispute is one arising out of the agreement. If, therefore, the other party brings a suit against him in respect of the contract, he is entitled to an order under section 19 of the Arbitration Act staying that suit. 45 C.W.N. 984. The expression "after appearance" in S. 19 is merely directory and the section is intended to prevent a party from filing an application after he had attorned to the jurisdiction of the Court. 48 I.C. 434 (S.). An appearance for the purpose of making a stay application may be treated as an appearance in the suit. (*Ibid.*) An oral application for the time to file a written statement by defendant's counsel in answer to a Court's question is taking a "step in the proceedings" within the meaning of section 19. 28 C.W.N. 771=1924 Cal. 789. Any application to the Court, even one for time is a "step in

the proceedings" within section 19. 40 I.C. 81 (S.). But merely applying for a copy of plaint is not. 52 Cal. 453. Having regard to the provisions of O. 5, r. 2, C.P. Code, a proceeding must be taken to have commenced within the meaning of section 19, Arbitration Act. only when the defendant is supplied with a copy of the plaint and the fixing of time by the Court for filing a written statement when the defendant has been supplied with a copy of the plaint cannot, in any sense, be regarded as a step taken by the defendant in the proceedings inasmuch as time for filing the written statement is necessarily given by the Court. A. I.R. 1941 Lah. 64.

BURDEN OF PROOF.—When a suit is filed in connection with a dispute, the *onus* is on the plaintiff to show why he should not be bound by the agreement to refer. 75 I.C. 1041=1924 S. 49; *see also* 47 Cal. 849; 44 C.W.N. 607; 1940 Lah. 186. The burden of proving that a particular dispute cannot be referred to arbitration lies on the party alleging it. 53 Bom. 271. Where a defendant does not plead at the early stages of a trial a subsisting agreement to refer to arbitration but submits to the jurisdiction of the Court and allows the trial to proceed, he cannot afterwards raise the plea. 20 A. L.J. 975=71 I.C. 144=1923 A. 139.

COURT EMPOWERED TO STAY.—The "Court" means the Court trying the suit and not the District Court. 1928 Bom. 275; 1931 Lah. 66; 1931 Lah. 644; 1931 Sind 106. "The Court in section 19 means the Court seized of the case, where such Court, be a High Court or a District Court, or any other Court, of inferior jurisdiction, such as the Court of Small Causes or a subordinate Court. It is that Court which is in a better position to know and to decide expeditiously whether the application for stay has been filed after appearance in Court and before taking any step in the proceedings. (Case-law reviewed.) 1933 Sind 376 (F.B.); 150 I.C. 839. Court in section 19 of the Act is the one in which the proceedings or other attempts to bring a suit are in fact. 43 All. 553.

STAY.—The Court is vested with a discretion either to stay or not to stay the suit; but the discretion must be guided by judicial principles. 75 I.C. 1041=1924 S. 49; 43 C.L.J. 297; 54 Bom. 197; 56 C. 848; 55 I.C. 817 (C.); I.L.R. (1940) 2 Cal. 26; 1941 Cal. 503. As to what must be proved by an applicant before granting his application for stay *see* 1928 Sind 94. There can be no stay of proceedings under section 19 when there is no "submission" in the true sense of the word. A submission to arbitration, which deprives a party of his right under the law to have his disputes decided by a Court of law, must be construed strictly; and unless it clearly appears from the terms of the submission that a party has



## NOTES.

so deprived himself no stay should be granted. Stay ought to be refused in a case where the tribunal contemplated by the parties has irrevocably committed itself to certain views. 28 S.L.R. 223=1934 Sind 200. Where legal proceedings were for a long time threatened against a person in respect of a contract which provided for all settlement of disputes by arbitration, and when instituted that person applied for a stay of suit pending arbitration he can claim it as a matter of right. His failure to object to the litigation is no ground for refusing stay. 45 M.L.J. 653=47 Mad. 164. Stay of suit pending arbitration—Discretion of Court—Charges of fraud. 22 A.L.J. 1031; see also 1937 Lah. 851 (allegations of fraud misrepresentation and coercion. Stay of suit cannot be ordered after award is filed. 1940 Lah. 265. An order staying a suit is a permanent one unless otherwise provided in the order itself and an order staying suit where the subject-matter was referred to arbitration and a decree was passed in terms of the award is sufficient to finally dispose of the suit. 43 All. 270; 43 All. 533. See also 47 Cal. 849; 1940 Lah. 265. The case would be different if by a reference and award before the suit the rights and liabilities of the parties had been determined at the date of the suit. 47 Cal. 752; 56 I.C. 160. Institution of suit after reference to arbitration by one of the parties and omission on the part of the other to apply for stay of suit amounts to waiver of right to arbitration. 44 A. 292. Provision for reference to two arbitrators—One arbitrator to be named by each party—No provision in case of the refusal by a party to nominate—Suit by party who has not nominated—Stay of suit can be granted. 107 I.C. 434=1928 Sind 94. See also 1935 Sind 62=155 I.C. 895 (Refusal of stay—Charge of fraud and forgery, if and when sufficient cause). See also 1937 Lah. 851.

**"STEPS IN THE PROCEEDINGS"—MEANING OF.**—If a party formally appears before the Registrar of the Court through his advocate's clerk, before he has had a reasonable time to enable him to decide on the course of action to be taken, that cannot ordinarily debar him from applying for stay of suit; that cannot amount to a step in the proceeding within the meaning of section 19. 28 S.L.R. 223=1934 Sind 200. Application for adjournment is not a step in the proceedings. 61 Cal. 702=38 C.W.N. 737=1934 Cal. 796. See also I.L.R. (1937) 2 Cal. 63=41 C.W.N. 1261; 1941 Lah. 64. An application made to the Court for postponement of the hearing of the suit is a step in the proceedings within the meaning of section 19 irrespective of the intention with which the application is made. Whether the applicant wishes to have further time to file a written statement or to raise as a bar

to the suit the agreement to refer to arbitration, in either event, his application is an application, to invite the Court to do something which would enable him to establish his defence. It is for the Court to determine whether any particular act or application is a step in the proceeding. 155 I.C. 895=28 S.L.R. 366=1935 S. 62. Where the defendant asked for an adjournment of the hearing of the summons taken out by the plaintiff to compel him to file the written statement, and the adjournment was obtained by consent and without prejudice to the defendant's pending application for stay of the suit. *Held*, that the defendant did not take any step in the proceedings within the meaning of the section. I.L.R. (1937) 2 Cal. 63=41 C.W.N. 1261.

**EVIDENCE.**—Before an order staying proceedings, can be made, it must be proved that there is a valid submission, that there is no sufficient reason why the matter should not be referred according to the submission and that the applicant was and is ready to do all things necessary to the proper conduct of the arbitration. 47 Cal. 1020. It is largely in the discretion of the Court to make an order staying proceedings in such a matter and when the discretion has been exercised, the Appellate Court will interfere only when a strong case is made out. 47 Cal. 1020. A suit is not barred by a reference to arbitration made before, but the award in which is delivered after the suit. 56 I.C. 150=13 S.L.R. 193. It is for the party who is invoking the Arbitration Act to prove his right so to do. 44 C.W.N. 607. Where an application is filed by a defendant for stay of the suit under section 19 of the Arbitration Act, the onus is always on the plaintiff to show why he should not be bound by an agreement to refer disputes to arbitration. A.I.R. 1940 Lah. 180=42 P.L.R. 48. Arbitrators can decide questions of law and the occurrence of a difficult or complicated question of law is not a sufficient ground to take the matter out of the arbitrator's hands. 58 C. 1107. But see 1941 Sind 99. *Held* that as the main dispute in this case involved an important and intricate question of law the Court was entitled to exercise its discretion and was justified in refusing stay of suit. A.I.R. 1941 Sind 99. So long as the authority delegated to an arbitrator is not revoked he has the power to make an award and there would be no impropriety of conduct on his part in proceeding with the reference after a suit is filed unless he has notice that there has been an application for leave to revoke the authority conferred on him to some competent Court. 35 I.C. 536=10 S.L.R. 1. Though it appears desirable to have the matter tried in Court the proper course is not to ignore the arbitration but to direct the defendant to take necessary steps to revoke the submission. 35 I.C. 536=10 S.



## NOTES.

L.R. 1. See also 11 I.C. 274 (S.). An arbitration clause in a contract does not oust the jurisdiction of the Court in case of its breach. 20 I.C. 504=7 S.L.R. 1. Where an action has been commenced upon a contract which contains a provision for reference to arbitration then even if a reference to arbitration has taken place before the suit is instituted and if no application is made to stay the suit pending the arbitration, the award is of no effect. 38 C.L.J. 67. Section 19 of the Arbitration Act is in the nature of a summary procedure and does not normally include any lengthy or protracted inquiry or investigation. The Arbitration Act requires a submission in writing, and the fact that a contract or submission in writing exists has to be established by the person who comes to Court and applies for a stay. On the assumption that a contract which contains a submission in writing exists, an application may be made, because on that assumption the arbitrators have jurisdiction. If the fact of the contract itself is disputed, the arbitrators cannot decide the point, and the Court in the normal course would refuse a stay. Merely sending contract notes by a party to another without any confirmation notes signed by the other party does not amount to a submission in writing as required by the Arbitration Act. I.L.R. 1940 Bom. 249=187 I.C. 494=41 Bom.L.R. 1293=A.I.R. 1940 Bom. 93. See also 1940 Lah. 265.

ESTOPPEL.—Where after the trial Court dismissed the defendants' application for stay under section 19 and pending an appeal therefrom, the defendants applied for an adjournment to file a written statement and consented to the issues being referred to the Commissioner, *held*, that those facts did not constitute evidence of consent on the part of the defendants precluding them from urging their application for stay in the appellate Court. (4 I.C. 359, Rel.) 27 S.L.R. 169=140 I.C. 626=1933 Sind 75.

STAY—GROUNDS FOR—CONSIDERATIONS FOR COURT.—Under section 19, a suit can only be stayed when it is in respect of any matter agreed to be referred but not otherwise. If it is not in respect of the same matter which is agreed to be referred there can be no stay of suit and there can be no question that the arbitrators are *functus officio* until such suit is stayed. Where one of the parties who have agreed to refer the dispute to arbitration files a suit praying for a declaration that the other party has no right to refer any matter to arbitration and that the arbitrators have no jurisdiction in any matter relating to the agreements between the parties, their claim strikes at the very root of the submission clause, but does not come within the submission clause as to render the arbitrators *functus officio*. The mere fact that the other party has applied for stay of

suit under section 19 and that the application is pending does not affect the question nor does the institution of suit by the party objecting to the award when it is instituted subsequent to the filing of award. 1935 Sind 228. There is nothing in section 19 of the Arbitration Act to justify the conclusion that an order of stay can be passed under the section even after the award had been given. The object of passing an order staying the suit under section 19, is to allow the parties to proceed with the arbitration. But if before the application for stay is made or has been disposed of the arbitrators have already made the award, there will be no point in making the stay order. In that event, the proper course for the opposite party would be to plead the award in bar of the suit and not to obtain an order staying the suit pending arbitration which had already terminated. A.I.R. 1937 Lah. 851. See also 155 I.C. 932=1935 Bom. 155; 1941 Cal. 415. What is a sufficient cause for refusing to stay on an application for stay under section 19 depends on the particular facts of each case. The fact that a submission clause does not include all the matters which are the subject of legal proceedings may be a sufficient cause for refusing to stay. When there is a charge of fraud or forgery against one of the parties to a submission clause, a Court has discretion to refuse a stay. Generally speaking where the party charged desires a public inquiry, the Court will generally refuse to send the case to arbitration, but where the party making the charge desires that the matter should be dealt with in Court, the Court will be less inclined to stay the suit. 155 I.C. 895=1935 Sind 62. Stay will not be ordered where an important and intricate question of law is involved. 1941 Sind 99. See also 45 C.W.N. 984. Where an agreement in writing was entered into between the plaintiffs and the defendants, which contained a clause, whereby it was provided that in case of disputes between the parties arising out of the agreement, the matter should be submitted to arbitration, and the plaintiff's case is that the contract was rescinded by him as the defendants were guilty of a breach of some of the written as well as the oral terms of the contract relating to payment, the dispute between the parties arises out of the agreement, the question being whether the defendants committed a breach of the terms, and the defendants are, therefore, entitled to an order staying the suit of the plaintiffs for a declaration that the contract has been validly rescinded. But when the case of the plaintiffs is that the person who signed the contract as representing them had no authority to do so, that there was, therefore, no contract between the parties and, accordingly, no agreement to refer to arbitration, a suit by them for a declaration



35. (1) No reference nor award shall be rendered invalid by reason only of the commencement of legal proceedings upon the subject-matter of the reference, but when legal proceedings upon the whole of the subject-matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceed-

## NOTES.

that they did not enter into the alleged contract is not, so far as it deals with that contract, in respect of a matter referred within the meaning of section 19 of the Arbitration Act, and the defendants are not, therefore, entitled to a stay of the suit. 41 C.W.N. 563. If allegations of fraud and coercion go to the very root of the agreement to refer to arbitration, or if they relate to matters outside the scope of the submission, the only forum to decide that matter is the Civil Court. In either of these cases section 19 will *ex necessitate rei* be inapplicable. If on the other hand, misrepresentation, fraud or coercion is alleged to have been committed in reference to matters which are sought to be proved in proof or disproof of the contentions of the parties relating to a dispute which has been, or can be validly referred to arbitration in accordance with the original agreement, this will not necessarily be a ground for declining to stay the suit. A.I.R. 1937 Lah. 851. See also 48 L.W. 399=1938 Mad. 918=(1938) 2 M.L.J. 531.

PRACTICE.—In respect of a suit pending on the file of the Judicial Commissioner at Sind, the practice is to file a separate application for stay under section 19 of the Act and not an application in the suit. 27 S.L.R. 169=140 I.C. 626=1933 Sind 75.

MISCELLANEOUS.—A decision of a Judge as an arbitrator with the consent of the parties is binding on the parties as if it were an award of an arbitrator, even though the Judge, as such, had no jurisdiction over the matter in controversy. But this doctrine cannot apply where the Judge was chosen as arbitrator not voluntarily but under great judicial pressure. 15 C.L.J. 142=13 I.C. 898=16 C.W.N. 444. An agreement to refer to arbitrator is not bad merely for the reason that it included disputes other than that before the Court, if there was a distinct clause to the effect that the arbitrators would only report to the Court their decision on the subject-matter of the suit. 76 I.C. 1007=1923 Lah. 411. Where a private information got by an arbitrator was, in the presence of the parties, communicated to the other arbitrators, an award by them is not invalid. Courts proceed very warily in allowing revision in awards. 41 M.L.J. 676. The umpire is not justified in the face of an objection by either party in taking any part of the evidence from the notes of the arbitrators unless there are specific provisions in the submission permitting him to do so. 64

I.C. 706. When a Court is asked to file an award, it is not sitting as a Court of appeal from the arbitrators; but the Court can certainly decide if the award sought to be filed is the production of a tribunal duly constituted under the terms of a contract binding on both parties. 44 A. 481. Where the Court below had cancelled the reference to arbitration on account of the delay in making the award, it is not competent to the appellate Court to look into the award or treat it as if it were the report of a commissioner. 4 Lah.L.J. 48=1922 L. 194 (2). On this section, see also 39 C. 669 (Rules of Bengal Chamber of Commerce); 1923 Lah. 453; 28 C.W.N. 140=27 Bom. L.R. 1098=1925 Bom. 449=09 B 854=38 C.L.J. 67. (Specific performance of agreement to refer to arbitration); 56 M.L.J. 291; 27 Bom.L.R. 568 (Sole arbitrator appointed by one party).

RES JUDICATA.—Where an application for stay is rejected and the order is not set aside, a second application for stay is barred as *res judicata* even if the first order is erroneous. 1935 Sind 62=155 I.C. 895=28 S.L.R. 366. An order staying the suit, if made on a fraudulent misrepresentation can be reversed by the Court making the order, if it is satisfied of the fraud and misrepresentation of the other side and the suit can in the circumstances be revived. Similarly, the Court is empowered under section 151, C.P.Code, to make any order as may be necessary for ends of justice or to prevent abuse of the process of the Court. Nothing in the Arbitration Act bars this action. 190 I.C. 576=A.I.R. 1940 Lah. 265.

APPEAL.—From an order refusing stay under section 19 no appeal lies; only revision is competent. 1937 Lah. 206; 1936 Sind 205.

REVISION.—An application made under section 19 is not an interlocutory proceeding or a mere branch of a suit within the meaning of section 115 of the C.P.Code. It is a case in itself and decides finally between the parties whether the matter shall or shall not be decided by arbitration; therefore an application in revision will lie and is not excluded by section 115. 1936 Sind 205. See also 1937 Lah. 206.

SEC. 35.—Section 35 relates to the effect of subsequent legal proceedings on a pending reference. Such proceedings will not affect the reference unless (a) they relate to the whole of the referred matter, and (b) all the parties to the reference are impleaded in the proceedings. Where these condi-



ings in a pending reference shall, unless a stay of proceedings is granted under section 34, be invalid.

(2) In this section the expression "parties to the reference" includes any persons claiming under any of the parties and litigating under the same title.

36. Where it is provided (whether in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the Court, if it orders (whether under this Act or any other law) that the agreement shall cease to have effect as regards any particular difference may further order that the said provision shall also cease to have effect as regards that difference.

Power of Court where arbitration agreement is ordered not to apply to a particular difference, to order that a provision making an award a condition precedent to an action shall not apply to such difference.

Limitations.

37. (1) All the provisions of the Indian Limitation Act, 1908, shall apply to arbitrations as they apply to proceedings in Court.

(2) Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, a cause of action shall, for the purpose of limitation, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement.

(3) For the purposes of this section and of the Indian Limitation Act, 1908, an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement requiring that the difference be submitted to the person so named or designated.

(4) Where the terms of an agreement to refer to future differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a difference arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(5) Where the Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the difference referred, the period between the commencement of the arbitration and the date of the order of the Court shall be

#### NOTES.

tions are fulfilled the legal proceedings will nullify the arbitration proceedings on the expiry of the time within which an application to stay the legal proceedings may be made or on the refusal of such an application. (*Statement of Objects and Reasons*)

CHANGES MADE BY THE SELECT COMMITTEE.  
—“We have substituted the words “unless a stay of proceedings is granted under section 34” for the words “on the expiry of the time for making an application under section 34 or on the rejection of such an application”, because the giving of notice to the arbitrators should be the time after which arbitration proceedings become invalid and invalidity should only result if the

Court does not grant a stay proceedings.” (*Rep. of Sel. Com.*)

SEC. 36.—Section 36 is based on section 5 (4) of the 1934 Act of Parliament and supplies an omission in the present Indian Law. An agreement may contain a clause that no legal proceedings shall be taken on a certain matter unless the matter has first been made the subject-matter of an award. It is necessary to empower the Court to overrule this provision when the award is set aside or otherwise becomes void.

SEC. 37.—Section 37 makes provision as to limitation in arbitration matters and follows closely section 16 of the 1934 Act of Parliament.



excluded in computing the time prescribed by the Indian Limitation Act, 1908, for the commencement of the proceedings (including arbitration) with respect to the difference referred.

38. (1) If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him, the Court may, on an application in this behalf, order that the arbitrator or umpire shall deliver the award to the applicant on payment into Court by the applicant of the fees demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitrator or umpire by way of fees such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.

(2) An application under sub-section (1) may be made by any party to the reference unless the fees demanded have been fixed by written agreement between him and the arbitrator or umpire, and the arbitrator or umpire shall be entitled to appear and be heard on any such application.

(3) The Court may make such orders as it thinks fit respecting the costs of an arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

## CHAPTER VI.

### APPEALS.

39. (1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court

Appealable orders.

### NOTES.

**CHANGES MADE BY THE SELECT COMMITTEE.**—We have omitted the words "the Court may further order that" because we feel that a mere order of the Court might not avail to affect the law of limitation. Without these words the clause will operate with statutory force to affect that law. (*Report of Select Committee.*)

**SEC. 38.**—Section 38 deals with disputes as to the arbitrator's fees and costs and follows generally section 13 of the 1934 Act of Parliament and para. 13 of the Second Schedule to the Code. The Court may require the arbitrator to deliver up the award on the deposit into Court of the amount he claims, and may then investigate the claim and grant to the arbitrator such sum as fees as it thinks reasonable—(*Statement of Objects and Reasons*).

**CASES UNDER THE OLD ACT.**—Costs incurred before umpire or arbitrator are not to be regarded as costs incurred in Court. Costs refers to costs incurred in Court where there is no valid reference or valid award Court has no jurisdiction to award costs. 1928 Mad. 370=54 M.L.J. 580. If the submission does not leave the question of costs to the arbitrators they cannot decide it. 9 B. 82. When under the reference all matters in dispute between the parties are referred, the arbitrators can deal with the question of costs. 1 Beng.L.R. (O.C.). 144. Court can award arbitration fees as costs in a suit where no award is made or where it is silent though an award has been made. 19 I.C. 611=6 S.L.R. 226. Costs incurred in processes of obtaining an order from Court are within the discretion of the Court, and outside the province of

arbitrators but an award is not bad merely because of their inclusion. 27 I.C. 526=8 S.L.R. 136; 7 O.W.N. 97=1930 O. 89. In the absence of any express provision in the Act for the remuneration of arbitrators, the English Law should be applied unless there is an express provision to the contrary; and no such prohibition exists in the Code. The term "costs of the arbitration" is wide and general, and there is no justification for limiting it to such costs as might be represented by travelling expenses and the summoning of witnesses. Court has, therefore, jurisdiction to award remuneration to the arbitrators for their services. 152 I.C. 373=17 N.L.J. 153=1934 N. 199. The words of para. 13 of Sch. II, C.P. Code, are very wide, and allow the Court to make such order as it thinks fit respecting the costs of arbitration if any question arises respecting such costs. A provision relating to arbitrator's fees is most often made in the award itself and the fees so provided would be deemed part of the costs of arbitration. But even if the award contains no sufficient provision respecting such fees, and though the award may be set aside, the Court has power to award the arbitrator's fees as part of the costs of the arbitration and as costs of the proceedings incidental to the suit under section 35, C.P. Code. From an order awarding a sum of money as fees to an arbitrator in arbitration proceedings revision would lie to the High Court, though the latter would not interfere unless it involves any question of any irregularity in jurisdiction, e.g., when the amount awarded is very excessive. I.L.R. (1940) Kar. 34=190 I.C. 880=A.I.R. 1940 Sind 190.

**SEC. 39.**—Section 39 deals with appeals and



passing the order:—

An order—

- (i) superseding an arbitration;
- (ii) on an award stated in the form of a special case;
- (iii) modifying or correcting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
- (vi) setting aside or refusing to set aside an award:

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to His Majesty in Council.

## CHAPTER VII.

### MISCELLANEOUS.

Small Cause Court not to have jurisdiction over arbitrations save arbitrations in suits before it.

40. A Small Cause Court shall have no jurisdiction over any arbitration proceedings or over any application arising thereout save on application made under section 21.

Procedure and power of Court.

41. Subject to the provisions of this Act and of rules made thereunder—

(a) the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings; the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court:

Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

42. Any notice required by this Act to be served otherwise than through the Court by a party to an arbitration agreement or by an arbitrator or umpire shall be served in the manner provided in the arbitration agreement, or if there is no such provision, either—

- (a) by delivering it to the person on whom it is to be served, or
- (b) by sending it by post in a letter addressed to that person at his usual or last known place of abode or business in British India and registered under Chapter VI of the Indian Post Office Act, 1898.

### NOTES.

replaces that part of section 104 (1) of the Code of Civil Procedure, 1908, which this Act repeals.

SEC. 40.—Section 40 has the effect of providing that Small Cause Courts shall not deal with arbitrations other than arbitrations in suits before it. Section 41 and the Second Schedule deal with procedure. The clause confers generally the same powers as the Court enjoys under the Code of Civil Procedure and with the Schedule adds certain special powers in relation to arbitrations on the lines of section 8 (1) of the 1934 Act of Parliament.

CHANGES MADE BY THE SELECT COMMITTEE.—“We have substituted the expression

arbitration proceedings’ for the words ‘a reference’ in order to cover the various kinds of proceedings which the Act contemplates.”—(*Report of Select Committee.*)

SEC. 42.—Section 42 makes provision for the service of notices under the Act between parties or between arbitrator and parties.

CHANGES MADE BY THE SELECT COMMITTEE.—“We have omitted the provision that substituted service may be effected by leaving a notice at the usual or last known place of abode of a person”.

SEC. 43.—Section 43 follows para. 7 of the Second Schedule to the Code in requiring the Court to assist the arbitrator to enforce the production of evidence and



Power of Court to issue processes for appearance before arbitrator.

43. (1) The Court shall issue the same processes to the parties and witnesses whom the arbitrator or umpire desire to examine as the Court may issue in suits tried before it.

(2) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the reference, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitrator or umpire as they would incur for the like offences in suits tried before the Court.

(3) In this section the expression "process" includes summonses and commissions for the examination of witnesses and summonses to produce documents.

Power to High Court to make rules.

44. The High Court may make rules consistent with this Act as to—

(a) the filing of awards and all proceedings consequent thereon or incidental thereto;

(b) the filing and hearing of special cases and all proceedings consequent thereon or incidental thereto;

(c) the staying of any suit or proceeding in contravention of an arbitration agreement;

(d) the forms to be used for the purposes of this Act;

(e) generally, all proceedings in Court under this Act.

Crown to be bound.

45. The provisions of this Act shall be binding on the Crown.

46. The provisions of this Act, except sub-section (1) of section 6 and sections 7, 12 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder.

47. Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:

Act to apply to all arbitrations.

Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending.

#### NOTES.

empowering the Court to punish default or contempt before the arbitrators as if it were committed before the Court—(*Statement of Objects and Reasons*). There is nothing illegal in parties to an arbitration agreeing before Panchayatdars to have evidence taken after the administration of any reasonable form of oath to witnesses. 29 I.C. 49=2 L.W. 320. The words "refusing to give their evidence in section 43 (2) are intended to refer to the case of a person who refuses to give evidence when placed on oath and required to answer questions put to him. 11 I.C. 259=8 A.L.J. 929.

SEC. 44.—Section 44 reproduces with small changes section 20 of the 1899 Act and empowers High Courts to make rules.

SEC. 45.—Section 45 repeats section 22 of

the 1899 Act and binds the Crown.

SEC. 46.—Section 46 applies with certain exceptions the provisions of the Act to statutory arbitrations, and is based on section 20 of the 1934 Act of Parliament.

SEC. 47.—Section 47 applies, subject to section 46, the Act to all arbitrations. The section replaces section 89 of the Code of Civil Procedure, 1908, which this Act repeals. —(*See Statement of Objects and Reasons*).

CHANGES MADE BY THE SELECT COMMITTEE.—"The section has been re-drafted in order to remove the dangers of the provision that an arbitration award obtained otherwise than in accordance with all the provisions of the Act should be unenforceable for any purpose. The effect which the section as re-drafted is designed to produce is that arbitrations shall not be conducted in any



48. The provisions of this Act shall not apply to any reference pending at the commencement of this Act, to which the law in force immediately before the commencement of this Act shall, notwithstanding any repeal effected by this Act, continue to apply.

Saving for pending references.

49. (1) The enactments specified in the Third Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

Repeals and amendments.

(2) The enactments specified in the Fourth Schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

### THE FIRST SCHEDULE

(See section 3.)

#### IMPLIED CONDITIONS OF ARBITRATION AGREEMENTS.

1. Unless otherwise expressly provided, the reference shall be to a sole arbitrator.
2. If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments.
3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.
4. If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators.
5. The umpire shall make his award within two months of entering on the reference or within such extended time as the Court may allow.
6. The parties to the reference and all persons claiming under them shall, subject to the provisions of any law for the time being in force, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in difference and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds; papers, accounts, writings and documents within their possession or power respectively which may be required or called for, and do all other things which, during the proceedings on the reference, the arbitrators or umpire may require.
7. The award shall be final and binding on the parties and persons claiming under them respectively.
8. The costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to, and by whom, and in what manner; such costs or any part thereof shall be paid and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between legal practitioner and client.

### THE SECOND SCHEDULE.

(See section 41.)

#### POWERS OF COURT.

1. The preservation, interim custody or sale of any goods which are the subject-matter of the reference.
2. Securing the amount in difference in the reference.
3. The detention, preservation or inspection of any property or thing which is the

#### NOTES.

way repugnant to the Act and that any arbitration award may with the consent of the parties be used for the purposes of rule 3 of O. XXIII of the Code of Civil Procedure".—(Report of Select Committee.)

SEC. 48.—Section 48 saves reference pending at the commencement of this enactment: such references will continue to be governed by the existing law. The Arbitration Act of 1899 must govern an application made thereunder even though the new Act of 1940 comes into operation at the time when the application is heard. A.I.R. 1941 Cal. 415.

SCH. I.—The first Schedule follows the First Schedule to the 1899 Act. The main differences are (a) arbitrators are required to appoint an umpire within a month of their own appointment, (b) the power to enlarge the time for making the award is transferred

to the Court (Cf. section 29), and (c) Item VII is omitted as redundant in view of Clause 13 (a).

CHANGES MADE BY THE SELECT COMMITTEE.—"The change made in rule 2 removes a difficulty which might otherwise arise in connection with sub-cl. (2), section 10 of the Act. If where there are three arbitrators the award of the majority shall prevail, the appointment of an umpire is superfluous. The changes made in rules 3 and 5 are merely for the purpose of slightly increasing the limits of time fixed by those rules" (Report of Select Committee.)

SCH. II.—"We have added as an additional power of Court the power to appoint a guardian for a minor or person of unsound mind"—(Report of Select Committee)—



subject of the reference or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

4. Interim injunctions or the appointment of a receiver.

5. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.

### THE THIRD SCHEDULE.

[See section 49 (1).]

ENACTMENTS REPEALED.

Year.	No.	Short title.	Extent of repeal.
1	2	3	4
1899	IX	The Indian Arbitration Act, 1899.	The whole.
1908	V	The Code of Civil Procedure, 1908.	Section 89, clauses (a) to (f) (both inclusive) of sub-section (1) of section 104 of the Second Schedule.

### THE FOURTH SCHEDULE.

[See section 49 (2).]

ENACTMENTS AMENDED.

Year.	No.	Short title.	Amendments.
1	2	3	4
1863	XX	The Religious Endowments Act, 1863.	(a) In section 16— (i) for the words and figure "Chapter VI of the Code of Civil Procedure" the words and figures "Chapter IV of the Arbitration Act, 1940" shall be substituted; (ii) for the words and figure "section 312 of the said Code" the words and figure "section 21 of the said Act" shall be substituted. (b) In section 17, for the words and figure "section 312 of the said Code of Civil Procedure" the words and figures "section 21 of the Arbitration Act, 1940" shall be substituted.
1877	I	The Specific Relief Act, 1877.	In section 21— (i) for the words and figure "Code of Civil Procedure, and the Indian Arbitration Act, 1899" the words and figure "Arbitration Act, 1940" shall be substituted; (ii) after the words "but if any person who has made such a contract" the words "other than an arbitration agreement to which the provisions of the said Act apply" shall be inserted.
1908	IX	The Indian Limitation Act, 1908.	In the First Schedule— (i) For Article 158 the following shall be substituted, namely:— "158. Under the Thirty days, The date of service of the no-

#### NOTES.

SCH. III.—The Third Schedule repeals the existing general arbitration law.

SCH. IV.—The Fourth Schedule makes certain consequential amendments of which

those to the Limitation Act are the most important. The second amendment of the Specific Relief Act, 1877, replaces section 3 of the 1899 Act.



Year. 1	No. 2	Short title. 3	Amendments. 4
			an award or to get an award re-mitted for re-consideration.
			time of fil- ing of the award."
			(ii) In Articles 159 and 179, for the words "same Code" in the first column the words and figure "Code of Civil Procedure, 1908" shall be substituted;
			(iii) For Article 178 the following shall be substituted, namely:—
			"178. Under the Ninety The date of Arbitration Act, days. service of the 1940, for the fil- notice of the ing in Court of making of an award. the award."
1910	IX	The Indian Electricity Act, 1910.	In section 52, for the figure "1899" the figure "1940" shall be substituted.
1913	VII	The Indian Companies Act, 1913.	In section 152—
			(i) for the figure "1899," in both places where it occurs, the figure "1940" shall be substituted;
			(ii) in sub-section (3) the words "other than those restricting the application of the Act in respect of the subject-matter of the arbitration" shall be omitted.

## THE ARBITRATION (PROTOCOL AND CONVENTION) ACT (VI OF 1937).<sup>1</sup>

[AMENDED BY ACT XXXII OF 1940.]

*An Act to make certain further provisions respecting the law of arbitration in British India.* [4th March, 1937.]

WHEREAS India was a State signatory to the Protocol on Arbitration Clauses set forth in the First Schedule, and to the Convention on the Execution of Foreign Arbitral Awards set forth in the Second Schedule, subject in each case to a reservation of the right to limit its obligations in respect thereof to contracts which are considered as commercial under the law in force in British India;

AND WHEREAS it is expedient, for the purpose of giving effect to the said Protocol and of enabling the said Convention to become operative in British India, to make certain further provisions respecting the law of arbitration;

It is hereby enacted as follows:—

Short title, extent and operation.

1. (1) This Act may be called THE ARBITRATION (PROTOCOL AND CONVENTION) ACT, 1937.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) The provisions of this Act, except this section shall have effect only from such date as the Central Government may, by notification in the Official Gazette, appoint in this behalf, and the Central Government may appoint different dates for the coming into effect of different provisions of the Act.

2. In this Act "foreign award" means an award on differences relating to matters considered as commercial under the law in force in British India, made after the 28th day of

Interpretation.

July, 1924,—

LEG. REF.

<sup>1</sup> For Statements of Objects and Reasons, see Gazette of India, 1936, Pt. V; p. 10; and

for Report of Select Committee, see *ibid.*, 1937; Pt. V, p. 73.



(a) in pursuance of an agreement for arbitration to which the Protocol set forth in the First Schedule applies, and

(b) between persons of whom one is subject to the jurisdiction of some one of such powers as the Central Government, being satisfied, that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Second Schedule, and of whom the other is subject to the jurisdiction of some other of the powers aforesaid, and

(c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies,

and for the purposes of this Act an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

3. Notwithstanding anything contained in the <sup>1</sup>[Indian Arbitration Act, 1940,] or in the Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an agreement to which the Protocol set forth in the First Schedule as modified by the reservation subject to which it was signed by India applies, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings; and the Court, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

4. (1) A foreign award shall, subject to the provisions of this Act, be enforceable in British India as if it were an award made on a matter referred to arbitration in British India.

(2) Any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in British India, and any references in this Act to enforcing a foreign award shall be construed as including references to relying on an award.

5. (1) Any person interested in a foreign award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

6. (1) Where the Court is satisfied that the foreign award is enforceable under this Act, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.



(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

Conditions for enforcement of foreign awards.

7. (1) In order that a foreign award may be enforceable under this Act it must have—

(a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed,

(b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties,

(c) been made in conformity with the law governing the arbitration procedure,

(d) become final in the country in which it was made,

(e) been in respect of a matter which may lawfully be referred to arbitration under the law of British India,

and the enforcement thereof must not be contrary to the public policy or the law of British India.

(2) A foreign award shall not be enforceable under this Act if the Court dealing with the case is satisfied that—

(a) the award has been annulled in the country in which it was made, or

(b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented, or

(c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration:

Provided that if the award does not deal with all questions referred the Court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the Court may think fit.

(3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in clauses (a), (b) and (c) of sub-section (1), or existence of the conditions specified in clauses (b) and (c) of sub-section (2), entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the Court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.

Evidence.

8. (1) The party seeking to enforce a foreign award must produce—

(a) the original award or a copy thereof duly authenticated in manner required by the law of the country in which it was made;

(b) evidence proving that the award has become final; and

(c) such evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in clauses (a), (b) and (c) of sub-section (1) of section 7 are satisfied.

(2) Where any document requiring to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in British India.

Saving.

9. Nothing in this Act shall—



(a) prejudice any rights which any person would have had of enforcing in British India any award or of availing himself in British India of any award if this Act had not been passed, or

(b) apply to any award made on an arbitration agreement governed by the law of British India.

Rule-making powers of the High Court.

10. The High Court may make rules consistent with this Act as to—

(a) the filing of foreign awards and all proceedings consequent thereon or incidental thereto;

(b) the evidence which must be furnished by a party seeking to enforce a foreign award under this Act; and

(c) generally, all proceedings in Court under this Act.

### THE FIRST SCHEDULE.

#### PROTOCOL ON ARBITRATION CLAUSES.

The undersigned, being duly authorised, declare that they accept, on behalf of the countries which they represent, the following provisions:

1. Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations in order that the other Contracting States may be so informed.

2. The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

4. The Tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an Arbitration Agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the Arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative.

5. The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratification shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the Signatory States.

6. The present Protocol will come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

7. The present Protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other Signatory States and inform them of the date on which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

8. The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the undermentioned territories: that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all Signatory States. They



will take effect one month after the notification by the Secretary-General to all Signatory States.

The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

## THE SECOND SCHEDULE.

### CONVENTION ON THE EXECUTION OF FOREIGN ARBITRAL AWARDS.

*Article 1.*—In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses opened at Geneva on September 24, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary:

(a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;

(c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appel or pourvoi en cassation (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

*Article 2.*—Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied:

(a) That the award has been annulled in the country in which it was made;

(b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

(c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

*Article 3.*—If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1 (a) and (c), and Article 2 (b) and (c); entitling him to contest the validity of the award in a Court of law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof giving such party a reasonable time within which to have the award annulled by the competent tribunal.

*Article 4.*—The party relying upon an award or claiming its enforcement must supply, in particular:

(1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;

(2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 (d), in the country in which it was made;

(3) When necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph 1 and paragraph 2 (a) and (c) have been fulfilled.

A translation of the award and of the other documents mentioned in this Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translations must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

*Article 5.*—The provisions of the above Articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.



*Article 6.*—The present Convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923.

*Article 7.*—The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified.

It may be ratified only on behalf of those Members of the League of Nations and non-Member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

*Article 8.*—The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect; in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

*Article 9.*—The present Convention may be denounced on behalf of any Member of the League or non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notifications, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, *ipso facto*, the denunciation of the present Convention.

*Article 10.*—The present Convention does not apply to the Colonies, Protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this Convention to one or more of such Colonies, Protectorates or territories to which the Protocol on Arbitration Clauses opened at Geneva on September 24, 1923; applies, can be effected at any time by means of a declaration addressed to the Secretary-General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect three months after the deposit thereof.

The High Contracting Parties can at any time denounce the Convention for all or any of the Colonies, Protectorates or territories referred to above. Article 9 hereof applies to such denunciation.

*Article 11.*—A certified copy of the present Convention shall be transmitted by the Secretary-General of the League of Nations to every Member of the League of Nations and to every non-Member State which signs the same.

## THE ARYA MARRIAGE VALIDATION ACT (XIX OF 1937).<sup>1</sup>

[Amended by Act XXXII of 1940.]

*An Act to recognise and remove doubts as to the validity of inter-marriages current among Arya Samajists.* [14th April, 1937.]

WHEREAS it is expedient to recognise and place beyond doubt the validity of inter-marriages of a class of Hindus known as Arya Samajists;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE ARYA MARRIAGE VALIDATION ACT, 1937.

(2) It extends to the whole of British India<sup>2</sup> [\* \* \*], and applies also to all subjects of His Majesty, within other parts of India, and to all Indian subjects of His Majesty without and beyond British India.

2. Notwithstanding any provision of Hindu Law, usage or custom to the

contrary no marriage contracted whether before or after the commencement of this Act between two persons being at the time of the marriage Arya Samajists shall be invalid or shall be deemed ever to have been invalid by reason only of the fact that the parties at any time belonged to different castes or different sub-castes of Hindus or that either or both of the parties at any time before the marriage belonged to a religion other than Hinduism.

LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons, see *Gazette of India*, 1935, Part. V; p. 132;

and for Report of Select Committee, see *ibid.*, 1936, Part V, p. 306.

<sup>2</sup> Omitted by Act XXXII of 1940.



# THE BANKERS' BOOKS EVIDENCE ACT (XVIII OF 1891).

## EFFECT OF LEGISLATION.

Year.	No.	Short title.	Repealed or otherwise how affected by Legislation.
1891	XVIII	The Bankers' Books Evidence Act, 1891.	Repealed in Part, Act X of 1914 Amended, Acts I of 1893; XII of 1900; Govt. of India (Adaptation of Indian Laws) Order, 1937.

PREFATORY NOTE.—The following is the Statement of Objects and Reasons attached to the Bill:—

"It is some time since the Imperial Parliament recognised the great inconvenience which is caused to bankers from their being required to produce their books in Courts of Justice. In the first place, these books are usually of great size and weight, and, in the second place, they are required for entering the daily transactions of the bank. Facilities were provided for proving the contents of bankers' books by means of certified copies, and in the year 1891, an Act was passed for British India upon the same lines. Unfortunately the definition of a company adopted in the Act was too narrow. It failed to provide for banking companies carrying on business in the country but registered or incorporated in the United Kingdom, and in a criminal case which was recently tried in Calcutta it was discovered that the entries in the books of the Delhi and London Bank could not be proved by copies. The Advocate-General immediately called attention to this defect in the law and suggested the draft of a Bill for removing it. This Act was intended to widen the definition of the company adopted in the Act of 1891.

"The Bengal Chamber of Commerce had asked the Government to consider the question of extending the definition so as to include all foreign banks in India; but, after carefully considering the question, the Government of India came to the conclusion that it would be better to leave these foreign banks to be admitted in particular cases one by one under the power of notification given by section 3 of the Act of 1891." See Proceedings in Council, *Fort St. George Gazette*, 20th July, 1900.

The Hon'ble Sir Alexander Miller in presenting the Report of the Select Committee on the Bill to amend the Law of Evidence with respect to Bankers' Books said:—

"The Select Committee have made several considerable changes in detail, but none which, I think, affects the principle of the Bill. The alterations are briefly these. Instead of the elaborate machinery proposed in the Bill in which it is to be proved by a system of affidavits that the books were examined and the extracts verified, we proposed to introduce a system of certified copies, exactly analogous to that in the present law in respect to certified copies of public documents and we do not propose to permit any evidence to be given otherwise than by the production of the books themselves, or by the certified copies. We were asked to extend the Act to all kinds of mercantile concerns, but that was not desirable. We have omitted all reference to Government Savings Bank and to the Post Office because we think that the books of these bodies are "public documents" within the meaning of the Evidence Act. We have, however, introduced a clause enabling the Local Government in any case to extend the provisions of the Act to the books of any company which keeps a regular set of books analogous to the recognised bankers' books and to which the Local Government consider it desirable to extend them. We have also introduced provisions enabling the bank, if it thinks fit, to offer to produce certified copies instead of allowing its books to be examined. We thought there might be very good reasons for this course, and that in the interest of the bank or its clients the clause which proposed to enable any party to obtain authority to look through the books of the bank may offer to give copies of the necessary certificate. There is one point in connection with this matter, which is, relevant entries. One of the District Judges has made a note to the effect that it is impossible for a bank to judge what entries are or are not relevant. The answer is that the bank is not bound to take advantage of this provision. If for the purpose of concealing the accounts it chooses to take advantage of it and does not insert all relevant entries, it must act on its own responsibility and at its own risk.

We have inserted no clauses with reference to the payment of any fee to a bank for the supply of certified copies, but we have given a discretionary power to the Court, where the matter comes before it, to award costs to or against the bank as it may think just; and the reason is that we think that in most cases it would be more beneficial to the bank to give these certificates free of costs than to have their books produced, and possibly detained for days, or even weeks, for purposes of legal proceedings, but if in any case the bank does not choose to grant these certified copies without payment the party will have it in his own power either to pay what the bank asks, or to go before the Court and get



an order. Probably in many cases an agreement with the bank would be come to in preference to going before the Court, but if the matter does go before the Court, then we give the Court complete power to make any order which it thinks proper as to costs for or against the bank.

The Bill does not contain any express power to the Court to require the production of the books instead of acting on the certified copies.

I think the power is given incidentally, because we say that these certified copies shall be received as *prima facie* evidence of the existence of the entries and also that no officer of a bank shall in proceedings to which the bank is not a party be compelled to produce the books without special order; but I am not quite sure that it may not be desirable to insert a clause to the effect that notwithstanding anything in the Act the Court may order the production of the books themselves whenever it thinks this necessary." (See Proceedings in Council, *Fort St. George Gazette*, 6th October, 1891, Supp. pp. 1, 2.)

LOCAL EXTENT OF THE OPERATION OF THE ACT.—The Act has been extended by notification under section 5 of the Scheduled Districts Act (XIV of 1874) to British Baluchistan, see *Gazette of India*, 1896, Pt. II, p. 1004. It was declared in force in Upper Burma (Except the Shan States) by the Burma Laws Act (XIII of 1898). It has been declared in force in the Sonthal Parganas by section 3 of the Sonthal Parganas Settlement Regulation (III of 1872) as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899). (See *Calcutta Gazette*, 1892, Pt. I, p. 448.)

## THE BANKERS' BOOKS EVIDENCE ACT (XVIII OF 1891).<sup>1</sup>

[1st October, 1891.

*An Act to amend the Law of Evidence with respect to Bankers' Books.*

WHEREAS it is expedient to amend the Law of Evidence with respect to Bankers' Book; It is hereby enacted as follows:—

Title and extent.

1. (1) This Act may be called THE BANKERS' BOOKS EVIDENCE ACT, 1891.

(2) It extends to the whole of British India;<sup>2</sup>[\*]

<sup>2</sup>[(3) \* \* \* \*].

Definitions.

2. In this Act, unless there is something repugnant in the subject or context,—

<sup>3</sup>[(1) "company" means a company registered under any of the enactments relating to companies for the time being in force in any part of His Majesty's dominions or incorporated by an Act of Parliament or by an Indian Law or by Royal Charter or by Letters Patent]:

(2) "bank" and "banker" mean—

(a) any company carrying on the business of bankers,

(b) any partnership or individual to whose books the provisions of this Act shall have been extended as hereinafter provided,

<sup>4</sup>[(c) any post office savings bank or money order office:]

(3) "bankers' books" include ledgers, day-books, cash-books, account-books and all other books used in the ordinary business of a bank:

(4) "legal proceeding" means any proceeding or inquiry in which evidence is or may be given, and includes an arbitration:

(5) "the Court" means the person or persons before whom a legal proceeding is held or taken;

### LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons, see *Gazette of India*, 1891, Pt. V, p. 24; for Report of Select Committee, see *ibid.*, p. 189; and for Proceedings in Council, see *ibid.*, Pt. VI, pp. 15, 25, 117, 135 and 140.

<sup>2</sup> Repealed by Act X of 1914, Sch. II.

<sup>3</sup> Substituted by A. O. for previous definition which had been substituted for original definition by Act XII of 1900.

<sup>4</sup> Added by Act I of 1893, section 2.

### NOTES.

SEC. 2 (2) (c): BANK.—See 58 I.C. 893.

SEC. 2 (3): "BANKERS' BOOKS"—MEANING OF.—As to whether Loan Register in Public Debt Office in the Bank of Bengal is a Banker's book, see 31 C. 284=8 C.W.N. 125.



(6) "Judge" means a Judge of a High Court.

(7) "trial" means any hearing before the Court at which evidence is taken: and

(8) "certified copy" means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business, and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title.

3. The Provincial Government may, from time to time, by notification<sup>1</sup> in the Official Gazette, extend the provisions of the Act to the books of any partnership or individual carrying on the business of bankers within the territories under its administration, and keeping a set of not less than three ordinary account books, namely, a cash-book, a day-book or journal, and a ledger, and may in like manner rescind any such notification.

4. Subject to the provisions of this Act, a certified copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.

5. No officer of a bank shall in any legal proceeding to which the bank is not a party be compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the Court or a Judge made for special cause.

#### LEG. REF.

<sup>1</sup> For notifications, see *Bombay Government Gazette*, 1902, Pt. I, p. 1289 and as to Madras, see *Mad. R. and O.*, Vol. I (List).

#### NOTES.

SEC. 2 (8).—As to who can inspect and obtain *certified copies*, see 31 C. 284=8 C. W.N. 125.

SEC. 4.—As to copy of entry in the books of a Bank not falling within the definition of company, see 4 C.W.N. 433 (F.B.); 18 A. 92 at pp. 94-95. As to who could order production of books, see 32 C. 498.

SEC. 5.—S. 94 (3) of the Cr. P. Code does not exempt Bankers' books from production before the police, and an officer in charge of a Police-station conducting an investigation is entitled to inspect them even without an order of Court. Section 5 of this Act does not prevent him from doing so, as proceedings before him are not legal proceedings as defined in the Act. 17 L. 593=38 P.L.R. 1042. There is really no conflict between section 94 of the Cr. P. Code and the Bankers' Books Evidence Act. Section 5 of the latter Act is the only section which can be relied upon as containing anything inconsistent with section 94, Cr. P. Code. But all that section 5 of that Act enacts is

that no officer of the Bank shall in any legal proceeding to which the Bank is not a party be compellable to produce any banker's book the contents of which can be proved under the Act or to appear as a witness to prove the matters, transactions and accounts, etc., unless by order of the Court or Judge made for special cause. "*Court*" includes a *Magistrate trying a criminal case*, so that a Bank cannot be compelled to produce its books without an order of the Court "for special cause." But there is no reason at all why an order made under section 94, Cr. P. Code, should not be regarded as a sufficient order for the purpose of section 5 of the Bankers' Books Evidence Act. There is nothing in that Act which prevents an order being made under section 94, Cr. P. Code, in the proper case. *In a prosecution against the auditors of a Bank* for offences in respect of false statements in the balance-sheet of the Bank certified by them as correct, an order for production can lawfully be made under section 94, Cr. P. Code, but it should be made, in the case of bankers' books, very cautiously and carefully drafted. A routine order *ex parte* is generally undesirable. The prosecutor who applies for an order and for inspection of the books produced should be required to state before the issue of the order not only what books he requires to be



6. (1) On the application of any party to a legal proceeding the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceeding, or may order the bank to prepare and produce, within a time to be specified in the order, certified copies of all such entries, accompanied by a further certificate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceeding, and such further certificate shall be dated and subscribed in manner hereinbefore directed in reference to certified copies.

(2) An order under this or the preceding section may be made either with or without summoning the bank, and shall be served on the bank three clear days (exclusive of bank holidays) before the same is to be obeyed, unless the Court or Judge shall otherwise direct.

(3) The bank may at any time before the time limited for obedience to any such order as aforesaid either offer to produce their books at the trial or give notice of their intention to show cause against such order, and thereupon the same shall not be enforced without further order.

7. (1) The costs of any application to the Court or a Judge under or for the purposes of this Act and the costs of anything done or to be done under an order of the Court or a Judge made under or for the purposes of this Act shall be in the discretion of the Court or Judge, who may further order such costs or any part thereof to be paid to any party by the bank if they have been incurred in consequence of any fault or improper delay on the part of the bank.

(2) Any order made under this section for the payment of costs to or by a bank may be enforced as if the bank were a party to the proceeding.

(3) Any order under this section awarding costs may, on application to any Court of Civil Judicature designated in the order, be executed by such Court as if the order were a decree for money passed by itself:

Provided that nothing in this sub-section shall be construed to derogate from any power which the Court or Judge making the order may possess for the enforcement of its or his directions with respect to the payment of costs.

## THE INDIAN BAR COUNCILS ACT (XXXVIII OF 1926).

PREFATORY NOTE.—The necessity for, and the circumstances under which this Act is passed is thus explained in the *Statement of Objects and Reasons*:—The recommendations of the Indian Bar Committee in regard to the constitution of Bar Councils and their functions were as follows:—

1. An All-India Bar or Council is impracticable. Statutory Bar Councils should, however, be established at Calcutta, Madras, Bombay, Allahabad, Patna and Rangoon, but

### NOTES.

produced but also why their production is necessary with specific reference to the allegations in his complaint. *Anything in the nature of a roving or fishing inspection of the books of a Bank should be prevented.* But the prosecution cannot be denied the right of inspection of documents the production of which has been held to be necessary or desirable for the purpose of the trial and which have been held to be relevant after considering the objections of the party producing. I.L.R. (1938) Bom. 31.

SEC. 6.—An order under the section cannot ordinarily, in the absence of special circumstances, be made without notice to the other side. 5 Bom.L.R. 865; 1932 B. 428. See also 20 M. 189 (196). A Bank has under section 6, sub-section (3) of the Act

statutory right to object to any order directing inspection to be given of its books. It is not the practice of the Court to allow inspection of bankers' books under the Act, unless a *prima facie* case is made out for thinking that there is some matter on which the books of the Bank are bound to be relevant. Courts have no doubt very wide powers of ordering production and directing inspection of documents but such an order against a person, not a party to the proceedings involves a serious inroad upon his normal rights as a citizen. Courts are always averse to giving anything in the nature of a roving or fishing commission to inspect documents. I.L.R. (1938) B. 119=39 Bom.L.R. 1187=A.I.R. 1938 B. 33 (S.B.). No revivies from order under the section. 237 P.L.R. 1900.



provision should be made permitting the constitution of Councils at Lahore, Nagpur, Karachi and Lucknow later on. (Paragraphs 48 and 55.)

2. The Council should consist of 15 members, four of whom should be nominated by the High Court, including, where possible, the Advocate-General or the Government Advocate and the Government Pleader. The remaining eleven, of whom six should be Advocates of at least 10 years' standing, should be elected by advocates of the High Court, provided that in Calcutta and Bombay the High Courts should determine how many of the eleven should be advocates entitled to practise on the original side. The nominated members should ordinarily be advocates, but it should be left to the High Courts to nominate Judges past and present. (Paragraphs 57 and 58.)

3. The first Councils should hold office for 3 years, the term of office of subsequent Councils being determined by rules to be framed by the Councils themselves. (Paragraph 57.)

4. A Bar Council should have power to make rules subject to the approval of the High Court in respect of the following matters:—

(a) the qualifications, admission and certificates of proper persons to be advocates of the High Court;

(b) the powers and duties of advocates;

(c) the conduct of any examination which may be prescribed by it and the fees to be paid for appearing at the same;

(d) legal education including the delivery of lectures to students and the fees to be chargeable therefor;

(e) matters relating to the discipline and professional conduct of advocates;

(f) procedure and practice in cases falling within the disciplinary jurisdiction of the Council;

(g) the method of holding elections of members of the Council, and all matters incidental thereto;

(h) the meetings of the Council, the quorum necessary for the transaction of business, the election of a President or other officer and the appointment of committees for special purposes;

(i) the period for which a Council, after the first Council, should hold office and the filling of vacancies occurring between elections;

(j) the terms on which advocates of another High Court may be permitted to appear occasionally in the High Court to which the Council is attached; and

(k) any other matter prescribed by the High Court. (Paragraph 59.)

5. The rules regulating the election of the first Council and the filling of vacancies before rules are made by the Council should be made by the High Court, and it should be provided that no rules shall be made affecting the special provisions suggested for the original sides of the Calcutta and Bombay High Courts so long as those provisions remain in force. (Paragraph 59.)

6. A Bar Council should have power either of its own motion or on complaint or on a reference by the High Court to inquire into all matters of the kind referred to in sections 12 and 13 of the Legal Practitioners Act, 1879, breaches of rules and other improper conduct in which an advocate of the Court, is concerned, and make a report to the High Court with a recommendation as to the action, if any, to be taken by the Court.

A Bar Council should also be entitled to be heard in any matter relating to the admission of an advocate or in support of any report made by it to the Court. (Paragraph 60.)

7. The existing disciplinary jurisdiction of the High Court should be maintained, but the Court should be bound before taking disciplinary action against an advocate, except in regard to contempt of Court and the like, to refer the case to the Bar Council for inquiry and report. On receipt of a report from the Bar Council the Court should be empowered itself to make or require the Council to make further inquiry. At the request of a Bar Council or on its own motion a High Court should be authorised to order an inquiry to be held by a local Court. (Paragraph 61.)

8. Provision should be made for procuring with the sanction of the Court the attendance of witnesses and production of documents required by the Council for an inquiry, and witnesses should receive the same protection as when they give evidence before a Court. (Paragraph 61.)

(The paragraphs referred to are paragraphs in the Report.)

The Government of India consulted Local Governments and High Courts upon these recommendations. In certain respect it appeared necessary to amplify them and in some respects to modify them in the light of the views urged by the authorities consulted. It is intended that these recommendations with the amplifications and modifications should be given effect to by or under the Bill.



2. The Bill is intended also to carry out as far as possible the following miscellaneous recommendations of the committee:—

(a) The ideal to be kept in view should be the disappearance of different grades of legal practitioners so that ultimately there may be a single grade entitled to appear in all Courts. At present the largest degree of unification possible should be effected. (Paragraphs 11 and 17.)

(b) In all High Courts a single grade of practitioners entitled to plead should be enrolled to be called advocates (not barristers), the grade of High Court Vakils or Pleaders being abolished, and when special conditions are maintained for admission to plead on the original side the only distinction should be within that grade which shall consist of advocates entitled to appear on the original side and advocates not so entitled. (Paragraph 19.)

(c) Advocates of one High Court should be entitled to practise in another High Court subject to conditions to be imposed by the Bar Council of the latter Court or by the Court where there is no Bar Council. (Paragraph 20.)

(d) Where there is a compulsory dual agency system at present it should be allowed to continue. (Paragraph 26.)

(e) The High Courts should retain their power to fix the amount payable by a party in respect of the fees of an adversary's legal practitioner. (Paragraph 61.)

(f) Partnerships between legal practitioners should be permitted wherever all classes of legal practitioners are entitled to act as well as to appear and plead. (Paragraph 69.)

(g) The High Courts, where this is not now permitted, should consider the advisability of allowing Indian barristers applying for enrolment as advocates to read with an approved Indian practitioner instead of reading in chambers in England, at least when it is shewn that the individual cannot obtain entry in suitable Chambers in England. (Paragraph 68.)

3. Incidentally it is intended that the provisions of the Bill and the rules which may be made under it shall, in regard to advocates, entitled as of right to practise in the High Courts, replace the relevant provisions of the Legal Practitioners Act, the Bombay Pleaders Act and the Letters Patent of the various High Courts of Judicature as well as the rules made under those provisions. In regard to certain matters for which provision has not been made in the Bill it has, however, been necessary to retain the residuary powers of the High Courts of Judicature under their Letters Patent.

In accordance with the recommendation of the Committee in paragraph 56 of their Report the enrolment and control of legal practitioners other than Advocates is left to the High Courts under the Legal Practitioners Act and the Bombay Pleaders Act as amended by the Bill.

4. The principal modifications of the Committee's recommendations which are contained in the Bill are as follows:—

(a) the constitution of the Bar Councils differs slightly from the recommendations in that the Advocate-General must be a member and the number of members to be elected is ten, instead of eleven;

(b) the rules regarding all elections of the Councils instead of only the election of the first Councils are to be made by the High Courts, the powers of the Councils, in this respect being restricted to the making of bye-laws in regard to matters not provided for by the rules made by the High Courts. For the making of these bye-laws, however, the approval of the High Court will not be required;

(c) power is given to the Councils, with the sanction of the High Court, to prescribe fees to be payable to the Councils in respect of admission and enrolment and of the issue of certificates; and

(d) the powers of the Councils to hold inquiries into complaints of unprofessional conduct are restricted to cases referred to the Council by the High Court, and the inquiries are to be held by a Tribunal consisting of members of the Council appointed for the purposes of the inquiry by the Chief Justice or Chief Judge of the High Court. The High Court is, however, required to refer all complaints of unprofessional conduct which it does not dismiss either to the Bar Council or to a subordinate Court for inquiry. Instead of requiring the sanction of the Court for compelling the attendance of witnesses in each case a Tribunal is given power to enforce such attendance. A Tribunal is also given power to administer oaths to witnesses, and the protection of the witnesses who give evidence, which was recommended by the Committee, is secured by applying the provisions of section 132 of the Indian Evidence Act to proceedings before a Tribunal. On the other hand, rules governing the procedure of a Tribunal are to be prescribed by the High Courts instead of by the Councils with the approval of the High Court. (Statement of Objects and Reasons)—[*Gazette of India*, dated 2nd January, 1927, Part V, pages 6, 7 and the Report of the Bar Committee.]

When the Bill was referred to a Select Committee, several other alterations and amendments were made, with reference to which they said:—



"We have made a large number of alterations in the Bill, but we have not radically altered its scope in view of the fact, that, although many of the opinions received are in favour of the conferment of much wider powers upon Bar Councils, many others, including some of great weight, reveal considerable opposition to the innovations already proposed. In these circumstances, we think it would be unwise to depart from the present scheme of the Bill as a more or less tentative measure which is intended to be the first step towards the unification and eventual autonomy of the legal profession. With these preliminary remarks we now proceed to refer in detail to the more important amendments which we have made.

*Clause 1.*—We wish to record a suggestion that the Local Government of the United Provinces and the Chief Judge of the Chief Court of Oudh might well be consulted as to the desirability of applying the provisions of the Act to that Court.

*Clause 4.*—We think it desirable to indicate clearly that Judges of the High Court may be represented on the Bar Council, and have provided that two out of the four persons nominated by the Court may be Judges.

*Sub-clause (3)* of this clause was intended to provide for the representation on the Bar Council of advocates entitled to practise on the Original Side of the two High Courts to which it refers and more especially for the representation of the barrister element among them, an element which will no doubt tend to diminish with the course of time. We have accordingly provided definitely that at least one-half of the representation of Original Side advocates on the Bar Councils of these two High Courts shall be Barristers.

We think it is essential, in view of the status of the Advocate-General in the Presidency-towns, that they should be made *ex-officio* Chairman of the Bar Councils to which they respectively belong.

*Clause 6.*—The matters to be dealt with by rules made under this clause are, we think, matters which should ordinarily be dealt with by the Bar Councils themselves. We have accordingly provided that the rules should be made only in the first instance by the High Court and thereafter by the Bar Council with the previous sanction of the High Court. This involves the omission of sub-clause (c) of clause 7, which in the Bill as introduced was not altogether consistent with the provisions of clause 6.

*Clause 8.*—We have, in the first place, omitted the last part of the proviso to sub-clause (1) of this clause, as we are of opinion that it would not be possible to hold that a person appearing, pleading or acting on his own behalf or by his recognized agent could be held to be "practising."

We are also of opinion that the objection to sub-clause (2) which has been raised by several High Courts, namely, that the preparation and maintenance of the roll of advocates should be entrusted to the High Court instead of to the Bar Council, is well founded. We have accordingly provided for the maintenance of the roll by the High Court and for the maintenance of a copy of it by the Bar Council, principally in order that the election roll of persons entitled to elect members to the Bar Council may be kept up to date. In order to enable this to be done we lay upon the High Court the duty of furnishing a copy of the roll to the Bar Council and of communicating to it all alterations and additions as they are made.

Objections have been taken to the provision for the imposition of a fee in respect of enrolment of persons who are advocates, vakils, or pleaders of the High Court at the time when the provisions of the Act came into force in respect thereof. We think that, if only for the purpose of starting the Bar Council, in funds some nominal fee should be payable by such persons and we have fixed this at the sum of Rs. 10. In cases of new entrants the fee payable will be that prescribed by rules made by the Bar Council under the next following clause. We desire to point out that persons who have once been enrolled in a High Court as advocates, vakils or pleaders will not, in view of the provisions of Article 30 in Schedule I to the Indian Stamp Act, 1899, be required to pay stamp duty again in respect of their enrolment under this Act.

We have added to this clause two sub-clauses providing respectively for the seniority of advocates *inter se* and their respective rights of pre-audience. Sub-clause (4) as drafted by us enables the High Court in individual cases to grant precedence to an advocate out of the order of his seniority. We think a provision of this kind might be used to the advantage not only of a rising and successful, but also of a senior and less successful, advocate.

Finally in view of some of the opinions received, we consider it desirable to point out that clause (1) (3) of the Bill is designed to enable the various provisions of the Bill to be brought into force on different dates and thus to prevent the possibility of any period intervening between the operation of the prohibition contained in sub-clause (1) of clause 8 and the preparation of the new roll.

*Clause 9.*—Objections were raised to the provisions of sub-clause (4) of this clause in the Bill as introduced which was intended merely to preserve the existing powers of the Chartered High Courts under their Letters Patent to regulate the numbers of admissions and to refuse admission to individuals at their discretion. As however, no High Court has,



we believe, attempted to restrict in any way the numbers of new entrants, we think a provision enabling them to do so is unnecessary. But we do consider it essential that the High Court should have power to refuse admission to any person otherwise qualified if it considers that he would be on other grounds an undesirable addition to the Bar, and have made provision accordingly by means of a proviso to sub-clause (1).

We have added a new sub-clause (4) to this clause to meet a criticism advanced by the High Court of Judicature at Bombay that under the Bill as introduced the powers of the High Court in respect of admissions to the Original Side were not sufficiently defined. The new sub-clause is intended to make it clear that the powers of the High Courts at Calcutta and Bombay to regulate absolutely the qualifications for admission to practise on the Original Side will remain unimpaired.

*Clause 10.*—It has been pointed out that the expression 'unprofessional conduct' does not cover the whole range of cases in which it may be necessary to take disciplinary action against advocates, and we have made some drafting alterations in this clause to meet this point.

Some misunderstanding appears to have arisen as to the object of providing for a reference of cases of misconduct to subordinate Courts. Such a provision is necessary as a Tribunal of the Bar Council will not in all cases be in a position to inquire satisfactorily into matters which have occurred in the mofussil. We think that the allocation of inquiries between subordinate Courts and the Bar Council must be left to the discretion of the High Court, but we have provided that the High Courts shall be bound to consult the Bar Council in any case before referring it to such a Court; and we have further provided that Courts to which such reference may be made shall be the Courts of District Judges.

We have omitted the punishment of fine for which the Bill originally provided.

*Clause 12.*—The alterations which we have made in this clause provide firstly, that the Advocate-General shall have notice of, and shall be entitled to appear at the hearing of, every case before the High Court, whether the inquiry has been made by a Tribunal of a Bar Council or by a District Court, and secondly, that the High Court shall have the power to review its orders. This power will enable it to accept a belated apology if it thinks fit, and remit or reduce the punishment.

*Clause 13.*—We have added a proviso to sub-clause (1) to give effect to a suggestion made by the High Court of Judicature at Bombay that the Tribunal should not have unrestricted power to enforce the attendance of judicial officers, a power which might result in dislocation of judicial business and inconvenience to the public. We, therefore, require the Tribunal to obtain the previous sanction of the High Court or of the Local Government, as the case may be, before issuing a summons to the presiding officer of any Court.

We have further thought it advisable to make definite provision as to the manner in which Tribunals may be enabled to utilise the powers conferred by this section.

*Clause 14.*—We think the provisions of the Bill as introduced were somewhat too stringent in refusing to allow an advocate of one High Court to appear before another unless rules had been made by the latter Court or by the Bar Council, where such exists, regulating the conditions of such appearances. We think it reasonable to give advocates the right of appearing in another High Court unconditionally unless conditions are imposed by such rules, and we have re-drafted the clause accordingly. We have also made an addition to sub-clause (1) to provide for certain cases which have been brought to our notice in which legal practitioners are at present entitled to appear before certain public officers or bodies not legally authorised to take evidence.

*Clause 15.*—We have given effect to a suggestion that provision should be made for rules to regulate the investment and general management of the funds of the Bar Council. We have also added a clause which will enable rules to be made in respect of other matters which experience may reveal as requiring regulation.

*Clause 17.*—We have inserted this clause in the usual form to provide indemnity for *bona fide* action taken by Bar Councils and Committees, Tribunals and members of Bar Councils.—[*Gazette of India*, dated 21st August, 1926, Part V, pages 119-121.]

## CONTENTS.

### SECTIONS.

1. Short title, extent, application and commencement.
2. Interpretation.
3. Constitution and incorporation of Bar Councils.
4. Composition of Bar Councils.
5. Special provisions regarding constitution of first Bar Councils.
6. Power to make rules regarding constitution and procedure of Bar Councils.

### SECTIONS.

7. Power of Bar Councils to make bye-laws.
8. Enrolment of advocates.
9. Qualification and admission of advocates.
10. Punishment of advocate for misconduct.
11. Tribunal of Bar Council.
12. Procedure in inquiries.



## SECTIONS.

13. Powers of the Tribunal and Courts in inquiries.  
 14. Right of advocates to practice.  
 15. General power of Bar Councils to make rules.

## SECTIONS.

16. Power to fix fees payable as costs.  
 17. Indemnity against legal proceedings.  
 18. Publication of rules.  
 19. Amendment of enactments, etc.  
 THE SCHEDULE.

THE INDIAN BAR COUNCILS ACT (XXXVIII OF 1926).<sup>1</sup>  
 EFFECT OF SUBSEQUENT LEGISLATION.

Year.	No.	Short title.	Repealed or otherwise how affected by Legislation.
1926	XXXVIII	The Indian Bar Councils Act, 1926.	Amended by Act XIII of 1927.

[9th September, 1926.]

*An Act to provide for the constitution of Bar Councils in British India and for other purposes.*

WHEREAS it is expedient to provide for the constitution and incorporation of Bar Councils for certain Courts in British India, to confer powers and impose duties on such Bar Councils, and to consolidate and amend the law relating to legal practitioners entitled to practise in such Courts; It is hereby enacted as follows:—

*Preliminary.*

Short title, extent, application and commencement.

1. (1) This Act may be called THE INDIAN BAR COUNCILS ACT, 1926.

(2) It extends to the whole of British India, and shall apply to the High Courts of Judicature at Fort William in Bengal, and at Madras, Bombay, Allahabad <sup>2</sup>[and] Patna <sup>3</sup>[\* \* \*] and to such other High Courts within the meaning of clause (24) of section 3 of the General Clauses Act, 1897, as the <sup>4</sup>[Provincial Government] may, by notification<sup>5</sup> in the Official Gazette, declare to be High Courts to which this Act applies.

LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons, see *Gazette of India*, 1926, Pt. V, p. 5; and for Report of Select Committee, see *ibid.*, p. 119.

<sup>2</sup> Inserted by A.O., 1937.

<sup>3</sup> Words "and Rangoon" omitted by *ibid.*

<sup>4</sup> Substituted for "Governor-General in Council" by *ibid.*

<sup>5</sup> For notification declaring the Chief Court of Oudh to be a High Court to which this Act applies, see *Gazette of India*, 1928, Pt. I, p. 325.

NOTES.

SEC. 1.—(Per Sulaiman, Banerjee and Sen, JJ.).—Independently of this Act, the High Court does no longer possess any inherent jurisdiction to punish an advocate for *professional misconduct* or to adopt a procedure for enquiry other than that laid down in the Act or to pass an order for costs against him or to impose a fine not contemplated by the Act. 1930 A. 225=52 A. 619=1930 A.L.J. 402 (F.B.). The High Court has power to refuse admission to the Bar to any person at its discretion. But weight should be attached to the recommendation of the Bar Council which re-

presents the view of the legal profession. 1930 A. 22=1929 A.L.J. 1105=123 I.C. 683; 124 I.C. 659=5 Luck. 615. Advocates enrolled in the Madras High Court under the provisions of the Act, are entitled to *act and plead in the insolvency jurisdiction* of the High Court. 52 M. 92=1928 M. 1182=55 M.L.J. 551. All judicial officers should keep a vigilant eye on the *conduct of legal practitioners* of whatever status and should in proper cases institute inquiries under the Act according to the status of the legal practitioner concerned; but legal practitioners are *entitled also to the protection of the Court* and inquiries should not be instituted or complaints made without having given very grave consideration to the reasonable probability of the case against the legal practitioner being well founded. As much injustice may be done to a legal practitioner by ill-conceived proceedings against him as may be done to the public interest and to the general body of legal practitioners by failure to keep a vigilant eye upon and take proper and strong action against cases of misconduct. Complaint rejected. 1931 A.L.J. 678=1931 A. 580. In a proceeding against a legal



(3) This section and sections 2, 17, 18 and 19 shall come into force at once; and the <sup>1</sup>[Provincial Government] may, by notification<sup>2</sup> in the Official Gazette, direct that the other provisions of this Act, or any provision thereof specified in the notification, shall come into force in respect of any High Court to which this Act applies on such date as <sup>3</sup>[it] may by the notification appoint.

Interpretation.

<sup>4</sup>[2. (1)] In this Act, unless there is anything repugnant in the subject or context,—

(a) "advocate" means an advocate entered in the roll of advocates of a High Court under the provisions of this Act;

(b) "Advocate-General" includes, where there is no Advocate-General, the Government Advocate and, where there is no Advocate-General or Government Advocate, such officer as the Provincial Government may declare to be the Advocate-General for the purposes of this Act;

(c) "High Court" means a High Court to which this Act applies; and

(d) "prescribed" means prescribed by rules made under this Act.

<sup>5</sup>[(2) In this Act "the Provincial Government" means, in relation to any High Court, the Provincial Government of the Province in which the High Court has its principal seat.]

### Constitution of Bar Councils.

Constitution and incorporation of Bar Councils.

3. (1) For every High Court a Bar Council shall be constituted in the manner hereinafter provided.

### LEG. REF.

<sup>1</sup> Substituted for "Governor-General in Council" by A.O., 1937.

<sup>2</sup> For such notification appointing the 1st March, 1928, as the date on which the rest of the Act will come into force in respect of the Chief Court of Oudh and sections 3 to 7 in respect of Calcutta High Court, see *ibid.*

Provisions of sections 8 to 16 came into force from the 1st July, 1928, in respect of Calcutta High Court, see *Gazette of India*, 1928, Pt. I, p. 382.

The rest of the Act came into force from the 16th July, 1928, in respect of Madras High Court, see *Gazette of India*, 1928, Pt. I, p. 382; in respect of Allahabad High Court from 1st June, 1928, see *Gazette of India*, 1928, Pt. I, p. 400; in respect of Patna High Court, from 1st January, 1929, see *ibid.*, p. 703; in respect of Bombay and Rangoon High Courts, from 1st January, 1929, see *ibid.*, p. 714.

<sup>3</sup> Substituted for "he" by A.O., 1937.

<sup>4</sup> S. 2 may be deemed to have been re-numbered as sub-section (1) of section 2 by the A.O. which has added a new sub-section (2) to that section.

<sup>5</sup> Sub-section (2) of section 2 inserted by A.O., 1937.

### NOTES.

practitioner under the Act it is open to the High Court to consider the case on the evidence and arrive at a different conclusion to that of the Bar Tribunal. 1930 M.W.N. 216. An advocate convicted for an offence of perjury although struck off the roll of vakils must be dealt with under the Act, he having been enrolled as the Advocate of the High Court under the provisions of the Act. 131 I.C. 67=8 O.W.N. 267=1931 O. 161. Where the High Court went into the report of the Bar Council and inflicted

punishment on a legal practitioner, and a counsel appeared on behalf of the Bar Council all the time, *held*, that the legal practitioner should be directed to pay a fee to the counsel. 1930 M.W.N. 216. Where a complaint against legal practitioner is made before the Act came into force but the enquiry takes place under the Act, the High Court has the power to direct the practitioner to pay the costs of the proceedings before the Tribunal and before the High Court. 54 M. 857=134 I.C. 33=61 M. L.J. 148 (F.B.). Before the Court will set aside a *bar council election* because of certain irregularities in the conduct of the election, it must be satisfied that the election was not an election in substance conducted under existing law according to the rules framed for the holding of the election. An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive in the conduct of the election, if the Court is satisfied that the result of the election was not and could not have been affected by those transgressions. 1935 A. 295=157 I.C. 220. An advocate who has once been consulted by a party is not thereby debarred from appearing for the opposite party for all times. He is free to accept a brief against him, if he has not received any information of a confidential nature from the party who consulted him. The onus of proving that such information was conveyed lies and lies heavily on the party seeking to restrain the advocate's appearance. I.L.R. (1940) All. 262=1940 A.L.J. 170=A.I.R. 1940 All. 233. See also 11 O.W.N. 23=1934 Oudh 58 (S.B.).

SEC. 2 (c): HIGH COURT.—High Court referred to in the Act is a chartered High Court. Benares State Chief Court is neither a High Court within the meaning of the Act



(2) Every Bar Council so constituted shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property, both movable and immovable, and to contract, and shall by the name of the Bar Council of the High Court for which it has been constituted sue and be sued.

Composition of Bar Councils.

4. (1) Every Bar Council shall consist of fifteen members, of whom—

(a) one shall be the Advocate-General;

(b) four shall be persons nominated by the High Court, of whom not more than two may be Judges of that Court; and

(c) ten shall be elected by the advocates of the High Court from amongst their number.

(2) Of the elected members of every Bar Council not less than five shall be persons who have for not less than ten years been entitled as of right to practice in the High Court for which the Bar Council has been constituted.

(3) Of the elected members of the Bar Councils to be constituted for the High Courts of Judicature at Fort William in Bengal and at Bombay such proportion as the High Court may direct in each case shall be persons who have, for such minimum period as the High Court may determine, been entitled to practice in the High Court in the exercise of its original jurisdiction, and such number as may be fixed by the High Court out of the said proportion shall be barristers of England or Ireland or members of the Faculty of Advocates in Scotland.

(4) There shall be a Chairman and Vice-Chairman of each Bar Council elected by the Council in such manner as may be prescribed:

Provided that the Advocates-General of Bengal, Madras and Bombay shall be Chairman *ex officio*, respectively, of the Bar Councils constituted for the High Courts of Judicature at Fort William in Bengal, at Madras and at Bombay.

5. (1) Notwithstanding anything contained in clause (c) of sub-section (1) of section 4, the elected members of the first Bar Council constituted under this Act for any High Court shall be elected by and from amongst the advocates, vakils and pleaders who are on the date of the election entitled as of right to practice in the High Court.

(2) The terms of office of the nominated and elected members of any such first Bar Council shall be three years from the date of the first meeting of the Council.

Power to make rules regarding constitution and procedure of Bar Councils.

6. (1) Rules, consistent with this Act, may be made to provide for the following matters, namely:—

(a) the manner in which elections of members of the Bar Council shall be held; the method of determining, in accordance with the provisions of sub-sections (2) and (3) of section 4, the candidates who shall be declared to have been elected; the manner in which the result of elections shall be published; and the manner in which and the authority by which doubts and disputes as to the validity of an election shall be finally decided;

(b) the terms of office of nominated and elected members of the Council;

#### NOTES.

nor subordinate to the Allahabad High Court. 1930 A. 91 (1)=27 A.L.J. 1195.

SECS. 4 TO 8.—These sections 4 to 8 must be read together. 163 I.C. 510=1936 Sind 75 (S.B.).

SEC. 5 (2).—There is nothing in the section which prevents rules being framed whereby certain members elected to the first Bar Council may continue in office there-

after so that a certain continuity may be maintained between that Council and its successor. 163 I.C. 510=1936 Sind 75 (S.B.).

SEC. 6 (1) (b) AND (4).—The powers conferred by this section to provide for retirement of members from office by rotation, relate to the first Bar Council also, and are not confined to its successors alone. 163 I.C. 510=A.I.R. 1936 Sind 75 (S.B.).



(c) the filling of casual vacancies in the Council;  
 (d) the convening of meetings of the Council, and the quorum necessary for the transaction of business thereat;

(e) the manner of election and the respective terms of office of the Chairman, in cases where the Chairman is to be elected, and of the Vice-Chairman; and

(f) any matter incidental or ancillary to any of the foregoing matters.

(2) The first rules under this section shall be made by the High Court, but the Bar Council may thereafter, with the previous sanction of the High Court, add to, amend or rescind any rules so made.

(3) No election of a member or members to the Council shall be called in question on the ground that due notice thereof has not been given to any person entitled to vote thereat, if notice of the date fixed for the election has, not less than thirty days before that date, been published in the Official Gazette of the province, or of each province, as the case may be, in which the High Court exercises jurisdiction.

(4) Rules made under clause (b) of sub-section (1) may provide for the retirement of members from office by rotation and for the manner in which the order of such retirement shall be determined.

Power of Bar Councils to make bye-laws.

7. The Bar Council may make by-laws consistent with this Act and any rules made thereunder to provide for any of the following matters, namely:—

(a) the appointment of such ministerial officers and servants as the Bar Council may deem necessary, and the pay and allowances and other conditions of service of such officers and servants; and

(b) the appointment and constitution of Committees of the Council, the procedure of such Committees, and the determination of the powers or duties of the Council which may be delegated to such Committees.

#### *Admission and enrolment of advocates.*

8. (1) No person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the advocates of the High Court maintained under this Act:

Enrolment of advocates. Provided that nothing in this sub-section shall apply to any attorney of the High Court.

(2) The High Court shall prepare and maintain a roll of advocates of the High Court in which shall be entered the names of—

(a) all persons who were, as advocates, vakils or pleaders, entitled as of right to practise in the High Court immediately before the date on which this section comes into force in respect thereof; and

#### NOTES.

SEC. 6 (2).—Where in framing the rules, there is substantial compliance with the provisions of the Act, the omission on the part of the Bar Council strictly to follow the procedure enjoined in section 6 (2) does not amount to an illegality and it is no more than an irregularity. 157 I.C. 220=1935 A. 295.

SEC. 8: PRACTICE—MEANING OF.—Advocates enrolled in the High Court of Madras are entitled not only to appear and plead but also to act in the insolvency jurisdiction of the High Court. 52 M. 92=55 M.L.J.

551=1928 M. 1182. An agent with a power-of-attorney to appear and conduct judicial proceedings has no right of audience in Court. Nor is he entitled to notice if his principal wants to appear and conduct the proceedings himself in person or appoints an advocate to appear for him. Such a power-of-attorney agent cannot carry on business as a solicitor or attorney drafting, engrossing and filing plaint Judge's summons, affidavits and generally issuing legal process and charge fees to the principal. 46 L.W. 734=1937 M.W.N. 1060.



(b) all other persons who have been admitted to be advocates of the High Court under this Act:

Provided that such persons shall have paid in respect of enrolment the stamp duty, if any, chargeable under the Indian Stamp Act, 1899, and a fee, payable to the Bar Council, which shall be ten rupees in the case of the persons referred to in clause (a) and in other cases such amount as may be prescribed.

[(3) Entries in the roll shall be made in the order of seniority, and such seniority shall be determined as follows, namely:—

(a) all such persons as are referred to in clause (a) of sub-section (2) shall be entered first in the order in which they were respectively entitled to seniority *inter se* immediately before the date on which this section comes into force in respect of the High Court; and

(b) the seniority of any other person admitted to be an advocate of the High Court under this Act after that date shall be determined by the date of his admission, or, if he is a barrister, by the date of his admission or the date on which he was called to the Bar, whichever date is earlier:

Provided that, for the purposes of clause (b) the seniority of a person who before his admission to be an advocate was entitled as of right to practise in another High Court shall be determined by the date on which he became so entitled.

(4) The respective rights of pre-audience of advocates of the High Court shall be determined by seniority:

Provided that the Advocate-General shall have pre-audience over all other advocates and King's Counsel shall have pre-audience over all advocates except the Advocate-General.]<sup>1</sup>

<sup>1</sup>(5) The High Court shall issue a certificate of enrolment to every person enrolled under this section.

<sup>1</sup>(6) The High Court shall send to the Bar Council a copy of the roll as prepared under this section, and shall thereafter communicate to the Bar Council all alterations in, and additions to, the roll as soon as the same have been made.

<sup>1</sup>(7) The Bar Council shall enter in the copy of the roll all alterations and additions so communicated to it.

#### LEG. REF.

<sup>1</sup> Sub-sections (3) and (4) inserted and sub-sections (5), (6) and (7) re-numbered by Act XIII of 1927.

#### NOTES.

SEC. 8 (4): ACTING ADVOCATE-GENERAL—RIGHT OF PRE-AUDIENCE.—The Acting Advocate-General is entitled as much as the Advocate-General, to a right of pre-audience over all other advocates in respect of all business whether for the Crown or of a private nature. 136 I.C. 793=33 Bom.L.R. 1500 (F.B.).

SECS. 8 AND 9.—The applicant passed his law examination in 1919; he was enrolled as a pleader in 1920 and as a pleader of the first grade in 1922. He applied for admission as an advocate of the Chief Court, which application was objected to by the Bar Council. It was found from record that in a suit wherein he had appeared, even though he had received a payment of a sum which was due on a decree passed in favour of the decree-holder he had retained the money from August, 1924, till April, C. C. M.—21

1926, and had then paid to the decree-holder, under circumstances not free from suspicion. *Held*, that in this instance the Bar Council had not acted otherwise than honestly, fairly and without prejudice and therefore the applicant was refused admission as an advocate of the Chief Court. 1930 Oudh 121=5 Luck. 615. If the Bar Council can establish that as fairminded men, who have treated the application for admission as advocate on its merits and in a reasonable manner, they are convinced that a certain member of the profession does not deserve to be enrolled as an advocate and that his enrolment will be prejudicial to the credit of the body of advocates, their objections should prevail. It may not be that the conduct in question deserves suspension or removal. Such conduct may not be such as to debar the applicant from practising in the Courts subordinate to the Chief Court. It may well be said that a man is not good enough to be an advocate, although he may be allowed to practise in such Courts. 6 O.W.N. 1080=1930 Oudh 121. See also 1930 A. 22=123 I.C. 683.



Qualification and admission of advocates.

9. (1) The Bar Council may, with the previous sanction of the High Court, make rules to regulate the admission of persons to be advocates of the High Court:

Provided that such rules shall not limit or in any way affect the power of the High Court to refuse admission to any person at its discretion.

(2) In particular and without prejudice to the generality of the foregoing power, such rules shall provide for the following matters, namely:—

(a) the qualifications to be possessed by persons applying for admission as advocates;

(b) the form and manner in which applications shall be made to the High Court for admission;

(c) the giving of notice by the High Court to the Bar Council of all such applications;

(d) the hearing by the High Court of any objection preferred on behalf of the Bar Council to the admission of any applicant; and

(e) the charging of fees payable to the Bar Council in respect of enrolment.

(3) Rules made under this section shall provide that no woman shall be disqualified for admission to be an advocate by reason only of her sex.

(4) Nothing in this section or in any other provision of this Act shall be deemed to limit or in any way affect the powers of the High Courts of Judicature at Fort William in Bengal and at Bombay to prescribe the qualifications to be possessed by persons applying to practise in those High Courts respectively in the exercise of their original jurisdiction or the powers of those High Courts to grant or refuse, as they think fit, any such application <sup>1</sup>[or to prescribe the conditions under which such persons shall be entitled to practise or plead.]

#### Misconduct.

10. (1) The High Court may, in the manner hereinafter provided, reprimand, suspend or remove from practice any advocate of the High Court whom it finds guilty of professional or other misconduct.

#### LEG. REF.

<sup>1</sup> Inserted by Act XIII of 1927.

#### NOTES.

SEC. 9.—Under Rules framed by Karachi Bar Council, an application for enrolment will be dismissed in the absence of the receipt for the payment of fees attached to it. 158 I.C. 57=1935 Sind 180 (S.B.) Under rules framed by Sind Court, the application should be accompanied by a certificate or other proof that the applicant has taken the decree; and a mere certificate from the District Court that he has been allowed to practise there is not sufficient. 158 I.C. 707=1935 Sind 196.

SEC. 9 (4).—"High Court" referred to in Bar Councils Act, R. 1 (All.) is a Chartered High Court. 1929 A.L.J. 1195=1930 A. 91 (1).

BENARES STATE CHIEF COURT is neither a High Court within the meaning of Bar Council, R. 1, nor is it subordinate to the Allahabad High Court, and hence, a legal practitioner who enrolls himself as a pleader in Allahabad District Court and practises in Benares State Courts cannot be treated as

having practised in any High Court or a Court subordinate to Allahabad High Court and as such he is not entitled to be enrolled as an advocate of the Allahabad High Court. 1929 A.L.J. 1195=1930 A. 91 (1). See also 1930 A.L.J. 839=1930 A. 887.

The Subordinate Courts referred to in the proviso to R. 1 (All.) are Courts within the province. *Courts in Ajmere* are not Courts subordinate to the Allahabad High Court. 1930 A.L.J. 839=1930 A. 887. Rule 10 of the Appellate Side Rules of the Bombay High Court is not *ultra vires*. Advocates on the Appellate Side did not come within the definition of "pleader" as defined in section 4 of the Cr. P. Code, for the purposes of the Sessions Court because they are not authorised by law for the time being in force to practise in that Court. So, they have no right of audience in the Sessions side of that Court. 36 Bom.L.R. 1=1934 B. 70=58 B. 456 (F.B.).

SEC. 10.—Unprofessional conduct—Notice issued by High Court after the Act came into force—*Ultra vires*. See 51 A. 79. See also 1930 A. 225=52 A. 619 (F.B.).



(2) Upon receipt of a complaint made to it by any Court or by the Bar Council, or by any other person that any such advocate has been guilty of misconduct, the High Court shall, if it does not summarily reject the complaint, refer

## NOTES.

**LOCUS STANDI TO MAKE COMPLAINT.**—It is open to any person to complain to the Court as to the undesirability of certain remarks made by a Counsel during the course of a trial. Where a Mahommadan Counsel made some communal remarks during the course of a trial, it is open to the Hindu Association to make a complaint to the High Court to take action in the matter. 162 I.C. 919=37 Cr.L.J. 783=1936 Sind 49.

**CONTEMPT OF COURT.**—In *re Wallace* (L.R. 1 P.C. 283) is no authority for holding that an advocate should never be punished professionally for contempt of Court committed by him in his personal capacity, however gross the offence may be. Each case must be dealt with according to the circumstances. Where a pleader in his capacity as a suitor in the Small Cause Court made a grossly improper remark reflecting upon the Judges of the High Court who at that stage had no concern whatever with the suit and a gratuitous hit at the Chief Justice without the slightest justification and was fined Rs. 75 for contempt of Court, *held*, that the fine was not under the circumstances sufficient and that he should be suspended from practice for six months. 55 A. 148=1933 A. 224. But see also 1932 A. 492 (S.B.). An Advocate deliberately making false allegations involving imputations upon the fairness and impartiality of judicial officers in proceedings connected with an execution case to which he was himself a party cannot be punished under the disciplinary side under this Act. 1932 A.L.J. 773=1932 A. 492 (S.B.).

**WHAT IS MISCONDUCT—DISCRETION OF COURT.**—The words "professional or other misconduct" in section 10 (1) should be read in their plain and natural meaning. The legislature intended by the aforesaid words to confer on the High Court jurisdiction to take action in all cases of misconduct in professional or other capacity. 63 C. 867=37 Cr.L.J. 534=40 C.W.N. 366=1936 C. 158 (S.B.). The word "may" in sec. 10 (1) makes it plain that while the High Court has unrestricted jurisdiction in all cases of misconduct, a discretion is left to the Court to take action in suitable cases only. It is not possible to lay down any hard and fast rule or any general principles with regard to exercise of such discretion. It must be exercised judicially. 63 C. 867. The test that the Court has to apply in considering whether an advocate should be struck off the roll is whether his proved misconduct is such that he must be regarded as unworthy to remain a member of the profession and unfit to be entrusted with the responsible duties that an advocate is called upon to perform. 63 C. 867. See also 59 B. 57=36 Bom.L.R. 1136; 59 B. 676 (P.C.). Cl. 10 of the Letters Patent which empowers the High

Court to remove or suspend from practice advocates, vakils, or attorneys on "reasonable cause," gives a wide discretion to the Court in regard to the exercise of this disciplinary authority. "Reasonable cause" in the clause means the same as professional or other misconduct under Section 10 of the Bar Councils Act. "Misconduct" is a sufficiently wide expression, it is not necessary that it should involve moral turpitude. Any conduct which in any way renders a man unfit for the exercise of his profession or is likely to hamper or embarrass the administration of justice by the High Court or any of the Courts subordinate thereto may be considered to be misconduct calling for disciplinary action. What the Court has to consider is the conduct of the Advocate or Attorney as it affects his position as an Advocate or Attorney and his relations to the Court. 43 Bom.L.R. 250. An advocate was convicted for submitting a false return of his income to the income-tax authorities and for taking up a false defence and maintaining it even up to the High Court, even though he knew such defence to be false. *Held*, that his conduct involved moral turpitude and that his name should be struck off the roll. 12 R. 110=1934 R. 33=149 I.C. 856. An advocate was guilty of misconduct involving moral turpitude by falsely verifying an application and endeavouring to deceive the Court and to deprive the decree-holder of money due to him. But the complainant did not file his complaint out of any high sense of public duty. A third person, who had been engaged in litigation with the advocate in his personal capacity, was behind the application and had paid the expenses. The application was made out of a desire further to harass the advocate. The advocate was not acting for a client in this matter but was engaged in his own litigation, and that in the end no one had suffered by his action. He was subjected to heavy expenses in defending himself upon all these charges. *Held*, that an order suspending the advocate from practice for the term of three calendar months would be sufficient in the peculiar circumstances. 1932 A.L.J. 773=1932 A. 492 (S.B.). It is extremely necessary that advocates having to withdraw money or to accept serious responsibility of the kind from and on behalf of a client should even if there be no apparent circumstances to justify a suspicion do everything in their power to verify the form of the *Vakalatnama*, and further more should not accept a *Vakalatnama* unless they have satisfied themselves of the *bona fides* of the person who offers it to them. 16 P. 488=17 P.L.T. 407=A.I.R. 1937 P. 433 (S.B.) Agreement with client to receive payment only in the event of success is professional misconduct. 50 L.W. 234=A.I.R. 1939 Mad. 772=(1939) 2 M.L.J. 320 (F.B.).



the case for inquiry either to the Bar Council, or, after consultation with the Bar Council, to the Court of a District Judge (hereinafter referred to as a District Court) and may of its own motion so refer any case in which it has otherwise reason to believe that any such advocate has been so guilty.

#### NOTES.

As to being engaged in money-lending business, see I.L.R. 1940 A. 60=1939 A.L.J. 957=I.L.R. 1940 A. 60=1940 A. 1 (F.B.).

ADVOCATE ENTERING INTO PARTNERSHIP.—An advocate entering into a partnership business or trade as partner is guilty of misconduct. 158 I.C. 278=1935 O.W.N. 1029; 159 I.C. 561=1935 A. 1023. See also I.L.R. (1940) All. 60=A.I.R. 1940 All. 1 (F.B.).

NEGLIGENCE OF ADVOCATE.—Mere negligence on the part of an advocate, however gross, does not amount to misconduct, professional or otherwise, when it is not accompanied by moral delinquency. 62 C. 158=157 I.C. 374=1935 C. 484. But it would constitute misconduct if negligence be accompanied by suppression of truth or by deliberate misrepresentation. 62 C. 158. An advocate was engaged to file a suit. The advocate employed an unregistered clerk and left the plaint with him for presentation. The clerk failed to file the plaint and thus the suit was not filed. The advocate however did not take care to see whether the suit had been filed by looking into the cause list and thus allowed his clerk to cheat his client. Besides this the advocate did not return or account for the money he had taken from his client for stamps and other incidental purposes. Held, that the conduct of the advocate amounted to gross misconduct. 178 I.C. 398=A.I.R. 1938 Rang. 423 (S.B.). It is manifest that it is improper for an advocate to address a letter to a clerk in a Magistrate's office asking that an application filed by him should be dealt with urgently. The proper course for an advocate, if there was any delay, to bring the matter to the notice of the Magistrate himself. 1941 M.W.N. 56=53 L.W. 62=(1941) 1 M.L.J. 128 (F.B.).

BREACH OF TRUST.—An advocate who was convicted for two offences of criminal breach of trust in respect of a large amount and of attempt to cheat and who dishonestly induced a lady to part with a security is guilty of misconduct and his name should be removed from the rolls. 159 I.C. 1036=1935 R. 458.

ATTEMPT TO BRIBE JUDGE.—An advocate attempting to bribe a Judge to obtain judgment in his client's favour is guilty of grossest misconduct. 13 R. 518=36 Cr.L.J. 961=1935 R. 178. When a complaint is made, the Court under the Act can only dismiss it summarily or else refer it to the Bar Tribunal to inquire into. The Court would not generally be justified in dismissing a petition summarily unless it was satisfied that, even if the allegations made in the petition be proved, there would be no case for taking action. 138 I.C. 543=34 Bom. L.R. 443=1932 B. 199. The question

whether a particular advocate has violated the recognized canons of professional etiquette is primarily a matter that concerns the Bar Council and consequently the High Court ordinarily will accept findings on questions of fact recorded by the Bar Tribunal provided they are not perverse. 1939 A.L.J. 957 (F.B.). See also I.L.R. (1940) All. 60=1940 All. 1.

PUNISHMENT.—(Per C.J. and Gentle, J.) An advocate who misappropriates his client's moneys is not fit to remain a member of an honourable profession of advocates of the High Court, and the High Court should be failing in its duty if it does not direct the advocate's name to be removed from the rolls. The advocate is guilty of a criminal offence and such conduct cannot be condoned as to do so would encourage crimes of that nature and might have a harmful effect on the profession as a whole. The fact that the misappropriation is only temporary does not lessen the offence of the gravity of the misconduct. Varadachariar, J.—Though the conduct of an advocate who misappropriates the moneys belonging to his client must be strongly disapproved and though the members of the profession should observe the highest standard of professional conduct, the Court when dealing with the question of punishment, cannot shut its eyes to the fact that those standards have not unfortunately yet come to be generally observed and the way that advocates and clients carry on their pecuniary dealings sometimes leads advocates to imagine that they can persuade their clients to condone the faults on their part in dealing with their client's money; the possibility or even the fact of condonation by the client is, however, no justification for such conduct. 1937 M.W.N. 1322 (F.B.).

SECS. 10 AND 11: "PROFESSIONAL OR OTHER MISCONDUCT."—Merely having been member, or assisted the operation or managed the affairs, of an unlawful association does not render an advocate unfit to exercise his profession. Nor does such conduct necessarily involve any moral turpitude, or any attack upon the system of which the Court forms part, or embarrass in any way the administration of justice by the Court. No action is therefore called for in such a case. 59 B. 57=1935 B. 1=36 Bom.L.R. 1136 (F.B.). An advocate took a prominent part in Labour and Trade Union Movements and delivered a number of speeches advocating certain reforms. For some of these speeches he was bound over for one year under section 107, Cr. P. Code. For others, he was prosecuted under section 124-A, I.P. Code, and convicted thrice. There was no indication that he made any organised or persistent attempt to create a breach of the peace or to incite acts tending to



11. (1) Where any case is referred for inquiry to the Bar Council under section 10, the case shall be inquired into by a Committee of the Bar Council (hereinafter referred to as the Tribunal).

(2) The Tribunal shall consist of not less than three and not more than five members of the Bar Council appointed for the purpose of the inquiry by the Chief Justice or Chief Judge of the High Court, and one of the members so appointed shall be appointed to be the President of the Tribunal.

#### NOTES.

subvert law and order. The general tenor of the speeches was inoffensive. *Held*, no further action was called for in the case. 63 C. 867=37 Cr.L.J. 534=40 C.W.N. 366=1936 C. 158 (S.B.). It is not part of the duty of the High Court to impose penalties for misconduct, unconnected with the exercise of the profession, which is either not punishable or has been, or can be, punished under the law of the land. The State imposes suitable penalties for the infringement of its laws and provides proper sanctions for the enforcement of such penalties; and there is no reason why the Court's disciplinary jurisdiction should be employed merely in aid of the criminal law. 59 B. 57; 63 C. 867. In cases of misconduct involving moral turpitude, the Court has to see whether the advocate has shown himself to be unworthy of the confidence of the Court, or unfit to be entrusted with the business of his client or a person with whom his professional brethren cannot be expected to associate. But these are not the only cases in which the High Court may be called upon to take action. An advocate might engage in revolutionary activities designed to destroy the system of which the Court forms part, or activities likely to hamper or embarrass the administration of justice by the Courts. What has to be considered in such cases is the conduct of the advocate as it affects his position as an advocate and his relations to the Court. It will not tolerate on its rolls an advocate who is trying to undermine or destroy the authority of the Court. Any one electing to engage in activities of that nature must do so without the authority and prestige attached to the position of an advocate. 36 Bom.L.R. 1136=59 B. 57=1935 B. 1 (F.B.). A conviction for the offence of sedition under section 124-A, I. P. Code, cannot be regarded as such misconduct as would, in all circumstances, require action to be taken under the Court's disciplinary jurisdiction and as would demand the removal of the advocate from practice. 63 C. 867.

**EVIDENCE OF MISCONDUCT.**—The fact that an advocate has been convicted of a criminal offence is evidence of his misconduct within the meaning of this section. 59 B. 676=1935 P.C. 168=69 M.L.J. 431 (P.C.). It is not incumbent on the Advocate-General to adduce evidence of the grounds on which the conviction is based. It is for the Court to decide whether the conviction is evidence of such misconduct as to call for disciplinary

action by it. 69 M.L.J. 431 (P.C.). Where the High Court in its discretion proceeded to consider whether in the circumstances the misconduct proved called for any disciplinary action, the Privy Council will not interfere. 69 M.L.J. 43 (P.C.). The judgment and evidence in a civil suit are admissible as evidence in an inquiry under this section, but they are not conclusive proof. (*Iqbal Ahmed, J.*, dissenting). 159 I.C. 561=1935 A. 1023.

**SECS. 10 TO 13.**—Where a complaint has been made to the Chief Justice and the Judges of the High Court under section 10, and such complaint has been referred to the Bar Council to be enquired into by a tribunal, it is incumbent upon the tribunal to come to some finding or other and it cannot abandon the proceeding merely because the complainant withdrew the complaint. 1930 C. 574=57 C. 724. It is highly unsatisfactory from the point of view of advocates and of the public that any one should make a solemn complaint against one of them to the High Court and have the matter referred to the tribunal and that then, without any finding which could clear the advocate, the enquiry should be dropped. The complainant after the matter has been referred to the tribunal is not in any way a person who is like a plaintiff *dominus lues* and if such complainant withdraws the complaint, and if from circumstances and evidence the tribunal is of opinion that there is no need to investigate and the charge preferred has no substance it can so report. In other circumstances it is open to the tribunal to exercise its own discretion whether to employ its power to summon the complainant personally or other people. The Act requires that the tribunal should come to a finding. 57 C. 724=1930 C. 574. (Per *Rankin, C.J.*). See also 1931 A. 580. The Bar Council is in the position of a trustee and guardian of the dignity and privileges of the Bar and the rights and duties of its members and it is to the interest of the profession that when a charge is made against an advocate it should either be cleared or brought home to him. The rules are so designed that on a charge of misconduct, there should be a finding one way or the other. 57 C. 724=1930 C. 574. (Per *Buckland, J.*).

**SECS 10 AND 19.**—A notice was issued on the 13th June, 1928, by the High Court against a pleader calling upon him to show cause why he should not be dealt with under the Legal Practitioners Act for professional



12. (1) The High Court shall make rules to prescribe the procedure to be followed by Tribunals and by District Courts, respectively, in the conduct of inquiries referred under section 10.

(2) The finding of a Tribunal on an inquiry referred to the Bar Council under section 10 shall be forwarded to the High Court through the Bar Council, and the finding of a District Court on such an inquiry shall be forwarded direct to the High Court, which shall cause a copy thereof to be sent to the Bar Council.

(3) On receipt of the finding, the High Court shall fix a date for the hearing of the case and shall cause notice of the day so fixed to be given to the Advocate

#### NOTES.

misconduct. Objection was taken by the pleader in view of the Bar Councils Act which had come into force on 1st June, 1928. *Held*, that the provisions of the Letters Patent in so far as they may conflict with the provisions of the Act, were abrogated by section 19 (2), and therefore it was necessary for the case to be either referred to the Bar Council or at any rate for the Bar Council to be consulted. The Court was not properly seized of the case and that the notices issued to show cause was, as framed, *ultra vires* and a nullity. 51 A. 76=26 A. L.J. 1039=1928 A. 439 (F.B.).

SEC. 12.—Where the High Court refers to the District Judge an inquiry as to an advocate's alleged misconduct, he cannot delegate the same to one of his assistants. 168 I.C. 992=38 Cr.L.J. 664 (1)=A.I.R. 1937 Sind 98. In order to prevent *counsel appearing for the other party*, he must have a definite retainer, with a fee paid, or he must have such confidential instructions from one of the parties as would make it improper for him to appear for the other party. In the absence of either, it cannot be said to be unprofessional on the part of the counsel, to appear for the other party. 147 I.C. 1080=11 O.W.N. 23=1934 Oudh 58 (S.B.). *See also* I.L.R. (1940) All. 262=1940 A.L.J. 170=A.I.R. 1940 All. 233. The High Court in considering what orders ought to be passed in a case that falls within sec. 12, is *not in any way fettered by the report of the tribunal* or of the District Court, and although no doubt the *greatest weight ought to be attached to the findings contained in such a report*, it is competent to the Court to go into the facts for itself and to decide whether or not it agrees with those findings. 1935 A.L.J. 759=1935 A. 425; 35 C.W.N. 293=1931 C. 680; 155 I.C. 1054=1935 A. 503. *See also* 1939 A. L.J. 957=I.L.R. (1940) All. 60=1940 All. 1 (F.B.). The value of the report of the tribunal in a case is lessened where, in respect of the more serious charges, it is not unanimous and to some extent ambiguous. The finding of the Tribunal can be reversed by a Bench of the High Court even though all the Judges constituting the Bench are not unanimous, and an order of the majority of the Judges reversing such finding is not *ultra vires*. 159 I.C. 653=1935 A. 1037. The value of the report of the tribunal in a

case is lessened where, in respect of the more serious charges, it is not unanimous and to some extent ambiguous. Where the *report of the tribunal is ambiguous* and not explicit on findings it is *not necessary to send it back to the tribunal* if after investigating the facts itself the Court is in no doubt as to the order that ought to be passed in the case. 1933 R. 10. The Court's *decision must rest not upon suspicion*, but upon legal grounds established by legal testimony. 147 I.C. 1080=11 O.W.N. 23=1934 Oudh 58 (F.B.); 58 M.L.J. 635=1930 P.C. 144 (P.C.).

SEC. 12 (2).—The members of the Tribunal *can record separate findings* and make more than one report and the High Court is entitled to consider the report and findings of the minority as well as the majority of the Tribunal. 54 M. 857=61 M.L.J. 148=1932 M. 131 (F.B.). *See also* 42 C. W.N. 1111; I.L.R. 1940 A. 60. (F.B.). The offence of perjury always involves moral turpitude in varying degree according to the particular facts of each case. Although the High Court in proceedings under section 12 against an Advocate convicted of perjury, cannot question the propriety of the conviction, it can, with a view to fix the quantum of punishment, look into the circumstances of the case and *ascertain the degree of moral turpitude and extenuating circumstances if any*. Thus, the absence of direct evidence can be taken into account as also testimonials speaking highly of the character of the Advocate. Advocate suspended for six months. 131 I.C. 67=8 O.W.N. 267=1931 Oudh 161.

SEC. 12 (3).—Sub-section (3) provides that on receipt of the finding of the Tribunal, the Court shall fix a date for hearing and cause notice of the day so fixed to the Advocate concerned and to the Advocate-General. It follows that the *original petitioner is not entitled to be served with notice* or to be heard on the hearing before the Court. The Bar Council is there in order to assist the Court in any way it can and the Advocate concerned is of course entitled to be heard. The correct course is for the Advocate-General to open by submitting the report of the tribunal to the Court. Then the Advocate is entitled to be heard and if necessary, the Advocate-General will have a right of reply. 33 Bom.L.R. 1215=1931 B. 557. Section 12 (3) cannot be intended to exclude the right of the Court to hear any



concerned and to the Bar Council and to the Advocate-General and shall afford the advocate concerned and the Bar Council and the Advocate-General an opportunity of being heard before orders are passed in the case.

(4) The High Court may thereafter either pass such final orders in the case as it thinks fit or refer it back for further inquiry to the Tribunal through the Bar Council or to the District Court, as the case may be, and, upon receipt of the finding after such further inquiry, deal with the case in the manner provided in sub-section (3) and pass final orders thereon.

(5) In passing final orders the High Court may pass such order as regards the payment of the costs of the inquiry and of the hearing in the High Court as it thinks fit.

(6) The High Court may, of its own motion or on application made to it in this behalf, review any order passed under sub-section (4) or sub-section (5) and maintain, vary or rescind the same, as it thinks fit.

(7) When any advocate is reprimanded or suspended under this Act, a record of the punishment shall be entered against his name in the roll of advocates of the High Court and when an advocate is removed from practice his name shall forthwith be struck off the roll; and the certificate of any advocate so suspended or removed shall be re-called.

13. (1) For the purposes of any such inquiry as aforesaid, a Tribunal or a District Court shall have the same powers as are vested in a Court under the Code of Civil Procedure, 1908, in respect of the following matters, namely:—

Powers of the Tribunal and Courts in inquiries.

- (a) enforcing the attendance of any person and examining him upon oath;
- (b) compelling the production of documents; and
- (c) issuing commissions for the examination of witnesses:

Provided that the Tribunal shall not have power to require the attendance of the presiding officer of any Court save with the previous sanction of the High Court, or, in the case of an officer of a Criminal or Revenue Court, of the Provincial Government.

(2) Every such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code; and a Tribunal

#### NOTES.

person other than the persons mentioned therein when the object of it is to ensure that certain people shall have notice. Where the finding of the tribunal is considered by the High Court, it is in the power of the High Court to hear the complainant. 35 C.W.N. 293=134 I.C. 1270=1931 C. 680 (S.B.); 42 C.W.N. 1111.

SEC. 12 (4).—It would need very good reasons to induce the High Court to throw over the findings of fact which have been arrived at by a Tribunal after a careful and elaborate enquiry. 35 C.W.N. 293=1931 C. 680; 42 C.W.N. 1111. The exact extent of the rights of the complainants in such a matter may be left to be considered as occasion arises. (*Ibid.*) See also 1930 M.W.N. 216; 147 I.C. 139. See Notes under section 1.

SEC. 12 (5).—The rules framed under the Act empower the High Court to assess the costs directed to be paid to the Advocate by the complainant. At the same time it is open to the Court to direct an enquiry by the Registrar as to what sums had been paid by the complainant and the Advocate and pass final orders after the amount spent has been ascertained. 35 C.W.N. 293=134 I.C. 1270=1931 C. 680 (S.B.). See also 54

M. 857 (F.B.). In a case where the complainant was unsuccessful before the tribunal whose findings were confirmed by the Court, the complainant was ordered to pay the costs of the Advocate both in the enquiry before the tribunal and in the hearing before the Court. He was also ordered to pay the fees of the shorthand writer and the interpreter in the inquiry before the Bar Council. The costs were directed to be taxed by the Registrar of the original side as of a hearing. 42 C.W.N. 1113=A.I.R. 1938 Cal. 766.

SEC. 12 (6).—The power of *review* conferred upon High Courts under sub-section (6) of section 12 cannot be extended to an order passed under section 41, Legal Practitioners Act. 148 I.C. 299=1934 Oudh 140=11 O.W.N. 368 (S.B.).

SEC. 13.—Inherent powers of the Supreme Court of Calcutta were not conferred on the Allahabad High Court by the Indian High Courts Act of 1861, and *no power to exercise inherent disciplinary jurisdiction over legal practitioners* independently of the Legal Practitioners Act and the Indian Bar Councils Act now exists in the Allahabad High Court in respect of their professional or other misconduct. 52 A. 619=1930 A.L.J. 402=1930 A. 225 (F.B.).



shall be deemed to be a Civil Court for the purposes of sections 480, 482 and 485 of the Code of Criminal Procedure, 1898.

(3) For the purpose of enforcing the attendance of any person and examining him upon oath or of compelling the production of documents or of issuing commissions—

(a) the local limits of the jurisdiction of a Tribunal shall be those of the jurisdiction of the High Court by which the Tribunal has been constituted; and

(b) a Tribunal may send to any Civil Court having jurisdiction in the place where the Tribunal is sitting any summons or other process for the attendance of a witness or the production of a document required by the Tribunal, or any commission which it desires to issue, and the Civil Court shall serve such process or issue such commission, as the case may be, and may enforce any such process as if it were a process for attendance or production before itself.

(4) Proceedings before a Tribunal or a District Court in any such inquiry shall be deemed to be civil proceedings for the purposes of section 132 of the Indian Evidence Act, 1872, and the provisions of that section shall apply accordingly.

#### Miscellaneous.

Right of advocates to practise.

14. (1) An Advocate shall be entitled as of right to practise—

(a) subject to the provisions of sub-section (4) of section 9, in the High Court of which he is an advocate; and

(b) save as otherwise provided by sub-section (2) or by or under any other law for the time being in force, in any other Court in British India and before any other Tribunal or person legally authorised to take evidence; and

(c) before any other authority or person before whom such advocate is by or under the law for the time being in force entitled to practise.

(2) Where rules have been made by any High Court within the meaning of clause (24) of section 3 of the General Clauses Act, 1897, or in the case of a High Court for which a Bar Council has been constituted under this Act, by such Bar Council under section 15, regulating the conditions subject to which advocates of other High Courts may be permitted to practise in the High Court, such advocates shall not be entitled to practise therein otherwise than subject to such conditions.

(3) Nothing in this section shall be deemed to limit or in any way affect the power of the High Court of Judicature at Fort William in Bengal or of the High Court of Judicature at Bombay to make rules determining the persons who

#### NOTES.

SEC. 14: ENTRY IN THE ROLL OF ADVOCATES—EFFECT OF.—An ex-Judge of the Patna High Court, after his retirement as a Judge, applied to have his name entered on the roll of advocates. It was allowed with a condition refusing him the permission to appear in the Courts of the Province. *Held*, that the applicant's name being entered on the roll of advocates, he was entitled as of right to practise in the Courts of the Province. 58 I.A. 38=1931 P.C. 22 (2)=60 M.L.J. 179 (P.C.). Section 14 (1) (b) cannot be invoked to enable a Government servant in a departmental inquiry, the rules of which provide for his being "heard in person," to claim the right to be represented by Counsel. The question has to be determined not by the counsel's right of audience in inferior Courts, but by the right of the client to be represented by him. 46 L.W. 531=A.I.R. 1937 M. 735=(1937) 2 M.L.

J. 189.

SECS. 14 (2) AND 15 (b).—Where an application is made on behalf of an advocate of one High Court for permission to appear in case in another High Court under the rules framed under this Act, good reasons must be shown for the grant of such permission. The permission cannot be granted on mere application or as a matter of course, nor claimed as a matter of right. No question of reciprocity is involved in the matter. The Chief Justice will apply his mind to the circumstances of the application and see that good reasons have been made out for the grant of permission in any particular case. 167 I.C. 486=38 Cr.L.J. 392=17 P.L.T. 861=A.I.R. 1937 P. 122. As to when consultation of counsel debars appearance for the other side, see I.L.R. (1940) All. 262=1940 A.L.J. 170=A.I.R. 1940 All. 233; 1934 Oudh 58.



shall be entitled respectively to plead and to act in the High Court in the exercise of its original jurisdiction.

15. A Bar Council may, with the previous sanction of the High Court for which it is constituted, make rules consistent with this Act to provide for and regulate any of the following matters, namely:—

General power of Bar Councils to make rules.

(a) the rights and duties of the advocates of the High Court and their discipline and professional conduct;

(b) the conditions subject to which advocates of other High Courts may be permitted to practise in the High Court;

(c) the giving of facilities for legal education and training and the holding and conduct of examinations by the Bar Council;

(d) the charging of fees payable to the Bar Council in respect of the enjoyment of educational facilities provided, or of the right to appear at examinations held, by the Bar Council;

(e) the investment and management of the funds of the Bar Council; and

(f) any other matter in respect of which the High Court may require rules to be made under this section.

16. The High Court shall make rules for fixing and regulating by taxation or otherwise the fees payable as costs by any party in respect of the fees of his adversary's advocate upon all proceedings in the High Court or in any Court subordinate thereto.

Power to fix fees payable as costs.

17. No suit or other legal proceeding shall lie against a Bar Council or any Committee, Tribunal or member of a Bar Council for any act in good faith done or intended to be done in pursuance of the provisions of this Act or of any rule made thereunder.

Indemnity against legal proceedings.

18. All rules made under this Act shall be published in the Official Gazette of the province or of each province, as the case may be, in which the High Court by which or with whose sanction the rules are made exercises jurisdiction.

Publication of rules.

19. (1) When sections 8 to 16 come into force in respect of any High Court, any enactment mentioned in the first column of the Schedule which is in force in any province in which the High Court exercises jurisdiction shall, for the purpose of its application to that province, be amended to the extent and in the manner specified in the second column of the Schedule.

Amendment of enactments, etc.

#### NOTES.

SEC. 15.—*Investment of his savings by an advocate* do not necessarily amount to an engagement in money-lending business, the more so when such investments are few and far between and are mostly made to relations and friends. Nevertheless if investments by way of loan are made as a matter of regular business and for gain there can be no escape from the conclusion that such investments constitute engagement in money-lending business. It depends on the facts of each case and is a mixed question of fact and law, as to whether certain transactions

C. C. M.—22

amount to a money-lending business. 1939 A.L.J. 957 (F.B.)=1940 All. 1=I.L.R. (1940) All. 60.

SEC. 18.—Section 18 does not make the publication of the Rules of Official Gazette a condition precedent to their coming into force and it merely provides for the manner of their publication. 1935 A.W.R. 110=157 I.C. 220=1935 A. 295.

SEC. 19 (2).—See 51 A. 76, cited under section 10. As to the effect of this Act on rules 128 and 129 of the Madras High Court Insolvency Rules, see 52 Mad. 92=113 I.C. 876 (F.B.).



(2) When sections 8 to 16 come into force in respect of any High Court of Judicature established by Letters Patent, this Act shall have effect in respect of such Court notwithstanding anything contained in such Letters Patent and such Letters Patent shall, in so far as they are inconsistent with this Act or any rules made thereunder, be deemed to have been repealed.

(3) When sections 8 to 16 come into force in respect of the High Court of Judicature at Bombay, the Bombay Pleaders' Act, 1920, except section 7 thereof, shall cease to apply to or in respect of any person enrolled as an advocate of the High Court under this Act, and nothing in that Act shall be deemed to authorise the admission or enrolment of any person as a vakil or pleader of the High Court.

(4) When this Act has come into force in respect of any High Court, any provision of any other enactment or any order, scheme, rule, form or bye-law made thereunder, which was before that date applicable to advocates, vakils or pleaders entitled to practise in such High Court, shall, unless such a construction is repugnant to the context or to any provision made by or under this Act, be construed as applying to advocates of the High Court enrolled under this Act.

### THE SCHEDULE.

(See Section 19.)

#### AMENDMENT OF ENACTMENTS.

##### *Enactments amended.*

The Legal Practitioners' Act, 1879.

##### *Extent and manner of amendment.*

- (1) In section 4, after the words "with the permission of the Court" the words and figures "or, in the case of a High Court in respect of which the Indian Bar Councils Act, 1926, is in force, subject to rules made under that Act" shall be inserted.
- (2) In section 6, clauses (a) and (b) after the words "Royal Charter" the words and figures "in respect of which the Indian Bar Councils Act, 1926, is not in force" shall be inserted.
- (3) To section 38 the following words and figures shall be added, namely:—  
"and, except as provided by section 36, nothing in this Act applies to persons enrolled as advocates of any High Court under the Indian Bar Councils Act, 1926."
- (4) In section 41, sub-section (1), after the words "Royal Charter" the words and figures "in respect of which the Indian Bar Councils Act, 1926, is not in force" shall be inserted.

The Indian Stamp Act, 1899.

In Article 30 of the First Schedule, after the words "High Court", where they first occur, the words and figures "under the Indian Bar Councils Act, 1926, or" shall be inserted.

The Madras Stamp (Amendment) Act, 1922.

In Article 25 of Schedule 1-A, after the words "High Court," where they first occur, the words and figures "under the Indian Bar Councils Act, 1926, or" shall be inserted.

The Bengal Stamp (Amendment) Act, 1922.

In Article 30 of Schedule 1-A, after the words "High Court," where they first occur, the words and figures "under the Indian Bar Councils Act, 1926, or" shall be inserted.

The Indian Stamp (Punjab Amendment) Act, 1922.

In Article 30 of Schedule 1-A, after the words "High Court," where they first occur, the words and figures, "under the Indian Bar Councils Act, 1926, or" shall be inserted.



*Enactments amended.*

The Assam Stamp (Amendment) Act, 1922.

*Extent and manner of amendment.*

In Article 30 of Schedule 1-A, after the words "High Court" where they first occur, the words and figures "under the Indian Bar Councils Act, 1926, or" shall be inserted.

## THE BERAR LAW ACT (IV OF 1941).

[17th March, 1941.]

### *An Act to extend certain Acts to Berar.*

WHEREAS by orders made under the Indian (Foreign Jurisdiction) Order in Council, 1902, the provisions of certain Acts in force in British India have from time to time been applied to, and are now, by virtue of such application, in force in, Berar;

AND WHEREAS it is expedient that those and certain other Acts should be extended to, and be, by virtue of such extension, in force in, Berar:

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE BERAR LAWS ACT, 1941.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

2. (1) The Acts specified in the First Schedule and so much of any Act specified in the Second Schedule as relates to matters with respect to which the Central Legislature has power to make laws are hereby extended to, and shall be in force in, Berar; and in any enactment so extended any reference by whatever form of words to subjects of His Majesty shall be deemed to include a reference to Berari subjects of His Exalted Highness the Nizam of Hyderabad, and notwithstanding anything contained in clause (7) of section 3 of the General Clauses Act, 1897, any reference to British India shall be construed as a reference to British India and Berar.

(2) The Acts specified in the Third Schedule shall be amended in the manner set forth in the second column of that Schedule.

3. The application, if any, to Berar, made by order under the Indian (Foreign Jurisdiction) Order in Council, 1902, of the Acts specified in the First Schedule, of so much of any Act specified in the Second Schedule as relates to matters with respect to which the Central Legislature has power to make laws and of the Indian Cotton Cess Act, 1923, shall cease to have effect:

Provided that all appointments, delegations, notifications, orders, bye-laws, rules and regulations, which have been made or issued under, or in pursuance of, any provision of any of the said Acts as applied to Berar by order under the said Order in Council, and which are in force at the commencement of this Act, shall be deemed to have been made or issued under or in pursuance of the corresponding provision of that Act as now extended to, and in force in, Berar.

Removal of doubt.

4. For the removal of doubt it is hereby declared that the Acts specified in the Fourth Schedule have ceased to have effect and are repealed in Berar.



## THE FIRST SCHEDULE.

[See sections 2 (1) and 3.]

*Acts Extended to Berar.*

Year.	Number.	Short title.
1850	XIX	.. The Apprentices Act, 1850.
1850	XXI	.. The Caste Disabilities Removal Act, 1850.
1855	XIII	.. The Indian Fatal Accidents Act, 1855.
1856	XI	.. The European Deserters Act, 1856.
1856	XV	.. The Hindu Widows' Re-marriage Act, 1856.
1860	XLV	.. The Indian Penal Code.
1864	III	.. The Foreigners Act, 1864.
1865	III	.. The Carriers Act, 1865.
1866	XXI	.. The Native Converts' Marriage Dissolution Act, 1866.
1867	XXV	.. The Press and Registration of Books Act, 1867.
1869	IV	.. The Indian Divorce Act.
1872	I	.. The Indian Evidence Act, 1872.
1872	III	.. The Special Marriage Act, 1872.
1872	IX	.. The Indian Contract Act, 1872.
1872	XV	.. The Indian Christian Marriage Act, 1872.
1873	V	.. The Government Savings Banks Act, 1873.
1873	X	.. The Indian Oaths Act, 1873.
1874	IX	.. The European Vagrancy Act, 1874.
1875	IX	.. The Indian Majority Act, 1875.
1875	XVIII	.. The Indian Law Reports Act, 1875.
1876	IX	.. The Native Coinage Act, 1876.
1877	I	.. The Specific Relief Act, 1877.
1878	VIII	.. The Sea Customs Act, 1878.
1878	XI	.. The Indian Arms Act, 1878.
1879	XVIII	.. The Legal Practitioners Act, 1879.
1881	XXVI	.. The Negotiable Instruments Act, 1881.
1882	II	.. The Indian Trusts Act, 1882.
1882	XII	.. The Indian Salt Act, 1882.
1884	IV	.. The Indian Explosives Act, 1884.
1888	III	.. The Police Act, 1888.
1889	IV	.. The Indian Merchandise Marks Act, 1889.
1890	VIII	.. The Guardians and Wards Act, 1890.
1890	XI	.. The Prevention of Cruelty to Animals Act, 1890.
1891	XVIII	.. The Bankers' Books Evidence Act, 1891.
1898	V	.. The Code of Criminal Procedure, 1898.
1901	II	.. The Indian Tolls (Army) Act, 1901.
1903	VII	.. The Indian Works of Defence Act, 1903.
1903	XV	.. The Indian Extradition Act, 1903.
1904	VII	.. The Ancient Monuments Preservation Act, 1904.
1905	IV	.. The Indian Railway Board Act, 1905.
1906	III	.. The Indian Coinage Act, 1906.
1908	V	.. The Code of Civil Procedure, 1908.
1908	VI	.. The Explosive Substances Act, 1908.
1908	IX	.. The Indian Limitation Act, 1908.
1908	XIV	.. The Indian Criminal Law Amendment Act, 1908.
1908	XVI	.. The Indian Registration Act, 1908.
1909	IV	.. The Whipping Act, 1909.
1910	IX	.. The Indian Electricity Act, 1910.
1911	II	.. The Indian Patents and Designs Act, 1911.
1911	VIII	.. The Indian Army Act, 1911.
1912	IV	.. The Indian Lunacy Act, 1912.
1913	II	.. The Official Trustees Act, 1913.
1913	III	.. The Administrator-General's Act, 1913.
1914	III	.. The Indian Copyright Act, 1914.
1916	VII	.. The Indian Medical Degrees Act, 1916.
1917	II	.. The Motor Spirit (Duties) Act, 1917.
1917	XVIII	.. The Post Office Cash Certificates Act, 1917.
1918	XXII	.. The Bronze Coin (Legal Tender) Act, 1918.
1919	XII	.. The Poisons Act, 1919.
1920	V	.. The Provincial Insolvency Act, 1920.



Year.	Number.	Short title.
1920	XIV	.. The Charitable and Religious Trusts Act, 1920.
1920	XV	.. The Indian Red Cross Society Act, 1920.
1920	XLVII	.. The Imperial Bank of India Act, 1920.
1920	XLVIII	.. The Indian Territorial Force Act, 1920.
1920	XLIX	.. The Auxiliary Force Act, 1920.
1921	XVIII	.. The Maintenance Orders Enforcement Act, 1921.
1922	XI	.. The Indian Income-tax Act, 1922.
1922	XII	.. The Indian Finance Act, 1922.
1922	..	.. The Indian States (Protection against Disaffection) Act, 1922.
1923	IV	.. The Indian Mines Act, 1923.
1923	V	.. The Indian Boilers Act, 1923.
1923	VIII	.. The Workmen's Compensation Act, 1923.
1923	XXIII	.. The Legal Practitioners (Women) Act, 1923.
1924	VI	.. The Criminal Tribes Act, 1924.
1925	XXXIX	.. The Indian Succession Act, 1925.
1926	XI	.. The Promissory Notes (Stamp) Act, 1926.
1926	XVI	.. The Indian Trade Unions Act, 1926.
1926	XXI	.. The Legal Practitioners (Fees) Act, 1926.
1926	XXXVIII	.. The Indian Bar Councils Act, 1926.
1929	VII	.. The Trade Disputes Act, 1929.
1929	XIX	.. The Child Marriage Restraint Act, 1929.
1930	II	.. The Dangerous Drugs Act, 1930.
1930	III	.. The Indian Sale of Goods Act, 1930.
1930	XVIII	.. The Silver (Excise Duty) Act, 1930.
1930	XIX	.. The Indian Companies (Amendment) Act, 1930.
1930	XXIV	.. The Indian Lac Cess Act, 1930.
1931	..	.. The Indian Finance Act, 1931.
1931	..	.. The Indian Finance (Supplementary and Extending) Act, 1931.
1931	XVI	.. The Provisional Collection of Taxes Act, 1931.
1931	XXIII	.. The Indian Press (Emergency Powers) Act, 1931.
1932	IX	.. The Indian Partnership Act 1932.
1932	XI	.. The Public Suits Validation Act, 1932.
1932	XII	.. The Foreign Relations Act, 1932.
1932	XIII	.. The Sugar Industry (Protection) Act, 1932.
1932	XXIII	.. The Criminal Law Amendment Act, 1932.
1933	II	.. The Children (Pledging of Labour) Act, 1933.
1933	VII	.. The Indian Finance, Act, 1933.
1933	XVII	.. The Indian Wireless Telegraphy Act, 1933.
1933	XXVII	.. The Indian Medical Council Act, 1933.
1934	II	.. The Reserve Bank of India Act, 1934.
1934	VIII	.. The Khaddar (Name Protection) Act, 1934.
1934	IX	.. The Indian Finance Act, 1934.
1934	XI	.. The Indian States (Protection) Act, 1934.
1934	XIV	.. The Sugar (Excise Duty) Act, 1934.
1934	XVI	.. The Matches (Excise Duty) Act, 1934.
1934	XX	.. The Indian Carriage by Air Act, 1934.
1934	XXII	.. The Indian Aircraft Act, 1934.
1934	XXIII	.. The Mechanical Lighters (Excise Duty) Act, 1934.
1934	XXV	.. The Factories Act, 1934.
1934	XXXI	.. The Iron and Steel Duties Act, 1934.
1934	XXXII	.. The Indian Tariff Act, 1934.
1935	..	.. The Indian Finance Act, 1935.
1936	..	.. The Indian Finance Act, 1936.
1936	III	.. The Parsi Marriage and Divorce Act, 1936.
1936	IV	.. The Payment of Wages Act, 1936.
1936	XIV	.. The Geneva Convention Implementing Act, 1936.
1937	I	.. The Agricultural Produce (Grading and Marking) Act, 1937.
1937	VI	.. The Arbitration (Protocol and Convention) Act, 1937.
1937	..	.. The Indian Finance Act, 1937.



## THE SECOND SCHEDULE.

[See sections 2 (1) and 3.]  
*Acts partially extended to Berar.*

Year.	Number.	Short title.
1843	V	.. The Indian Slavery Act, 1843.
1850	XII	.. The Public Accountants' Default Act, 1850.
1850	XXXVII	.. The Public Servants (Inquiries) Act, 1850.
1855	XXIV	.. The Penal Servitude Act, 1855.
1870	VII	.. The Court-fees Act, 1870.
1871	XXIII	.. The Pensions Act, 1871.
1881	XI	.. The Municipal Taxation Act, 1881.
1882	IV	.. The Transfer of Property Act, 1882.
1885	XIII	.. The Indian Telegraph Act, 1885.
1886	VI	.. The Births, Deaths and Marriages Registration Act, 1886.
1886	XI	.. The Indian Tramways Act, 1886.
1890	I	.. The Revenue Recovery Act, 1890.
1890	VI	.. The Charitable Endowments Act, 1890.
1890	IX	.. The Indian Railways Act, 1890.
1895	XV	.. The Crown Grants Act, 1895.
1897	III	.. The Epidemic Diseases Act, 1897.
1897	X	.. The General Clauses Act, 1897.
1897	XIV	.. The Indian Short Titles Act, 1897.
1898	VI	.. The Indian Post Office Act, 1898.
1899	II	.. The Indian Stamp Act, 1899.
1899	IV	.. The Government Buildings Act, 1899.
1913	VII	.. The Indian Companies Act, 1913.
1914	IX	.. The Local Authorities Loans Act, 1914.
1916	XV	.. The Hindu Disposition of Property Act, 1916.
1917	V	.. The Destruction of Records Act, 1917.
1918	II	.. The Cinematograph Act, 1918.
1920	X	.. The Indian Securities Act, 1920.
1920	XXXIX	.. The Indian Elections Offences and Inquiries Act, 1920.
1923	III	.. The Cotton Transport Act, 1923.
1923	XIX	.. The Indian Official Secrets Act, 1923.
1924	XIII	.. The Indian (Specified Instruments) Stamps Act, 1924.
1925	IV	.. The Indian Soldiers (Litigation) Act, 1925.
1925	XII	.. The Cotton Ginning and Pressing Factories Act, 1925.
1925	XIX	.. The Provident Funds Act, 1925.
1927	XVI	.. The Indian Forest Act, 1927.
1928	XII	.. The Hindu Inheritance (Removal of Disabilities) Act, 1928.
1929	II	.. The Hindu Law of Inheritance (Amendment) Act, 1929.
1930	XXX	.. The Hindu Gains of Learning Act, 1930.
1936	V	.. The Decrees and Orders Validating Act, 1936.

## THE THIRD SCHEDULE.

[See section 2 (2).]  
*Acts Amended.*

Name of Act.	Amendments.
The Code of Civil Procedure 1908 (Act V of 1908).	<p>In section 7 and in rule 1 of Order L in the First Schedule,—</p> <p>(a) after the figures "1887" the words and figures "or under the Berar Small Cause Courts Laws 1905" shall be inserted, and</p> <p>(b) for the words "under that Act" the words "under the said Act or Law" shall be substituted.</p>



Name of Act.	Amendments.
The Indian Limitation Act, 1908 (IX of 1908).	In Article 161 of the First Schedule, the word "Provincial", in both places where it occurs, shall be omitted, and after the words "Small Causes", where they occur for the first time, the brackets and words "(other than a Presidency Small Cause Court)" shall be inserted.

## THE FOURTH SCHEDULE.

[See section 4.]

*Acts which have ceased to have effect and are repealed in Berar.*

Year.	Number.	Short title.
1841	XIX	.. The Succession (Property Protection) Act, 1841.
1847	XX	.. The Indian Copyright Act, 1847.
1860	IX	.. The Employers and Workmen (Disputes) Act, 1860.
1865	X	.. The Indian Succession Act, 1865.
1865	XXI	.. The Parsi Intestate Succession Act, 1865.
1881	V	.. The Probate and Administration Act, 1881.
1881	VI	.. The District Delegates Act, 1881.
1889	VII	.. The Succession Certificate Act, 1889.
1911	XII	.. The Indian Factories Act, 1911.
1912	V	.. The Provident Insurance Societies Act, 1912.
1912	VI	.. The Indian Life Assurance Companies Act, 1912.
1914	VIII	.. The Indian Motor Vehicles Act, 1914.
1919	X	.. The Excess Profits Duty Act, 1919.
1923	X	.. The Indian Paper Currency Act, 1923.
1926	XIX	.. The Indian Finance Act, 1926.
1927	V	.. The Indian Finance Act, 1927.
1928	XX	.. The Indian Insurance Companies Act, 1928.
1929	X	.. The Indian Census Act, 1929.
1933	XIII	.. The Safeguarding of Industries Act, 1933.
1935	..	.. The Criminal Law Amendment Act, 1935.
1936	I	.. The Italian Loans and Credits Prohibition Act, 1936.

**THE INDIAN BILLS OF LADING ACT (IX OF 1856).<sup>1</sup>**

Short title given, Act XIV of 1897.

Declared in force throughout B.I., except as regards the Scheduled Districts, Act XV of 1874, S. 3.

[11th April, 1856.]

ACT IX OF 1856 IS BASED ON THE BILLS OF LADING ACT, 1855.  
(18 and 19 VICT., c. 111).*An Act to amend the law relating to Bills of Lading.*

WHEREAS by the custom of merchants a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the endorsee but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original

## LEG. REF.

<sup>1</sup> Short title, "The Indian Bills of Lading Act, 1856." See the Indian Short Titles Act, 1897 (XIV of 1897).

Act IX of 1856 is based on the Bills of Lading Act, 1855 (18 and 19 Vict., c. 111).

This Act has been declared to be in force

in the whole of British India, except as regards the Scheduled Districts, by the Laws Local Extent Act, 1874 (XV of 1874), S. 3.

It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in the following Scheduled Districts, namely:—



shipper or owner and it is expedient that such rights should pass with the property; and whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bona fide* holder for value should not be questioned by the master or other person signing the same, on the ground of the goods not having been laden as aforesaid; it is enacted as follows:—

1. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Rights under bills of lading to vest in consignee or endorsee.

2. Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*,<sup>1</sup> or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

Not to affect right of stoppage *in transitu* or claims for freight.

3. Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not in fact been laden on board:

Bill of lading in hands of consignee, etc., conclusive evidence of the shipment as against master, etc.

Provided that the master or other person so signing may exonerate himself, in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder or some person under whom the holder claims.

Proviso.

#### LEG. REF.

in Sind . . .  
See *Gazette of India*, 1880, Pt. I, p. 672.  
West Jalpaiguri . . .  
See *Gazette of India*, 1881, Pt. I, p. 74.  
The Districts of Hazaribagh, Lohardaga (now the Ranchi, District *see* Calcutta Gazette, 1899, Pt. I, p. 44); and Manbhum; and Pargana Dhalbhum and the Kolhan in the District of Singhbhum . . .  
See *Gazette of India*, 1881, Pt. I, p. 504.  
The District of Sylhet . . .  
See *Gazette of India*, 1879, Pt. I, p. 631.  
The rest of Assam (except the North Lushai Hills) . . .  
See *Gazette of India*, 1877, Pt. I, p. 299.  
<sup>1</sup> As to stoppage in transit, *see* the Indian Contract Act, 1872 (IX of 1872), Ss. 99-106.

#### NOTES.

SECS. 1-3.—The object of a bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry and it is not concerned with liabilities to contribution in general average. The question whether an exemption clause covers

the liability to contribution in general average in a case of proper jettison depends on the intention of the parties. If the shipowner wishes to relieve himself, he must do so in clear words. 78 I.C. 972. Where a bill of lading contains the *usual exemption clause* as regards the liability for acts of God, King's enemies and the perils of the sea, in a suit by the consignee for damages for loss of goods, etc., the defendant shipowner must plead and prove *perils of the sea* if that is his defence. If he makes out a *prima facie* case plaintiff can rebut it by proving negligence on the part of the defendant. 47 Mad. 610=47 M.L.J. 150. "At Merchant's Risk," meaning of, 78 I.C. 972. Meaning and incidents of Bill of lading—Transfer of Bill of lading, effect of. *See* I.L.R. (1939) Kar. 439=1939 Sind 225. Section 3 of the Bills of Lading Act is limited to the master or the person signing the bills. 1925 S. 221.

SEC. 3.—*See* 9 B.H.C. 321; *see also* 45 I.C. 168 (Liability of carrier under bill of lading).



## THE BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT (VI OF 1886).

**PREFATORY NOTE.**—The following is the *Statement of Objects and Reasons* appended to the Births, Deaths and Marriages Registration Bill:—It is proposed by this Act (1) to establish a system of voluntary registration of births and deaths for the benefit of such classes of the community as would be likely to avail themselves of registration, (2) to establish general registry offices for keeping registers of the births and deaths so registered and of marriages registered under Act III of 1872 or the Indian Christian Marriage Act (XV of 1872), and (3) to provide a machinery for giving evidential value to certain existing registers of births, baptisms, deaths, burials and marriages, which have been kept under no law. The subject of the registration of births and deaths among Europeans in India had been frequently long under the consideration of the Government, whose attention had moreover been frequently directed to it by memorials from various Christian religious bodies, urging very strongly the need for legislation. The Indian Statute book contained at that time no general law for the registration of births and deaths. There were, indeed, enactments which provided for the registration of births and deaths within certain specified areas, principally municipalities and cantonments, but, in the first place, these enactments were strictly local in their nature, leaving the greater portion of the country unprovided for, and in the next place, their provisions being directed primarily to statistical purposes were not of such a nature as to make the registers of births and deaths kept under them of value for purposes of evidence. As to the numerous registers of baptisms and burials which were kept by ministers of religion in all parts of the country, it was doubtful how far they could be relied on for giving accurately the requisite particulars as to births and deaths, and most of them were, moreover, inadmissible in evidence. Such being the state of the law and considering the importance of the subject generally and having regard to the fact that references were frequently made to the Secretary of State for India and to the Government of India for proof of age or of death in connection with questions involving large individual interest, such as rights to property, the Government of India was of opinion that it was expedient to enact a permissible law under which full facilities for registering births and deaths should be given to persons valuing unimpeachable evidence of these events. As to the second object of the Bill, it was obvious that no system of registration of births and deaths could be complete or of practical value unless it provided for the establishment, at certain centres of general offices where the information registered at the various local offices should be collected and so arranged as to be readily available for public reference. In this connection the attention of the Government of India has been directed to the unsatisfactory nature of the system of registration of marriages under the Indian Christian Marriage Act, 1872 and Act III of 1872. Documentary evidence of all marriages under the former Act was, by the provisions of the Act or the orders thereunder, sent to the Secretary to the Local Government, who was also empowered to grant certified copies which were receivable in evidence. It would seem, therefore, at first sight that nothing further was required. But, as a matter of fact, not only were no arrangements made for maintaining an index to the marriages, the records of which were retained in the local Secretariate, but the greater portion of the marriage records which were received in the local Secretariate had, under section 81 of the Act and the orders in force, to be sent on in original to the Government of India in the Home Department for transmission to the Secretary of State; so that the greater number of the marriage records which reached the local Secretariate did not remain there for purposes of reference, and such as did remain were, owing to the absence of an index, practically valueless. As to Act III of 1872, this Act made no provisions for the marriages solemnized under it being reported to any central authority. The marriage certificate books for which it provided were retained by the Registrar, who was not even required to index them. Their value as records of the marriages to which they referred was accordingly much diminished. The Government of India had, therefore, availed themselves of the opportunity of the proposed legislation for the registration of births and deaths, to remove those defects in the marriages registration law by providing for general registry offices for keeping registers not only for the births and deaths which may be registered under the proposed law, but also of marriages which may be registered under Act III of 1872 or the Christian Marriage Act, 1872. (See *Statement of Objects and Reasons*.)

### CONTENTS.

#### CHAPTER I. PRELIMINARY.

- SECTIONS.
1. Short title and commencement.
  2. Local extent.
  3. Definitions.
  4. Saving of local laws.
  5. Powers exercisable from time to time.

C. C. M.—23

#### SECTIONS.

#### CHAPTER II.

- GENERAL REGISTRY OFFICES OF BIRTHS,  
DEATHS AND MARRIAGES.
6. Establishment of general registry offices and appointment of Registrars-General.
  7. Indexes to be kept at general registry office.



## SECTIONS.

8. Indexes to be open to inspection.
9. Copies of entries to be admissible in evidence.
10. Superintendence of Registrars by Registrar-General.

## CHAPTER III.

## REGISTRATION OF BIRTHS AND DEATHS.

*A.—Application of this Chapter.*

11. Persons whose births and deaths are registrable.

*B.—Registration Establishment.*

12. Power for Provincial Government to appoint Registrars for its territories.

13. Power for Central Government to appoint Registrars for Indian States.

14. Registrar to be deemed a public servant.

15. Power to remove Registrars. (*Omitted*).

16. Office and attendance of Registrar.

17. Absence of Registrar or vacancy in his office.

18. Register books to be supplied and preservation of records to be provided for.

*C.—Mode of Registration.*

19. Duty of Registrar to register births and deaths of which notice is given.

20. Persons authorized to give notice of birth.

21. Persons authorized to give notice of death.

22. Entry of birth or death to be signed by person giving notice.

23. Grant of certificate of registration of birth or death.

## SECTIONS.

24. Duty of Registrars as to sending certified copies of entries in register books to Registrar-General.

25. Searches and copies of entries in register books.

26. Exceptional provision for registration of certain births and deaths.

*D.—Penalty for False Information.*

27. Penalty for wilfully giving false information.

*E.—Correction of Errors.*

28. Correction of entry in register of births or deaths.

## CHAPTER IV.

## AMENDMENT OF MARRIAGE ACTS.

*(Rep. by Act I of 1938).*

## CHAPTER V.

## SPECIAL PROVISIONS AS TO CERTAIN EXISTING REGISTERS.

32. Permission to persons having custody of certain records to send them within one year to Registrar-General.

33. Appointment of Commissioners to examine registers.

34. Duties of Commissioners.

35. Searches of lists prepared by Commissioners and grant of certified copies of entries.

- 35-A. Constitution of additional Commissions for purposes of this Chapter.

## CHAPTER VI.

## RULES.

36. Rules.

37. *Omitted.*

## THE BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT (VI OF 1886)<sup>1</sup>.

## EFFECT OF LEGISLATION.

[8th March, 1886.]

Year.	No.	Short title	Repealed or otherwise how affected by legislation.
1886	VI	The Births, Deaths and Marriages Registration Act, 1886.	Repealed in part, II of 1891, S. 4; XII of 1891; I of 1938. Repealed in part and amended, IX of 1911. Amended, XVI of 1890; XXXVIII of 1920; XXIV of 1934.

*An Act to provide for the voluntary Registration of certain Births and Deaths, for the establishment of General Registry Offices for keeping Registers of certain Births, Deaths and Marriages, and for certain other purposes.*

WHEREAS it is expedient to provide for the voluntary registration of births and deaths among certain classes of persons, for the more effectual registration of those births and deaths and of the marriages registered under Act III of 1872, or the Indian Christian Marriage Act, 1872, and of certain marriages

## LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons see *Gazette of India*, 1885, Pt. V, p. 12; for Report of the Select Committee, see *ibid.*, 1886, Pt. IV, p. 103, and for proceedings in Council, see *ibid.*, 1885, Supplement, pp. 14 and 37, and *ibid.*, 1886, p. 290. By the

Amending Act IX of 1911, it is provided (S. 6) that "all the rules heretofore made under the Act by the Governor-General in Council shall, after the commencement of this Act, be deemed to have been made by the Local Government."



registered under the Parsi Marriage and Divorce Act, 1865, and for the establishment of general registry offices for keeping registers of those births, deaths and marriages;

And whereas it is also expedient to provide for the authentication and custody of certain existing registers made otherwise than in the performance of a duty specially enjoined by the law of the country in which the registers were kept, and to declare that copies of the entries in those registers shall be admissible in evidence; It is hereby enacted as follows:—

## CHAPTER I.

### PRELIMINARY.

Short title and commencement.

1. (1) This Act may be called THE BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT, 1886; and

(2) It shall come into force on such day<sup>1</sup> as the Central Government, by notification in the Official Gazette, directs.

(3) <sup>2</sup>[\* \* \*].

Local extent.  
Indian States.]

2. This Act extends to the whole of British India and applies also, <sup>3</sup>[to British subjects in

Definitions.

3. In this Act, unless there is something repugnant in the subject or context,—

“sign” includes mark, when the person making the mark is unable to write his name;

“prescribed” means prescribed by a rule made <sup>4</sup>[\* \* \*] under this Act; and

“Registrar of Births and Deaths” means a Registrar of Births and Deaths appointed under this Act.

4. Nothing in this Act, or in any rule made under this Act, shall affect any law heretofore or hereafter passed providing for the registration of births and deaths within particular local areas.

Powers exercisable from time to time.

5. All powers conferred by this Act may be exercised from time to time as occasion requires.

### LEG. REF.

<sup>1</sup>The 1st October, 1888, see *Gazette of India*, 1888, Pt. I, p. 336.

<sup>2</sup>Sub-section (3) of section 1, which was repealed by the Repealing and Amending Act (XII of 1891), was as follows:—

“(3) Any power conferred by the Act to make rules or to issue orders may be exercised at any time after the passing of this Act; but a rule or order so made or issued shall not take effect until the Act comes into force.”

<sup>3</sup>Substituted by Order in Council, 1937.

<sup>4</sup>Omitted by Order in Council, 1937.

### NOTES.

Sec. 2.—The Act has been declared in force in the Sonthal Parganas by section 3 of the Sonthal Parganas Settlement Regulation (III of 1872) as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), Bengal Code. It has been declared

in force in British Baluchistan by the British Baluchistan Laws Regulation (II of 1913), section 3 and Schedule, Baluchistan Code.

The Act has been declared in force in Upper Burma (except the Shan States) by the Burma Laws Act (XIII of 1898), see the first Schedule and section 4, Bur. Code. It had been previously extended there by notification under section 5 of the Scheduled Districts Act (XIV of 1874), see *Gazette of India*, 1888, Pt. I, p. 528. It has been declared in force in Arakan Hill District by section 2 of Reg. I of 1916; and in a certain area in the Northern Shan States by section 10 of Act XIII of 1898. See Notification No. 42, dated 26th August, 1926, *Burma Gazette*, 1926, Pt. I, p. 792; and in the Chittagong Hill tracts by notification under section 4 (2) of the Chittagong Hill Tracts Regulation I of 1900. See Notification No. 13083—E. A., dated 13th August, 1927; *Calcutta Gazette*, Pt. I, p. 1728.



## CHAPTER II.

## GENERAL REGISTRY OFFICES OF BIRTHS, DEATHS AND MARRIAGES.

Establishment of general registry offices and appointment of Registrars-General.

## 6. (1) Each Provincial Government—

(a) shall establish a general registry office for keeping such certified copies of registers of births and deaths registered under this Act, or marriages registered under Act III of 1872 (*to provide a form of marriage in certain cases*) or the Indian Christian Marriage Act, 1872, or beyond the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Bombay, under the Parsi Marriage and Divorce Act, 1865, as may be sent to it under this Act, or under any of the three last-mentioned Acts, as amended by this Act;<sup>1</sup> and

(b) may appoint to the charge of that office an officer, to be called the Registrar-General of Births, Deaths and Marriages for the territories under its administration;<sup>2</sup>

(2) [*Omitted by Order in Council, 1937*].

7. Each Registrar-General of Births, Deaths and Marriages shall cause Indexes to be kept at general registry office. indexes of all the certified copies of registers sent to his office under this Act, or under Act III of 1872, the Indian Christian Marriage Act, 1872, or the Parsi Marriage and Divorce Act, 1865, as amended by this Act, to be made and kept in his office in the prescribed form.

8. Subject to the payment of the prescribed fees, the indexes so made shall Indexes to be open to inspection. be at all reasonable times open to inspection by any person applying to inspect them, and copies of entries in the certified copies<sup>3</sup> of the registers to which the indexes relate shall be given to all persons applying for them.

9. A copy of an entry given under the last foregoing section shall be certified by the Registrar-General of Births, Deaths and Marriages, or by an officer authorized in this behalf by the Provincial Government, and shall be admissible in evidence for the purpose of proving the birth, death or marriage to which the entry relates. Copies of entries to be admissible in evidence.

10. Each Registrar-General of Births, Deaths and Marriages shall exercise Superintendence of Registrars by Registrar-General. a general superintendence over the Registrars of Births and Deaths in the territories for which he is appointed.

## CHAPTER III.

## REGISTRATION OF BIRTHS AND DEATHS.

## A.—Application of this Chapter.

Persons whose births and deaths are registrable.

11. (1) The persons whose births and deaths shall, in the first instance, be registrable under this Chapter are the following, namely:—

(a) in British India, the members of every race, sect or tribe to which the Indian Succession Act, 1865 applies, and in respect of which an order under section 332 of that Act is not for the time being in force, and all persons professing the Christian religion;

## LEG. REF.

<sup>1</sup> For General Registry Offices appointed for different provinces see the different Local Rules and Orders; for Delhi, see *Gazette of India*, 1912, Pt. I, p. 1105.

<sup>2</sup> For Registrar-General appointed for

different provinces, see different Local Rules and Orders.

<sup>3</sup> For officers authorised to certify copies of entries given under section 8 in different provinces, see different Local Rules and Orders.



(b) in [Indian States]<sup>1</sup> British subjects being members of a like race, sect or tribe, or professing the Christian religion;

(2) But the Provincial Government, by notification in the Official Gazette, may <sup>2</sup>[\* \* \*] extend the operation of this Chapter to any other class of persons either generally or in any local area.

*B.—Registration Establishment.*

<sup>3</sup>12. The Provincial Government may appoint, either by name or by virtue of their office, so many persons as it thinks necessary to be Registrars of Births and Deaths for such local areas within the territories under its administration as it may define and, if it sees fit, for any class of persons within any part of those territories.

Power for Provincial Government to appoint Registrars for its territories.

13. The Central Government may, by notification in the Official Gazette appoint, either by name or by virtue of their office, so many persons as [it]<sup>4</sup> thinks necessary to be Registrars of Births and Deaths for such local areas within <sup>1</sup>[any Indian State] as <sup>4</sup>[it] may define and, if <sup>4</sup>[it] sees fit, for any class of persons within any part of those <sup>1</sup>[States]<sup>5</sup>.

Power for Central Government to appoint Registrars for Indian States.

<sup>6</sup>[\* \* \*]

Registrar to be deemed a public servant.

\* 14. Every Registrar of Births and Deaths shall be deemed to be a public servant within the meaning of the Indian Penal Code.

15. [Omitted by Order in Council, 1937.]

Office and attendance of Registrar.

appointed.

16. (1) Every Registrar of Births and Deaths shall have an office in the local area, or within the part of the territories or dominions for which he is

(2) Every Registrar of Births and Deaths to whom the Provincial Government may direct this sub-section to apply shall attend at his office for the purpose of registering births and deaths on such days and at such hours as the Registrar-General of Births, Deaths and Marriages may direct, and shall cause to be placed in some conspicuous place on or near the outer door of his office his name, with the addition of Registrar of Births and Deaths for the local area or class for which he is appointed, and the days and hours of his attendance.

LEG. REF.

<sup>1</sup> Substituted by Order in Council.

<sup>2</sup> In Cl. 2 of section 11 the words "with the previous approval of the Governor-General in Council" were omitted by Act XXXVIII of 1920, Sch. I.

<sup>3</sup> As to Registrars appointed under this section, see different Local Rules and Orders, and General Rules and Orders, Vol. II, p. 559.

<sup>4</sup> Substituted by A.O., 1937 for "he".

<sup>5</sup> For Registrars of Births and Deaths appointed under this section for—

(1) Native States in the Bombay Presidency, see *Brit. Enact., N.S.*;

(2) States of Pudu Kottai, Banganapalle, and Sandur, see *Gazette of India*, 1889, Pt. I, p. 52;

(3) State of Mysore, see *Gazette of India*, 1889, Pt. I, p. 54; and *ibid.*, 1893, Pt. I, p. 381;

(4) Hyderabad State, see *Gazette of*

*India*, 1889 and 1890, Pt. I, pp. 621 and 468, respectively;

(5) Rampur and Tehri States, see *Gazette of India*, 1891, p. 424;

(6) Kashmir and Jammu, see *Brit. Enact., N.S.*;

(7) Nepal, see *Brit. Enact., N.S.*;

(8) Central Provinces Feudatory States, see *Brit. Enact., N.S.*, and *Gazette of India*, 1895, Pt. I, p. 404;

(9) States in the Central India Agency, see *Brit. Enact., N.S.*;

(10) The territory of the Raja of Nahan (Sirmur), see *Gazette of India*, 1899, Pt. 1, p. 277.

(11) Certain States in Rajputana see *Gazette of India*, 1912, Pt. I, p. 1051;

(12) Baluchistan Agency Territories, see *Gazette of India*, 1903, Pt. I, p. 916.

<sup>6</sup> Proviso omitted by Order in Council, 1937.



17. (1) When any Registrar of Births and Deaths to whom the Provincial Government may direct this section to apply, not being a Registrar of Births and Deaths for a local area in the town of Calcutta, Madras or Bombay, is absent, or when his office is temporarily vacant, any person whom the Registrar-General of Births, Deaths and Marriages appoints in this behalf, or, in default of such appointment, the Judge of the District Court within the local limits of whose jurisdiction the Registrar's office is situate, or such other officer as the Provincial Government appoints in this behalf, shall be the Registrar of Births and Deaths during such absence or until the Provincial Government fills the vacancy.

(2) When any such Registrar of Births and Deaths for a local area in the town of Calcutta, Madras or Bombay is absent, or when his office is temporarily vacant, any person whom the Registrar-General of Births, Deaths and Marriages appoints in this behalf shall be the Registrar of Births and Deaths during such absence or until the Provincial Government fills the vacancy.

(3) The Registrar-General of Births, Deaths and Marriages shall report to the Provincial Government all appointments made by him under this section.

18. The Provincial Government shall supply every Registrar of Births and Deaths with a sufficient number of register books of births and of register books of deaths, and shall make suitable provision for the preservation of the records connected with the registration of births and deaths.

Register books to be supplied and preservation of records to be provided for.

#### *C.—Mode of Registration.*

19. Every Registrar of Births and Deaths on receipt of notice of birth or death within the local area or among the class for which he is appointed, shall, if the notice is given within the prescribed time and in the prescribed mode by a person authorized by this Act to give the notice, forthwith make an entry of the birth or death in the proper register book :

Provided that—

(a) if he has reason to believe the notice to be in any respect false, he may refuse to register the birth or death until he receives an order from the Judge of the District Court directing him to make the entry and prescribing the manner in which the entry is to be made; and

(b) he shall not enter in the register the name of any person as father of an illegitimate child, unless at the request of the mother and of the person acknowledging himself to be the father of the child.

Persons authorized to give notice of birth.

20. Any of the following persons may give notice of a birth, namely:—

(a) the father or mother of the child;

(b) any person present at the birth;

(c) any person occupying, at the time of the birth, any part of the house wherein the child was born and having knowledge of the child having been born in the house;

(d) any medical practitioner in attendance after the birth and having personal knowledge of the birth having occurred;

(e) any person having charge of the child.

#### NOTES.

SEC. 17 (1).—The section has been declared by the Government of Madras to

apply to all Registrars appointed by that Government under the notification issued under section 12, see Madras R. and O.



Persons authorized to give notice of death.

21. Any of the following persons may give notice of a death, namely:—

(a) any relative of the deceased having knowledge of any of the particulars required to be registered concerning the death;

(b) any person present at the death;

(c) any person occupying, at the time of the death, any part of the house wherein the death occurred and having knowledge of the deceased having died in the house;

(d) any person in attendance during the last illness of the deceased;

(e) any person who has seen the body of the deceased after death.

22. (1) When an entry of a birth or death has been made by the Registrar of Births and Deaths under section 19, the person giving notice of the birth or death must sign the entry in the register in the presence of the Registrar:

Entry of birth or death to be signed by person giving notice.

<sup>1</sup>[Provided that it shall not be necessary for the person giving notice to attend before the Registrar or to sign the entry in the register, if he has given such notice in writing and has furnished to the satisfaction of the Registrar such evidence of his identity as may be required by any rules made by the Provincial Government, in this behalf.]

(2) Until the entry has been so signed <sup>1</sup>[or the conditions specified in the proviso to sub-section (1) have been complied with,] the birth or death shall not be deemed to be registered under this Act.

(3) When the birth of an illegitimate child is registered, and the mother and the person acknowledging himself to be the father of the child jointly request that that person may be registered as the father, the mother and that person must both sign the entry in the register in the presence of the Registrar.

23. The Registrar of Births and Deaths shall, on application made at the time of registering any birth or death by the person giving notice of the birth or death, and on payment by him of the prescribed fee,<sup>2</sup> give to the applicant a certificate in the prescribed form, signed by the Registrar, of having registered the birth or death.

Grant of certificate of registration of birth or death.

24. (1) Every Registrar of Births and Deaths in British India shall send to the Registrar-General of Births, Deaths and Marriages for the territories within which the local area or class for which he is appointed is situate or resides, at the prescribed intervals, a true copy certified by him, in the prescribed form, of all the entries of births and deaths in the register book kept by him since the last of those intervals:

Duty of Registrars as to sending certified copies of entries in register books to Registrar-General.

Provided that in the case of Registrars of Births and Deaths who are clergymen of the Churches of England, Rome and Scotland, the Registrar may, if so directed by his ecclesiastical superior, send the certified copies in the first instance to that superior, who shall send them to the proper Registrar-General of Births, Deaths and Marriages.

In this sub-section "Church of England" and "Church of Scotland" mean the Church of England and the Church of Scotland as by law established respectively; and "Church of Rome" means the Church which regards the Pope of Rome as its spiritual head.

#### LEG. REF.

<sup>1</sup> The proviso to sub-section (1) and the words in sub-section (2) within brackets were inserted by the amending Act IX of 1911.

<sup>2</sup> As to stamps in which such fees are to be paid, see *Gazette of India*, 1899, Pt. I, p. 82, paragraph 14 (c) of Notification No. 786 S. R.



(2) The provisions of sub-section (1) shall apply to every Registrar of Births and Deaths in <sup>1</sup>[any Indian State] with this modification that the certified copies referred to in that sub-section shall be sent to such one of the Registrars-General of Births, Deaths and Marriages as the <sup>1</sup>[Central Government] by notification<sup>2</sup> in the *Official Gazette* appoints in this behalf:

<sup>3</sup>[\* \* \*]

25. (1) Every Registrar of Births and Deaths shall, on payment of the prescribed fees, at all reasonable times, allow searches to be made in the register books kept by him, and give a copy of any entry in the same.

Searches and copies of entries in register books.

(2) Every copy of an entry in a register book given under this section shall be certified by the Registrar of Births and Deaths and shall be admissible in evidence for the purpose of proving the birth or death to which the entry relates.

26. Notwithstanding anything in section 19, the Provincial Government may make rules authorising Registrars of Births and Deaths on conditions and in circumstances to be specified in the rules, to register births and deaths occurring outside the local areas or classes for which they are appointed.

Exceptional provision for registration of certain births and deaths.

#### D.—Penalty for False Information.

27. If any person wilfully makes, or causes to be made for the purpose of being inserted in any register of births or deaths, any false statement in connection with any notice of a birth or death under this Act, he shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

Penalty for wilfully giving false information.

#### E.—Correction of Errors.

28. (1) If it is proved to the satisfaction of a Registrar of Births and Deaths that any entry of a birth or death in any register kept by him under this Act is erroneous in form or substance, he may, subject to such rules<sup>4</sup> as may be made by the Provincial Government with respect to the conditions and circumstances on and in which errors may be corrected, correct the error by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry and add thereto the date of the correction.

Correction of entry in register of births or deaths.

(2) If a certified copy of the entry has already been sent to the Registrar-General of Births, Deaths and Marriages, the Registrar of Births and Deaths shall make and send a separate certified copy of the original erroneous entry and of the marginal correction therein made.

### CHAPTER IV.

#### AMENDMENT OF MARRIAGE ACTS.

[Repealed by Act I of 1938].

#### LEG. REF.

<sup>1</sup> Substituted by A.O., 1937.

<sup>2</sup> For an instance of such application, see *Gazette of India*, 1899, Pt. I, p. 424.

<sup>3</sup> Proviso omitted by A.O., 1937.

<sup>4</sup> For rules made under section 26 conjointly with sections 28 and 36, see *Gazette of India*, 1888, Pt. I; p. 336; and *ibid.*, 1894, Pt. I, p. 436; *Gen. Rules and Orders*, Vol. II, p. 562 and different Local Rules and

Orders. All Rules made by the Governor-General in Council under this Act before 1911 shall be deemed to have been made by Act IX of 1911.

#### NOTES.

SEC. 23.—A certificate granted under section 23 of the Births, Deaths and Marriages Registration Act becomes evidence of the fact of marriage in a divorce case. 13 Pat. 129=15 Pat. L. T. 353=1934 Pat. 475.



## CHAPTER V.

## SPECIAL PROVISIONS AS TO CERTAIN EXISTING REGISTERS.

32. If any person in British India, or in <sup>1</sup>[any Indian State] has for the time being the custody of any register or record of birth, baptism, naming, dedication, death or burial of any persons of the classes referred to in section 11, sub-section (1), or of any register or record of marriage of any persons of the classes to which Act III of 1872 or the Indian Christian Marriage Act, 1872, or the Parsi Marriage and Divorce Act, 1865, applies, and if such register or record has been made otherwise than in performance of a duty specially enjoined by the law of the country in which the register or record was kept he may, <sup>2</sup>[at any time before the first day of April, 1891] send the register or record to the office of the Registrar-General of Births, Deaths and Marriages for the territories within which he resides, or, if he resides within <sup>1</sup>[any Indian State] to such one of the Registrars-General as aforesaid as the Central Government by notification<sup>3</sup> in the Official Gazette directs in this behalf:

Permission to persons having custody of certain records to send them within one year to Registrar-General.

[Provided that such register or record shall, in the case of <sup>1</sup>[any Indian States] which <sup>4</sup>[is] within the political charge of a Provincial Government be sent to the Registrar-General of Births, Deaths and Marriages for the territories under the administration of that Provincial Government].<sup>5</sup>

33. <sup>6</sup>[(1) Any Provincial Government, in the case of registers or records sent under section 32 to the Registrar-General for the territories under its administration, and the Central Government, in the case of registers or records so sent to any other Registrar-General appointed by <sup>1</sup>[it] under the said section, may appoint so many persons as it <sup>7</sup>[\*\*\*] thinks fit to be Commissioners for examining such registers or records.]

Appointment of Commissioners to examine registers.

(2) The Commissioners so appointed shall hold office for such period as the <sup>8</sup>[authority appointing them] by the order of appointment, or any subsequent order, directs.

34. (1) The Commissioners appointed under the last foregoing section shall enquire into the state, custody and authenticity of every such register or record as may be sent to the Registrar-General of Births, Deaths and Marriages under section 32; and shall deliver to the Registrar-General a descriptive list or descriptive lists of all such registers or records, or portions of registers or records, as they find to be accurate and faithful.

Duties of Commissioners.

(2) The list or lists shall contain the prescribed particulars and refer to the registers or records, or to the portions of the registers or records, in the prescribed manner.

(3) The Commissioners shall also certify in writing, upon some part of every separate book or volume containing any such register or record, or portion of a register or record, as is referred to in any list or lists made by the

## LEG. REF.

<sup>1</sup> Substituted by Order in Council, 1937.

<sup>2</sup> These words were substituted for the words "within one year from the date on which this Act comes into force" by the Births, Deaths and Marriages Registration Act (1886), Amendment Act (XVI of 1890), S. I.

<sup>3</sup> For an instance of such notification, see *Gazette of India*, 1899, Pt. I, p. 424.

C. C. M.—24

<sup>4</sup> Substituted by A.O., 1937 for "are".

<sup>5</sup> To S. 32, the proviso was added by Act XXXVIII of 1920, Sch. I.

<sup>6</sup> Sub-S. (1) to S. 33 was substituted by Act XXXVIII of 1920, Sch. I.

<sup>7</sup> Omitted by Order in Council, 1937.

<sup>8</sup> In S. 33 (2) the words "authority appointing them" were substituted for the words "Governor-General in Council" by Act XXXVIII of 1920, Sch. I.



Commissioners, that it is one of the registers or records, or portions of registers or records, referred to in the said list or lists.

35. (1) Subject to the payment of the prescribed fees, the descriptive list or lists of registers or records, or portions of registers or records, delivered by the Commissioners to the Registrar-General of Births, Deaths and Marriages shall be, at all reasonable times, open to inspection by any person applying to inspect it or them, and copies of entries in those registers or records shall be given to all persons applying for them.

(2) A copy of an entry given under this section shall be certified by the Registrar-General of Births, Deaths and Marriages, or by an officer or person authorized in this behalf<sup>1</sup> by the Provincial Government, and shall be admissible in evidence for the purpose of proving the birth, baptism, naming, dedication, death, burial or marriage to which the entry relates.

<sup>2</sup>[35-A. (1) The Central Government or the Provincial Government<sup>3</sup>[may by notification in the official Gazette] appoint more commissions<sup>4</sup> than one for the purposes of section 33, each such commission consisting of so many and such members, and having its functions restricted to the disposal, under this Act and the rules thereunder, of such registers and records sent under section 32 to the Registrar-General, as may be specified in the notification.

(2) If more commissions than one are appointed in exercise of the power conferred by sub-section (1), then references in this Act to the Commissioners shall be construed as references to the members constituting a commission so appointed.]

## CHAPTER VI.

### RULES.

<sup>5</sup>36. (1) The Provincial Government, for each Province and the Central Government, for British subjects in Indian States, may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality to the foregoing power, such rules may—

- (a) fix the fees payable under this Act;<sup>6</sup>
- (b) prescribe the forms required for the purposes of this Act;
- (c) prescribe the time within which, and the mode in which, persons authorized under this Act to give notice of a birth or death to a Registrar of Births and Deaths must give the notice;
- (d) prescribe the evidence of identity to be furnished to a Registrar of Births and Deaths by persons giving notice of a birth or death in cases where personal attendance before such Registrar is dispensed with;

### LEG. REF.

<sup>1</sup> For officers appointed under sub-section (2) of section 35, see different Local Rules and Orders.

<sup>2</sup> Section 35-A was inserted by Act XVI of 1890 and sub-section (1) was substituted for the original sub-section by Act XXXVIII of 1920. Sub-section (2) was added by Act XXIV of 1934, Sch. I.

<sup>3</sup> Substituted by Order in Council, 1937.

<sup>4</sup> For commissions appointed under this

section, see *Gen. Rules and Orders*, Vol. 11, p. 571.

<sup>5</sup> Section 36 was substituted by section 2, Sch. I of Act XXXVIII of 1920.

<sup>6</sup> For fees prescribed for attendance at private residences in—(1) Burma, see notification quoted in *Bur.R.M.*, (2) Madras, see *Madras Rules and Orders*.

For rules framed by the Government of India under this clause as to fees, see *Gazette of India*, 1894, Pt. I, p. 580.



(e) prescribe the registers to be kept and the form and manner in which Registrars of Births and Deaths are to register births and deaths under this Act, and the intervals at which they are to send to the Registrar-General of Births, Deaths and Marriages true copies of the entries of births and deaths in the registers kept by them;<sup>1</sup>

(f) prescribe the conditions and circumstances on and in which Registrars of Births and Deaths may correct entries of births and deaths in registers kept by them;

(g) prescribe the particulars which the descriptive list or lists to be prepared by the Commissioners appointed under Chapter V are to contain, and the manner in which they are to refer to the registers or records, or portions of registers or records, to which they relate; and

(h) prescribe the custody in which those registers or records are to be kept.<sup>2</sup>

(3) Every power to make rules conferred by this Act is subject to the conditions of the rules being made after previous publication.

(4) All rules made under this Act shall be published in the Official Gazette, and on such publication shall have effect as if enacted in this Act.

37. [\* \* \* \* \*]<sup>3</sup>

## THE BRONZE COIN (LEGAL TENDER) ACT (XXII OF 1918).<sup>4</sup>

[26th September, 1918.]

*An Act to provide that certain bronze coins coined outside British India shall be legal tender in British India.*

WHEREAS it is expedient to provide that certain bronze coins coined outside British India shall be legal tender in British India; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE BRONZE COIN (LEGAL TENDER) ACT, 1918.

2. (1) Where bronze coins of any of the denominations specified in section 8 of the Indian Coinage Act, 1906, are coined outside British India at the request of the Central Government and the Central Government is satisfied that such coins are in accordance with the requirements of section 9 and of any notification for the time being in force under section 10 of the said Act, [it]<sup>5</sup> may, by notification in the Official Gazette direct the issue of any such coins, and thereafter any such coins shall be legal tender in payment or on account in the same way and to the same extent as if they were coins referred to in section 14 of the said Act, and the provisions of the said Act shall apply accordingly.

(2) Every coin which is declared to be legal tender by sub-section (1) shall be deemed to be Queen's coin within the meaning of section 230 of the Indian Penal Code.

### LEG. REF.

<sup>1</sup> For rules for the guidance of Commissioners appointed under Chapter V see *Gazette of India*, 1890, Pt. I, p. 745.

<sup>2</sup> For rules for the guidance of Commissioners appointed under Chapter V, framed with regard to the powers conferred by these clauses, see *Gazette of India*, 1890 and

1892, Pt. I, pp. 745 and 123 respectively.

<sup>3</sup> Repealed by Act IX of 1911, section 5.

<sup>4</sup> For Statement of Objects and Reasons, see *Gazette of India*, 1918, Pt. V, p. 82; and for Proceedings in Council, see *ibid.*, 1918, Pt. VI, pp. 1001 and 1140.

<sup>5</sup> Substituted by Order in Council, 1937, for "he".



## THE CANTONMENTS ACT (II OF 1924).

**PREFATORY NOTE: NECESSITY FOR A SPECIAL LAW AS TO CANTONMENTS.**—The Hon'ble Mr. Scoble in introducing the old Cantonments Bill, of 1910 said:—

"There are one or two points in connection with this Bill, to which I think it is desirable briefly to call attention.

"Although there is no definition of the word 'cantonment' in the Bill, it has a well understood popular meaning. The term has for more than a century been applied to military stations in India and these stations have almost from their first establishment been subject to special regulations. The troops themselves being under military law, it became necessary—to use the language of Bengal Regulation XX of 1810—from the great number of native retainers and followers attached to military establishments in India and the importance of prompt and orderly discharge of their duties to the welfare of the troops—to bring them also to a certain extent under military discipline, and with this view, in order to ascertain the areas within which stricter rules thus sanctioned might be enforced, it was enacted that the limits of cantonments and garrisons, including the military bazaars attached thereto, at which any division or corps of the army, or any considerable detachment not being less than half a battalion may be quartered, shall be marked out by the commanding officer in concert with the magistrate, and submitted for the final orders of Government. Similar regulations were framed in Madras and Bombay and under one or other of these enactments, all the other cantonments in India have been demarcated. It seemed to the Select Committee, therefore, better to adhere to the old method of determining what places were to be treated as subject to cantonment law than to attempt a new definition, and S. 4 of the Bill accordingly provides that the Local Government with the previous consent of the Governor-General in Council, may by notification in the Official Gazette, declare any place within its territories, in which any of Her Majesty's regular forces are quartered to be a cantonment and the same authorities may also from time to time declare or vary the limits of cantonments and may also declare that places are no longer cantonments; while the Governor-General in Council is specially empowered to exclude the whole or any part of a cantonment from the operation of any portion of the Act. These provisions have been introduced in order to meet the changes which necessarily occur in the distribution of troops throughout the country; and it is considered that by requiring the concurrence of the Local Authority and the supreme Government to the establishment or continuance of cantonment law in any locality, every reasonable safeguard is secured that private rights will be respected and public convenience duly regarded.

"While recognising the necessity of maintaining special laws in places primarily intended for the occupation of troops and followers, it has been the object of the framers of the Bill to assimilate, wherever it was possible, the Cantonment Law to that prevailing in Municipalities. In some parts of India, Cantonments are included within the limits of Municipalities and special provisions have been introduced to prevent any conflict of jurisdiction from this cause. But in all cantonments only such taxes as can be imposed in a Municipality in the same province may be levied; and by S. 25 of the Bill, the Governor-General in Council is authorised to extend to any cantonment any enactment in force in any Municipality in British India, subject to such restrictions and modifications as circumstances may show to be expedient. Under this section I hope many useful sanitary provisions, to be found in local laws—such, for instance, as the Provisions of S. 364 of the Calcutta Municipal Consolidation Act, 1888, with regard to the sale of adulterated articles of food—will be introduced into military stations.

"Section 26 of the Bill contains a very careful enumeration of the objects and purposes for which special rules may be made. To secure uniformity, it is provided that the rules shall be made by the Governor-General in Council, and to secure publicity that they shall not be made until the persons to be affected by them have had an opportunity of examining them and submitting such criticisms or objections as they may wish to offer. Exception has been taken to the power given to make rules for the construction and maintenance to the satisfaction of the cantonment authority, of buildings and of boundary walls, hedges and other fences. I think this is a very necessary power. It is possessed by municipal authorities everywhere; and owners of property will only have themselves to blame if rules of a really more oppressive or arbitrary character than those which prevail in well organised civil communities are passed for the lack of due remonstrance on their part.

"With regard to cantonment funds, it may be observed that although the Bill requires that, as a general rule, they must be expended upon the purposes of the Act within the cantonment itself, power is taken, in S. 21, to apply them to like objects (as, for instance, the formation and conservancy of a cholera camp) beyond the limits of the cantonment.

"One other point remains to be noticed. It will be obvious that the health and discipline of the dwellers in cantonments cannot be secured if breaches of cantonment rules can be committed with impunity, just outside their boundaries. Section 28 of the Bill accordingly provides that the Local Government may extend to the neighbourhood of a cantonment any enactment or rules in force within the cantonment itself. It will rest with the Local



Government and not with the military authorities, to determine in what respects and within what area, these rules and enactments ought to be applied beyond cantonment limits; and, in order to prevent hardship or loss to owners of property in such neighbourhoods, it will be in the power of Local Government to award such compensation or to make such other conditions as the circumstances of the case may require."

See *Fort St. George Gazette Supplement*, 1910, pages 1 and 2.

*Necessity for amendment of the old Act.*—The following is the Statement of Objects and Reasons attached to the present Cantonments Bill:—

A committee, which was appointed by the Government of India in January, 1921, to consider what changes were necessary in order to introduce into the administration of cantonments the spirit, of the reformed scheme of Government, recommended a complete revision and amalgamation of the Cantonments Act (Act XV of 1910) and the Cantonment Code, 1912, in order to bring them into conformity with ordinary Municipal Law and the system under which military cantonments are administered.

The recommendations of the committee have now been examined by the Government of India and the conclusions arrived at are embodied in the Bill.

The main features of the Bill are as follows:—

(a) It is proposed to take power to municipalise Government of those cantonments which contain a substantial civil population having no essential connexion with or dependence upon the military administration. In other cantonments where these circumstances do not fully exist, the administration of cantonment affairs will be vested in the hands of the commanding officer of the cantonment, who, for the purpose of the Act, will be constituted a corporation sole. The general effect will be that the cantonment authority will cease to be the purely executive agency of Government, which it is at present. In the larger cantonments the existing Cantonment Committee will be replaced by Cantonment Board which will be municipal in character and an essentially local Self-Government body.

(b) The reformed Cantonment Authorities will have a separate legal *persona*, will be capable of suing and being sued in their name and of making contracts. They will also be empowered to make bye-laws to govern local matters of administration which require different treatment in different cantonments.

(c) The cantonment fund under the reformed system will be a local fund invested in the cantonment authority.

(d) In the reformed cantonments where a Board is constituted a proportion of the Cantonment Board will be elected representatives of the civil inhabitants of the cantonment. An official majority will, however, be maintained.

(e) The Cantonment Magistrate as such, will be eliminated. In his place an "Executive officer" will be appointed. He will be paid by the Government. He will perform amongst other things, the duty of the Secretary of the Board, and he will have no judicial powers or functions.

(f) The Local Government will exercise certain larger powers of superintendence and control over cantonment affairs than they do at present.

(g) The military authorities will retain special powers in matters affecting the health, welfare and discipline of troops. (*See Statement of Objects and Reasons—Fort St. George Gazette*, 17th April, 1923, Pt. III, p. 228).

## THE CANTONMENTS ACT (II OF 1924).

### CONTENTS.

CHAPTER I. PRELIMINARY.	SECTIONS.	SECTIONS.
1. Short title, extent and commencement.	7. Disposal of cantonment fund when area ceases to be included in a cantonment.	area ceases to be a cantonment.
2. Definitions.	8. Application of funds and property transferred under Ss. 6 and 7.	
CHAPTER II. DEFINITION AND DELIMITATION OF CANTONMENTS.	9. Limitation of operation of Act.	
3. Definition of cantonments.	CHAPTER III. BOARDS AND CANTONMENT BOARDS. Boards.	
4. Alteration of limits of cantonments.	10. Cantonment Board and Executive Officer.	
5. The effect of including area in cantonment.	11. Incorporation of Cantonment Board.	
6. Disposal of cantonment fund when		



## SECTIONS.

12. Appointment of Executive Officer.
13. Constitution of Cantonment Boards.
14. Power to vary constitution of Boards in special circumstances.
15. Term of office of members.
16. Filling of vacancies.
17. Vacancies in special cases.
18. Oath or affirmation.
19. Resignation.
20. President and Vice-President.
21. Term of office of Vice-President.
22. Duties of President.
23. Duties of Vice-President.
24. Duties of the Executive Officer.
25. Special power of the Executive Officer.

*Elections.*

26. Electoral rolls.
27. Qualification of electors.
28. Qualification for being a member of the Board.
29. Interpretation.
30. Joint families, etc.
31. Power to make rules regulating elections.

*Members.*

32. Member not to vote on matter in which he is interested.
33. Liability of members.
34. Removal of members.
35. Consequences of removal.

*Servants.*

36. Disqualification of person as servant of Board.
- 36-A. Cantonment servant to be deemed a public servant.

*Procedure.*

37. Meetings.
38. Business to be transacted.
39. Quorum.
40. Presiding officer.
41. Minutes.
42. Meetings to be public.
43. Method of deciding questions.
- 43-A. Committee for Bazaars.
44. Power to make regulations.
45. Joint action with other local authority.
- 45-A. Report on administration.

*Control.*

46. Power of Central Government to require production of documents.
47. Inspection.
48. Power to call for documents.
49. Powers to require execution of work etc.
50. Power to provide for enforcement of direction under S. 49.
51. Power to override decision of Board.
52. Power of Officer Commanding-in-Chief, the Command, on reference under S. 51 or otherwise.
53. Powers of Central Government on a reference made under S. 51.
54. Supersession of Board.
- Validity of Proceedings.*
55. Validity of proceedings, etc.

## SECTIONS.

## CHAPTER IV.

## SPIRITUOUS LIQUORS AND INTOXICATING DRUGS.

56. Unauthorised sale of spirituous liquor or intoxicating drug.
57. Unauthorised possession of spirituous liquor.
58. Arrest of persons and seizure and confiscation of things for offences against the two last foregoing sections.
59. Saving of articles sold or supplied for medicinal purposes.

## CHAPTER V.

## TAXATION.

*Imposition of Taxation.*

60. General power of taxation.
61. Framing of preliminary proposals.
62. Objections and disposal thereof.
63. Imposition of tax.
64. Definition of "annual value".
65. Incidence of taxation.

*Assessment List.*

66. Assessment list.
67. Publication of assessment list.
68. Revision of assessment list.
69. Authentication of assessment list.
70. Evidential value of assessment list.
71. Amendment of assessment list.
72. Preparation of new assessment list.
73. Notice of transfers.
74. Notice of erection of buildings.

*Remission and Refund.*

75. Demolition, etc., of buildings.
76. Remission of tax.
77. Power to require entry in assessment list of details of buildings.
- 77-A. Notice to be given of the circumstances in which remission or refund is claimed.

78. What buildings, etc., are to be deemed vacant.

79. Notice to be given of every occupation of vacant building or house.

*Charge on Immovable Property.*

80. Tax on buildings and land to be a charge thereon.

*Octroi, Terminal Tax and Toll.*

81. Inspection of imported goods, etc.
82. Evasion of octroi or terminal tax.
83. Lease of octroi, terminal tax or toll.

*Appeals.*

84. Appeals against assessment.
85. Costs of appeal.
86. Recovery of costs from Board.
87. Conditions of right to appeal.
88. Finality of appellate orders.

*Payment and Recovery of Taxes.*

89. Time and manner of payment of taxes.
90. Presentation of bill.
91. Notice of demand.
92. Recovery of tax.
93. Distress.
94. Disposal of distrained property.
95. Recovery from a person about to leave cantonment.
96. Power to institute suit for recovery.
- Special Provisions relating to Taxation.*
97. Power to prohibit or exempt from taxation.



## SECTIONS.

- 98. Power to make special provision for conservancy in certain cases.
- 99. Exemption in the case of buildings.
- 99-A. General power of exemption.
- 100. Exemption of poor persons.
- 101. Composition.
- 102. Irrecoverable debts.
- 103. Obligation to disclose liability.
- 104. Immaterial error not to affect liability.
- 105. Distraint not to be invalid by reason of immaterial defect.

## CHAPTER VI.

## CANTONMENT FUND AND PROPERTY.

*Cantonment Fund.*

- 106. Cantonment fund.
  - 107. Custody of cantonment fund.
- Property.*
- 108. Property.
  - 109. Application of cantonment fund and property.
  - 110. Acquisition of immovable property.
  - 111. Power to make rules regarding cantonment fund and property.

## CHAPTER VII.

## CONTRACTS.

- 112. Contracts by whom to be executed.
- 113. Sanction.
- 114. Execution of contracts.
- 115. Contracts improperly executed not to be binding on a Board.

## CHAPTER VIII.

## DUTIES AND DISCRETIONARY FUNCTIONS OF BOARDS.

- 116. Duties of Board.
- 116-A. Power to manage property.
- 117. Discretionary functions of Board.
- 117-A. Power of expenditure for educational purposes outside the cantonment.

## CHAPTER IX.

## PUBLIC SAFETY AND SUPPRESSION OF NUISANCES.

*General Nuisances.*

- 118. Penalty for causing nuisances.

*Dogs.*

- 119. Registration and control of dogs.

*Traffic.*

- 120. Rule of the road.

*Prevention of Fire, etc.*

- 121. Use of inflammable materials for building purposes.
- 122. Stacking or collecting inflammable materials.
- 123. Care of naked lights.
- 124. Regulation of cinematographic and dramatic performances.
- 125. Discharging fire-works, fire-arms, etc.
- 126. Power to require buildings, wells, etc., to be rendered safe.
- 127. Enclosure of waste land used for improper purposes.

## CHAPTER X.

## SANITATION AND THE PREVENTION AND TREATMENT OF DISEASE.

*Sanitary Authorities.*

- 128. Responsibility for sanitation.
- 129. General duties of Health Officer.

## SECTIONS.

*Conservancy and Sanitation.*

- 130. Public latrines, urinals and conservancy establishment.
  - 131. Power of Board to undertake private conservancy arrangements.
  - 132. Deposit and disposal of rubbish, etc.
  - 133. Cess-pools, receptacles, filth, etc.
  - 134. Filling up of tank, etc.
  - 135. Provision of latrines, etc.
  - 136. Sanitation in factories, etc.
  - 137. Private latrines.
  - 138. Removal of congested buildings.
  - 139. Overcrowding of dwelling houses.
  - 140. Power to require repair or alteration of building.
  - 141. Power to require land or building to be cleansed.
  - 142. Power to order disuse of house.
  - 143. Removal of noxious vegetation.
  - 144. Agriculture and irrigation.
- Burial and Burning Grounds.*
- 145. Power to call for information regarding burial and burning grounds.
  - 146. Permission for use of new burial or burning ground.
  - 147. Power to require closing of burial or burning ground.
  - 148. Exemption from operation of Ss. 145 to 147.
  - 149. Removal of corpses.

*Prevention of Infectious or Contagious Diseases.*

- 150. Obligation to give information of infectious or contagious diseases.
- 151. Special measures in case of outbreak of infectious or epidemic diseases.
- 152. Power to require names of dairyman's customers.
- 153. Power to require names of a washerman's customers.
- 154. Report after inspection of dairy or washerman's place of business.
- 155. Action on report submitted by Health Officer.
- 156. Examination of milk or washed clothes.
- 157. Contamination of public conveyance.
- 158. Disinfection of public conveyance.
- 159. Penalty for failure to report.
- 160. Driver of conveyance not bound to carry person suffering from infectious or contagious disease.
- 161. Disinfection of building or articles therein.
- 162. Destruction of infectious hut or shed.
- 163. Temporary shelter for inmates of disinfected or destroyed building or shed.
- 164. Disinfection of building before letting the same.
- 165. Disposal of infected article without disinfection.
- 166. Means of disinfection.
- 167. Making or selling of food, etc., or washing clothes by infected person.
- 168. Power to restrict or prohibit sale of food or drink.
- 169. Control over wells, tanks, etc.
- 170. Disposal of infectious corpse.



## SECTIONS.

*Hospitals and Dispensaries.*

- 171. Maintenance or aiding of hospitals or dispensaries.
- 172. Medical supplies, appliances, etc.
- 173. Free patients.
- 174. Paying patients.
- 175. Power to order person to attend hospital or dispensary.
- 176. Power to exclude from cantonment persons refusing to attend hospital or dispensary.

*Control of Traffic for Hygienic purposes*

- 177. Routes for pilgrims and others.
- Special conditions regarding essential services.*

- 178. Conditions of service of sweepers.

## CHAPTER XI.

## CONTROL OVER BUILDINGS, STREETS, BOUNDARIES, TREES, ETC.

*Buildings.*

- 178-A. Sanction for building.
- 179. Notice of new buildings.
- 180. Conditions of valid notice.
- 181. Power of Board to sanction or refuse.
- 182. Compensation.
- 183. Lapse of sanction.
- 183-A. Period for completion of building.
- 184. Illegal erection and re-erection.
- 185. Power to stop erection or re-erection or to demolish.
- 186. Power to make bye-laws.
- 187. Projections and obstructions.
- 188. Unauthorised buildings over drains, etc.
- 189. Drainage and sewer connections.
- 190. Power to attach brackets for lamps.

*Streets.*

- 191. Temporary occupation of street, land, etc.
- 192. Closing and opening of streets.
- 193. Names of streets and numbers of buildings.

*Boundaries and Trees.*

- 194. Boundary walls, hedges and fences.
- 195. Felling, lopping and trimming of trees.
- 196. Digging of public land.
- 197. Improper use of land.

## CHAPTER XII.

## MARKETS, SLAUGHTER HOUSES, TRADES AND OCCUPATIONS.

- 198. Public markets and slaughter-houses.
- 199. Use of public market.
- 200. Levy of stallages, rents and fees.
- 201. Stallages, rents, etc., to be published.
- 202. Private markets and slaughter-houses.
- 203. Conditions of grant of licence for private market or slaughter-house.
- 204. Penalty for keeping market or slaughter-house open without licence, etc.
- 205. Penalty for using unlicensed market or slaughter-house.
- 206. Prohibition and restriction of use of slaughter-houses.
- 207. Power to inspect slaughter-houses.
- 208. Power to make bye-laws.

## SECTIONS.

*Trades and Occupations.*

- 209. Provision of washing places.
- 210. Licences required for carrying on of certain occupations.
- 211. Conditions which may be attached to licences.

*General Provisions.*

- 212. Power to vary licence.
- 213. Carrying on trade, etc., without licence or in contravention of S. 212.
- 214. Feeding animals on dirt, etc.
- Entry, Inspection and Seizure.*
- 215. Powers of entry and seizure.
- Import of Cattle and Flesh.*
- 216. Import of cattle and flesh.

## CHAPTER XIII.

## WATER SUPPLY, DRAINAGE AND LIGHTING.

*Water Supply.*

- 217. Maintenance of water supply.
- 218. Control over sources of public water supply.
- 219. Power to require maintenance or closing of private source of public drinking water supply.
- 220. Supply of water.
- 221. Power to require water supply to be taken.
- 222. Supply of water under agreement.
- 223. Board not liable for failure of supply.
- 224. Conditions of universal application.
- 225. Supply to persons outside cantonment.
- 226. Penalty.
- Water, Drainage and other Connections.*
- 227. Power of Board to lay wires, connections, etc.
- 228. Wires, etc., laid above surface of ground.
- 229. Connection with main not to be made without permission.
- 230. Power to prescribe ferrules and to establish meters, etc.
- 231. Power of inspection.
- 232. Power to fix rates and charges.

*Application of this Chapter to Government Water Supplies.*

- 233. Government water supply.
- 234. Recovery of charges.
- 234-A. Supply of water from Government water supply to the Board.
- 234-B. Functions of the Board in relation to the distribution of bulk supply.

## CHAPTER XIV.

## REMOVAL AND EXCLUSION FROM CANTONMENTS AND SUPPRESSION OF SEXUAL IMMORALITY.

- 235. Power to remove brothels and prostitutes.
- 236. Penalty for loitering and importuning for purposes of prostitution.
- 237. Removal of lewd persons from cantonment.
- 238. Removal and exclusion from cantonments of disorderly persons.
- 239. Removal and exclusion from cantonment of seditious persons.
- 240. Penalty.



## SECTIONS.

## CHAPTER XV.

POWERS, PROCEDURE, PENALTIES AND APPEALS.  
*Entry and Inspection.*

- 241. Powers of entry.
- 242. Powers of inspection by member of a Board.
- 243. Power of inspection, etc.
- 244. Power to enter land adjoining land where work is in progress.
- 245. Breaking into premises.
- 246. Entry to be made in the day time.
- 247. Owner's consent ordinarily to be obtained.
- 248. Regard to be had to social and religious usages.
- 249. Penalty for obstruction.

*Powers and Duties of Police Officers.*

- 250. Arrest without warrant.
- 251. Duties of police officers.

*Notices.*

- 252. Notices to fix reasonable time.
- 253. Authentication and validity of notices issued by Board.
- 254. Service of notice, etc.
- 255. Method of giving notice.
- 256. Powers of Board in case of non-compliance with notice, etc.

*Recovery of Money.*

- 257. Liability of occupier to pay in default of owner.

- 258. Relief to agents and trustees.

- 259. Method of recovery.

*Committees of Arbitration.*

- 260. Application for a Committee of Arbitration.

- 261. Procedure for convening Committee of Arbitration.

- 262. Constitution of Committee of Arbitration.

- 263. No person to be nominated who has direct interest or whose services are not immediately available.

- 264. Meetings and powers of Committees of arbitration.

- 265. Decisions of Committees of arbitration.

*Prosecutions.*

- 266. Prosecutions.

- 267. Composition of offence.

*General Penalty Provisions.*

- 268. General penalty.

- 269. Cancellation and suspension of licen-

## SECTIONS.

ces.

- 270. Recovery of amount payable in respect of damage to cantonment property.

*Limitation.*

- 271. Limitation for prosecution.

*Suits.*

- 272. Protection of Board, Executive Officer, etc.

- 273. Notice to be given of suits.

*Appeals and revision.*

- 274. Appeals from executive orders.

- 275. Petition of appeal.

- 276. Suspension of action pending appeal.

- 277. Revision.

- 278. Finality of appellate orders.

- 279. Right of appellant to be heard.

## CHAPTER XVI.

## RULES AND BYE-LAWS.

- 280. Power to make rules.

- 281. Supplemental provisions respecting rules.

- 282. Power to make bye-laws.

- 283. Penalty for breach of bye-laws.

- 284. Supplemental provisions regarding bye-laws.

- 285. Rules and bye-laws to be available for inspection and purchase.

## CHAPTER XVII.

## SUPPLEMENTAL PROVISIONS.

- 286. Extension of certain provisions of the Act and rules to places beyond cantonments.

- 286-A. Power to delegate functions of Executive Officer.

- 287. Registration.

- 288. Validity of notices and other documents.

- 289. Admissibility of document or entry as evidence.

- 290. Evidence by officer or servant of the Board.

- 291. Application of Act IV of 1899.

- 292. *Repealed.*

SCHEDULE I.—Notice of Demand.

SCHEDULE II.—Form of Warrant.

SCHEDULE III.—Form of Inventory of Property Distrained and Notice of Sale.

SCHEDULE IV.—Cases in which Police may arrest without warrant.

SCHEDULE V.—Appeals from Orders.

SCHEDULE VI.—[*Repealed.*]THE CANTONMENTS ACT (II OF 1924).<sup>1</sup>

[16th February, 1924.]

N.B.:—(1) Throughout this Act, save as otherwise provided expressly, for the words "Local Government" the words "Central Government" have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

(2) In this Act, for the expressions "Cantonment Authority," "Cantonment Authorities" and "Cantonment Authority's", wherever they occur, the words "Board" "Boards" and "Board's" respectively have been substituted by Act XXIV of 1936, S. 69.

## LEG. REF.

<sup>1</sup>For Statement of Objects and Reasons, see Gazette of India, 1923, Pt. V, p. 220, and

C. C. M.—25

for Report of Select Committee, see *ibid.* p. 270.



## EFFECT OF LEGISLATION.

Year.	No.	Short title.	How repealed or otherwise affected by Legislation.
1924	II	The Cantonments Act, 1924.	Am., Act VII of 1925; Act XXXV of 1926; Act X of 1927; Act XXVI of 1927; Act VIII of 1930; Act VII of 1931; Act XVII of 1932; Act XXIV of 1934; Act XII of 1935; Act XXIV of 1936; Act XXXIV of 1939; Act XXXI of 1940; Act XXXII of 1940; Government of India (Adaptation of Indian Laws) Order, 1937. Rep. in pt., Act XII of 1927.

*An Act to consolidate and amend the law relating to the administration of cantonments.*

WHEREAS it is expedient to consolidate and amend the law relating to the administration of cantonments; It is hereby enacted as follows:—

## CHAPTER I.

## PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE CANTONMENTS ACT, 1924.

(2) It extends to the whole of British India, including British Baluchistan.

## NOTES.

SEC. 1.—The Secretary of State is absolute owner of all Cantonment lands, unless it can be proved that he parted with it. There can be no adverse possession against him. A person occupying land in Cantonments not specifically transferred to him by the Secretary of State, can only hold it as a licensee from him, who could eject him at will by revoking his licence. 66 I.C. 582=1922 All. 57. The mere fact that certain lands are declared by Government to be within a Cantonment area does not vest their ownership in the Government unless it is shown that the lands were acquired by the Government for that purpose. 31 C.W.N. 1033=1927 Cal. 786. All land within Cantonment area does not necessarily belong to Government. 1927 C. 786. It is not the necessary implication of the second paragraph of cl. (6) of Ben. Cantonment Regulations, though the rules suggest that the greater part of the land was at that time Government property. 57 I.A. 339=58 C. 858=60 M.L.J. 142 (P.C.). Where subsequent to the establishment of a Cantonment the ownership of the land within it becomes vested in the Secretary of State and the prior owners of the land were compensated for the loss of such rights as they may have actually suffered, it is a fair presumption that the amount of compensation would vary according to whether the prior ownership was deprived wholly of ownership and possession or whether he was deprived only of ownership and allowed to remain in possession as licensee without the payment of any rent. 1930 All. 587=128 I.C. 441. The

Peshawar Cantonment Board, as representing the Secretary of State who acquired the Peshawar Cantonment by purchase, is the owner of all the lands situate within the Cantonment and is entitled to eject a licensee in possession on payment of compensation in respect of structures or improvements, if any, made by him. 142 I.C. 657=1933 Pesh. 56. Subsequent to the establishment of Cantonment possession of one enclosed plot of land was found to be with original owner described as 'malik' in official records, who subsequently built on portion of land with permission of Cantonment authorities and let out buildings for shops. Permission to build is not licence with regard to site for shops only but original owner continued to be licensee of whole plot of land. 1930 All. 587. Where Army Regulations were in force by which a house could not be sold at all to Civilians and later on it was allowed to be sold with the sanction of the Commanding Officer, *held*, in the absence of evidence as to the actual terms, it must be presumed that the permission was subject to a reservation about sanction. 46 A. 427=1924 All. 415. Therefore every transfer made with the permission of the military authority must be treated as indicating an admission of a new licence upon the prevailing conditions. 46 A. 427. A transfer without sanction furnishes a cause of action for a declaration that it was not binding on the Secretary of State. 46 A. 427. The rights of the occupier to sell the materials of the house are not affected by the Regulation. 46 A. 427=1924 All. 415.



(3) The Central Government may, by notification in the Official Gazette direct that this Act, or any provisions thereof which <sup>1</sup>[it] may specify, shall come into force on such date<sup>2</sup> as <sup>1</sup>[it] may appoint in this behalf.

2. In this Act, unless there is anything repugnant in the subject or context,—

Definitions.

(i) "Assistant Health Officer" means the medical officer appointed by the <sup>3</sup>[Officer Commanding-in-Chief, the Command] to be the Assistant Health Officer for a cantonment;

(ii) "Board" means a Cantonment Board constituted under this Act;

(iii) "Brigade area" means one of the brigade areas, whether occupied by a brigade or not, into which India is for military purposes for the time being divided, and includes for all or any of the purposes of this Act any area which the Central Government may, by notification in the Official Gazette declare to be a brigade area for such purpose or purposes;

<sup>4</sup>[(iv) "building" means a house, outhouse, stable, latrine, shed, hut or other roofed structure whether of masonry, brick, wood, mud, metal or other material, and any part thereof, and includes a well and a wall (other than a boundary wall not exceeding eight feet in height and not abutting on a street) but does not include a tent or other portable and temporary shelter;]

(v) <sup>5</sup>[\* \*]

(vi) "casual election" means an election held to fill a casual vacancy;

(vii) "casual vacancy" means a vacancy occurring otherwise than by efflux of time in the office of an elected member of a Board;

(viii) "Command" means one of the Commands into which India is for military purposes for the time being divided, and includes any area which the Central Government may, by notification in the Official Gazette, declare to be a Command for all or any of the purposes of this Act;

(ix) <sup>6</sup>[\* \*];

(x) "dairy" includes any farm, cattle-shed, milk-store, milk-shop or other place from which milk is supplied or in which milk is kept for purposes of sale or is manufactured for sale into butter, ghee, cheese or curds, and, in relation to a dairyman who does not occupy any premises for the sale of milk, includes any place in which he keeps the vessels used by him for the storage or sale of milk;

(xi) "dairyman" includes the keeper of a cow, buffalo, goat, ass or other animal, the milk of which is offered or is intended to be offered for sale for human consumption, and any purveyor of milk and any occupier of a dairy;

<sup>7</sup>[(xi-a) "entitled consumer" means a person in a cantonment who is paid from the Defence Services Estimates and is authorised by general or special order of the Central Government to receive a supply of water for domestic purposes from the Military Engineer Services or the Public Works Department on such terms and conditions as may be specified in the order;]

(xii) "Executive Engineer" means the Public Works Officer of that grade, or the <sup>8</sup>[officer of the Military Engineer Services] of the corresponding grade, having charge of the military work in a cantonment, <sup>9</sup>[or where more than one such officer has charge of the military works in a cantonment such one of those officers as the Officer Commanding the Station may designate in this behalf], and includes the officer of whatever grade in immediate executive engineering charge of a cantonment;

#### LEG. REF.

<sup>1</sup>Substituted for "he" by A.O., 1937.

<sup>2</sup>This Act came into force on the 1st day of May, 1924, see *Gen. R. and O.*, Vol. V, p. 466.

<sup>3</sup>These words were substituted by S. 2 of Act XXXV of 1926.

<sup>4</sup>Cl. (iv) of sec. 2 substituted by Act

XXIV of 1936.

<sup>5</sup>Cl. (v) of sec. 2 omitted by Act XXIV of 1936.

<sup>6</sup>Cl. (ix) omitted by Act of XII of 1935.

<sup>7</sup>Cl. (xi-a) inserted by Act XXIV of 1936.

<sup>8</sup>Substituted by Act VII of 1925.

<sup>9</sup>Inserted by Act XXIV of 1936.



(xiii) "Executive Officer" means the person appointed under this Act to be the Executive Officer of a cantonment;

(xiv) "Health Officer" means the senior executive medical officer in military employ on duty in a cantonment;

(xv) <sup>1</sup>[\* \*]

(xvi) "hut" means any building, no material portion of which above the plinth level is constructed of masonry or of squared timber framing or of iron framing;

(xvii) "infectious or contagious disease" means cholera, leprosy, enteric fever, small-pox, tuberculosis, diphtheria, plague, influenza, venereal disease and any other epidemic, endemic or infectious disease which the Central Government may, by notification<sup>2</sup> in the Official Gazette, declare to be an infectious or contagious disease for the purposes of this Act;

(xviii) "inhabitant", in relation to a cantonment, or local area, means any person ordinarily residing or carrying on business or owning or occupying immovable property therein, and in case of a dispute means any person declared by the District Magistrate to be an inhabitant;

(xix) "intoxicating drug" means opium, ganja, bhang, charas and any preparation or admixture thereof, and includes any other intoxicating substance, or liquid which the Central Government <sup>3</sup>[\* \*] may, by notification<sup>4</sup> in the Official Gazette, declare to be an intoxicating drug for the purposes of this Act;

(xx) "market" includes any place where persons assemble for the purpose of selling meat, fish, fruit, vegetable, live-stock or any other article of food;

<sup>5</sup>[(xx-a) "Military Estates Officer" means the officer appointed by the Central Government to perform the duties of the Military Estates Officer under rules made under clauses (a) and (b) of sub-section (2) of S. 280;]

(xxi) "military officer" means—

(a) a person who, being an officer within the meaning of the Army Act or the Indian Army Act, 1911, or the Air Force Act, <sup>6</sup>[or the Indian Air Force Act, 1932] is commissioned and in pay as an officer doing military or air force duty which His Majesty's military or air forces, or is an officer doing such duty in any arm, branch or part of those forces; or

(b) a person doing military or air force duty as a warrant officer with either of those forces or with any arm, branch, or part thereof, whether he is or is not an officer within the meaning of the Army Act or the Indian Army Act, 1911, or the Air Force Act <sup>6</sup>[or the Indian Air Force Act, 1932;]

(xxii) "nuisance" includes any act, omission, place or thing which causes or is likely to cause injury, danger, annoyance or offence to the sense of sight, smell or hearing, or which is or may be dangerous to life or injurious to health or property;

(xxiii) "occupier" includes an owner in occupation of, or otherwise using, his own land or building;

(xxiv) "Officer Commanding the District" means the Officer Commanding any one of the districts into which India is for military purposes for the time being divided, or any brigade area which does not form part of any such district, or any area which the Central Government may, by notification in the Official Gazette, declare to be such a district for all or any of the purposes of this Act;

#### LEG. REF.

<sup>1</sup>Cl. (xv) omitted by Act XXIV of 1936.

<sup>2</sup>For such notification by the Govt. of Assam, see *Assam Gazette*, 1924. Pt. II, p. 732.

<sup>3</sup>Omitted by Act VII of 1925.

<sup>4</sup>For such Notification by the Govt. of Assam, see *Assam Gazette*, 1914, Pt. II,

p. 943.

<sup>5</sup>Cl. (xx-a) inserted by Act XXIV of 1936.

<sup>6</sup>Inserted by Act XXIV of 1936.

#### NOTES.

SEC. 2 (xxiv).—Officer does not include a police officer. 2 S.L.R. 137.



<sup>1</sup>[(xxiv-a) "Officer Commanding the station" means the military officer for the time being in command of the forces in a cantonment, or, if that officer is the Officer Commanding the District or officer Commanding-in-Chief, the Command, the military officer who would be in command of those forces in the absence of the Officer Commanding the District and Officer Commanding-in-Chief, the Command;]

(xxv) "ordinary election" means an election held to fill a vacancy in the office of an elected member of a Board arising by efflux of time;

(xxvi) "owner" includes any person who is receiving or is entitled to receive the rent of any building or land whether on his own account or on behalf of himself and others or an agent or trustee, or who would so receive the rent or be entitled to receive it if the building or land were let to a tenant;

(xxvii) "party wall" means a wall forming part of a building and used or constructed to be used for the support or separation of adjoining buildings belonging to different owners, or constructed or adapted to be occupied by different persons;

(xxviii) "private market" means a market which is not maintained by a Board and which is licensed by a Board under the provisions of this Act;

(xxix) "private slaughter-house" means a slaughter-house which is not maintained by a Board and which is licensed by a Board under the provisions of this Act;

(xxx) "public market" means a market maintained by a Board;

(xxxi) "public place" means any place which is open to the use and enjoyment of the public, whether it is actually used or enjoyed by the public or not;

(xxxii) "public slaughter-house" means a slaughter-house maintained by a Board;

<sup>2</sup>[(xxxii-a) a person is deemed to reside in a cantonment if he maintains therein a house or a portion of a house which is at all times available for occupation by himself or his family even though he may himself reside elsewhere, provided that he has not abandoned all intention of again occupying such house either by himself or his family;]

(xxxiii) "shed" means a slight or temporary structure for shade or shelter;

(xxxiv) "slaughter-house" means any place ordinarily used for the slaughter of animals for the purpose of selling the flesh thereof for human consumption;

(xxxv) "soldier" means a person who is a soldier or airman within the meaning of the Army Act or the Air Force Act, or is subject to the Indian Army Act, 1911, and who is not a military officer;

(xxxvi) "spirituous liquor" means any fermented liquor, any wine, or any alcoholic liquid obtained by distillation or the sap of any kind of palm tree, and includes any other liquid containing alcohol which the Central Government <sup>3</sup>[\* \* \*] may, by notification in the Official Gazette, declare to be a spirituous liquor for the purposes of this Act;

(xxxvii) "street" includes any way, road, lane, square, court, alley <sup>4</sup>[or] passage <sup>5</sup>[\* \* \*] in a cantonment, whether a thoroughfare or not and whether built upon or not, over which the public have a right-of-way and also the road-way or foot-way over any bridge or causeway;

#### LEG. REF.

<sup>1</sup> Inserted by the Repealing and Amending Act, 1935 (XII of 1935), S. 2 and Sch. I.

<sup>2</sup> Cl. (xxxii-a) inserted by Act XXIV of 1936.

<sup>3</sup> Omitted by Act VII of 1925.

<sup>4</sup> Word 'or' inserted by Act XXIV of 1936.

<sup>5</sup> Words 'or open space' omitted by Act XXIV of 1936.

#### NOTES.

SEC. 2 (xxxvii).—Where the accused had a number of years ago enclosed a piece of



(xxxviii) "vehicle" means a wheeled conveyance of any description which is capable of being used on a street, and includes a motor-car, motor-lorry, motor-omnibus, cart, locomotive, tram-car, hand-cart, truck, motor-cycle, bicycle tricycle and rickshaw; 1[\* \*]

(xxxix) "water-works" includes all lakes, tanks, streams, cisterns, springs, pumps, wells, reservoirs, aqueducts, water-trucks, sluices, mains, pipes, culverts, hydrants, stand-pipes, and conduits, and all machinery, lands, buildings, bridges and things, used for, or intended for the purpose of, supplying water to a cantonment; 2[and

(xl) "year" means the year commencing on the first day of April.]

## CHAPTER II.

### DEFINITION AND DELIMITATION OF CANTONMENTS.

3. (1) The Central Government 3[\* \*] may, by notification in the Official Gazette declare any place or places in which any part of His Majesty's regular forces or regular air force is quartered or which, being in the vicinity of any such place or places, is or are required for the service of such forces to be a cantonment for the purposes of this Act and of all other enactments for the time being in force, and 4[\* \*] may, by a like notification,<sup>5</sup> declare that any cantonment shall cease to be a cantonment.

(2) The Central Government 4[\* \*] may, by a like notification, define the limits of any cantonment for the aforesaid purposes.

6[(3) When any place is declared a cantonment for the first time, the Central Government may, until a Board is constituted in accordance with the provisions of this Act, by order make any provision which appears necessary to 7[it] either for the administration of the Cantonment or for the constitution of the Board].

4. (1) The Central Government 3[\* \*] may, by notification in the Official Gazette, declare its intention to include within a cantonment any local area situated in the 8[\* \*] vicinity thereof or to exclude from a cantonment any local area comprised therein.

(2) Any inhabitant of a cantonment or local area in respect of which a notification has been published under sub-section (1) may, within six weeks from the date of the notification, submit in writing to the Central Government through the Officer Commanding-in-Chief, the Command, an objection to the notification, and the Central Government shall take such objection into consideration.

(3) On the expiry of six weeks from the date of the notification, the Central Government may 3[\* \*] after considering the objections, if any, which have been submitted under sub-section (2), by notification in the Official Gazette, include the local area in respect of which the notification was published under sub-section (1), or any part thereof, in the cantonment or, as the case may be, exclude such area or any part thereof from the cantonment.

#### LEG. REF.

<sup>1</sup> Word 'and' omitted by Act XXIV of 1936.

<sup>2</sup> Inserted by Act XXIV of 1936.

<sup>3</sup> Words 'with the previous sanction of Governor-General in Council' omitted by A.O., 1937.

<sup>4</sup> Words 'with the like sanction' omitted by A.O., 1937.

<sup>5</sup> For Notification declaring that the Cantonments of Shwebo, Thayetmo and Meiktila shall cease to be cantonments, see *Burma Gazette*, 1926, Pt. I, p. 244.

For a similar notification in respect of

Dibrugarh, see *Assam Gazette*, 1924, Pt. I, p. 664.

<sup>6</sup> Sub-sec. (3) of sec. 3 inserted by Act XXIV of 1936.

<sup>7</sup> Substituted for 'him' by the A.O., 1937.

<sup>8</sup> Word "immediate" omitted by Act XXVI of 1927.

#### NOTES.

land within gates and had paved them with burnt bricks, that land would not be 'street' within the definition. 158 I.C. 858=36 Cr.L. J. 1475=1935 Lah. 858.

SEC. 3 (2).—See 5 I.C. 905=24 P.R. 1910.



5. When, by a notification under section 4, any local area is included in a cantonment, such area shall thereupon become subject to this Act and to all other enactments for the time being in force throughout the cantonment and to all notifications, rules, regulations, bye-laws, orders and directions issued or made thereunder.

6. (1) When, by a notification under section 3, any cantonment ceases to be a cantonment and the local area comprised therein is immediately placed under the control of a local authority, the balance of the cantonment fund and other property vesting in the Board shall vest in such local authority, and the liabilities of the Board shall be transferred to such local authority.

(2) When, in like manner, any cantonment ceases to be a cantonment and the local area comprised therein is not immediately placed under the control of a local authority, the balance of the cantonment fund and other property vesting in the Board shall vest in His Majesty, and the liabilities of the Board shall be transferred to the <sup>1</sup>[Central Government].

7. (1) When, by a notification under section 4, any local area forming part of a cantonment ceases to be under the control of a particular Board and is immediately placed under the control of some other local authority, such portion of the cantonment fund and other property vesting in the Board and such portion of the liabilities of the Board, as the Central Government may, by general or special order, direct, shall be transferred to that other local authority.

(2) When, in like manner, any local area forming part of a cantonment ceases to be under the control of a particular Board and is not immediately placed under the control of some other local authority, such portion of the cantonment fund and other property vesting in the Board shall vest in His Majesty, and such portion of the liabilities of the Board shall be transferred to the <sup>1</sup>[Central Government], as the Central Government may, by general or special order, direct.

8. Any cantonment fund or portion of a cantonment fund or other property of a Board vesting in His Majesty under the provisions of section 6 or section 7 shall be applied in the first place to satisfy any liabilities of the Board transferred under such provisions to the <sup>1</sup>[Central Government] and in the second place for the benefit of the inhabitants of the local area which has ceased to be a cantonment or, as the case may be, part of a cantonment.

9. The Central Government may, <sup>2</sup>[\* \*] by notification in the Official Gazette, exclude from the operation of any part of this Act the whole or any part of a cantonment, or direct that any provision of this Act shall, in the case of any cantonment—

<sup>3</sup>[(a) situated within the limits of a Presidency-town; or  
(b) in which the Board is superseded under S. 54,]  
apply with such modifications as may be so specified.

#### LEG. REF.

<sup>1</sup> Substituted for "Secretary of State in Council" by A.O., 1937.

<sup>2</sup> Words 'with the previous sanction of the Governor-General in Council' omitted by A.O., 1937.

<sup>3</sup> Substituted for "specified in the notification in which there is no Board" by Act XXIV of 1936.

#### NOTES.

SEC. 5.—See 31 C.W.N. 1033=1927 Cal. 786. and other cases noted under S. 1, *supra*.



## CHAPTER III.

[CANTONMENT BOARDS.]<sup>1</sup>

Cantonment Board and Executive Officer.

<sup>2</sup>[10. For every cantonment there shall be a Cantonment Board and an Executive Officer.]

<sup>2</sup>[11. Every Board shall, by the name of the place by reference to which the cantonment is known, be a body corporate having perpetual succession and a common seal with power to acquire and hold property both movable and immovable and to contract and shall, by the said name, sue and be sued.]

Incorporation of Cantonment Board.

<sup>2</sup>[12. (1) The Executive Officer of every cantonment shall be appointed by the Central Government, or by such person as the Central Government may authorise in this behalf, from the Service of Executive Officers constituted by rules made under section 280:

Appointment of Executive Officer.

Provided that an Executive Officer appointed before the commencement of the Cantonments (Amendment) Act, 1936, shall, unless the Central Government otherwise directs in any case, be deemed to have been duly appointed in accordance with this sub-section.

(2) Not less than half the cost of the salary of the Executive Officer shall be paid by <sup>3</sup>[the Central] Government and the balance from the cantonment fund:

Provided that the salary of an Executive Officer appointed before the commencement of the Cantonments (Amendment) Act, 1936, shall, until the Central Government otherwise directs, continue to be paid from the source from which it was being paid at the commencement of the said Act.

(3) The Executive Officer shall be the Secretary of the Board and of every committee of the Board, but shall not be a member of the Board or of any such committee.]

Constitution of Cantonment Boards.

<sup>2</sup>[13. (1) Cantonments shall be divided into three classes, namely:—

(i) Class I Cantonments, in which the civil population exceeds ten thousand;

(ii) Class II Cantonments, in which the civil population exceeds two thousand five hundred, but does not exceed ten thousand; and

(iii) Class III Cantonments, in which the civil population does not exceed two thousand five hundred:

Provided that the Central Government may, by notification in the Official Gazette, place in Class II any cantonment in the North-West Frontier Province or in British Baluchistan which if it were situated elsewhere would be a Class I Cantonment, or place in Class III any such cantonment which if it were situated elsewhere would be a Class II Cantonment.

(2) For the purposes of sub-section (1), the civil population shall be calculated in accordance with the latest official census, or, if the Central Government, by general or special order, so directs, in accordance with a special census taken for the purpose.

(3) In Class I Cantonments, the Board shall consist of the following members, namely:—

## LEG. REF.

<sup>1</sup> Heading substituted by Act XXXIV of 1939.

<sup>2</sup> Sections 10 to 14 were substituted for the original sections by Act XXIV of 1936.

<sup>3</sup> Substituted by A.O., 1937.

## NOTES.

SEC. 10.—See 1 P.R. 1897 (Cr.); 9 B. 333; 5 Bom.L.R. 869; Rat. 849. As to jurisdiction of District Magistrate over Cantonment Magistrate, see Rat. 849=9 B. 100. As to disqualification of Cantonment Magistrate see 48 P.R. 1887 (Cr.). Power to cancel licence. 15 C. 452.



(a) the Officer Commanding the station or, if the Central Government so directs in respect of any cantonment, such other military officer as may be nominated in his place by the Officer Commanding-in-Chief, the Command;

(b) a Magistrate of the first class nominated by the District Magistrate;

(c) the Health Officer;

(d) the Executive Engineer;

(e) four military officers nominated by name by the Officer Commanding the station by order in writing;

(f) seven members elected under this Act.

(4) In Class II Cantonments, the Board shall consist of the following members, namely:—

(a) the Officer Commanding the station or, if the Central Government so directs in respect of any cantonment, such other military officer as may be nominated in his place by the Officer Commanding-in-Chief, the Command;

(b) a Magistrate of the first class nominated by the District Magistrate;

(c) the Health Officer;

(d) the Executive Engineer;

(e) (i) in cantonments of which the civil population exceeds seven thousand five hundred, three military officers,

(ii) in cantonments of which the civil population exceeds five thousand, but does not exceed seven thousand five hundred, two military officers,

(iii) in cantonments of which the civil population does not exceed five thousand and in cantonments which the Central Government, by notification under the proviso to sub-section (1), has placed in Class II, whatever be the population, one military officer,

nominated by name by the Officer Commanding the station by order in writing;

(f) such number of members elected under this Act as is equal to the number of members constituted or nominated by or under clauses (b) to (e).

(5) In Class III Cantonments, the Board shall consist of the following members, namely:—

(a) the Officer Commanding the station, or if the Central Government so directs in respect of any cantonment, such other military officer as may be nominated in his place by the Officer Commanding-in-Chief, the Command;

(b) one military officer nominated by name by the Officer Commanding the station by order in writing;

(c) one member elected under this Act.

(6) The Officer Commanding the station may, if he thinks fit, with the sanction of the Officer Commanding-in-Chief, the Command, nominate in place of any military officer whom he is empowered to nominate under clause (e) of sub-section (3), clause (e) of sub-section (4) or clause (b) of sub-section (5), any person, whether in the service of the <sup>1</sup>[Crown] or not, who is ordinarily resident in the cantonment or in the vicinity thereof.

(7) Every election or nomination of a member of a Board and every vacancy in the membership thereof shall be notified by the Central Government in the Official Gazette.]

Power to vary constitution of Boards in special circumstances.

<sup>2</sup>[14. (1) Notwithstanding anything contained in S. 13, if the Central Government is satisfied—

(a) that, by reason of military operations, it is necessary, or

(b) <sup>3</sup>[\* \*], that, for the administration of the cantonment, it is desirable.

<sup>1</sup> Substituted for 'Government' by A.O., 1937.

<sup>2</sup> See foot-note (2), page 200, *supra*.

<sup>3</sup> Words 'after consultation with the Local Government' omitted by A.O., 1937.



(3) In every Board in which there is more than one elected member, there shall be a Vice-President elected by the elected members only and from among their number.]

Term of office of Vice-President. 21. (1) <sup>1</sup>[The term of office of a Vice-President shall be three years or the residue of his term of office as a member, whichever is less.]

(2) A Vice-President may resign his office by notice in writing to the President and, on the resignation being accepted by the Board, the office shall become vacant.

Duties of President. 22. (1) It shall be the duty of the President of every Board—

(a) unless prevented by reasonable cause, to convene and preside at all meetings of the Board and to regulate the conduct of business thereat;

(b) to exercise supervision and control over the financial and executive administration of the Board;

(c) to perform all the duties and exercise all the powers specifically imposed or conferred on the President by or under this Act; and

(d) subject to any restrictions, limitations and conditions imposed by this Act, to exercise executive power for the purpose of carrying out the provisions of this Act and to be directly responsible for the fulfilment of the purposes of this Act.

(2) The President may, by order in writing, empower the Vice-President to exercise all or any of the powers and duties referred to in clause (c) of sub-section (1) other than any power, duty or function which he is by resolution of the Board expressly forbidden to delegate.

(3) The exercise or discharge of any powers, duties or functions delegated by the President under this section shall be subject to such restrictions, limitations and conditions, if any, as may be laid down by the President and to the control of, and to revision by, the President.

(4) Every order made under sub-section (2) shall forthwith be communicated to the Board and to the <sup>2</sup>[Officer Commanding-in-Chief, the Command].

Duties of Vice-President. 23. It shall be the duty of the Vice-President of every Board—

(a) in the absence of the President and unless prevented by reasonable cause, to preside at meetings of the Board and when so presiding to exercise the authority of the President under sub-section (1) of section 22.

(b) during the incapacity or temporary absence of the President or pending his appointment or succession, to perform any other duty and exercise any other power of the President; and

(c) to exercise any power and perform any duty of the President which may be delegated to him under sub-section (2) of section 22.

24. The Executive Officer shall perform all the duties imposed upon him by or under this Act, and shall be responsible for the custody of all the records of the Board, and shall arrange for the performance of such duties relative to the proceedings of the Board or of any Committee of the Board or of any Committee of Arbitration constituted under this Act, as those bodies may respectively impose on him, and shall comply with every requisition of the Board on any matter pertaining to the administration of the cantonment.

Duties of the Executive Officer.

LEG. REF.  
<sup>1</sup> Substituted by Act XXIV of 1936.

<sup>2</sup> Substituted by Act XXXV of 1926.



25. The Executive Officer may, in cases of emergency, direct the execution of any work or the doing of any act which would ordinarily require the sanction of the Board and the immediate execution or doing of which is, in his opinion, necessary for the service or safety of the public, and may direct that the expense of executing such work or doing such act shall be paid from the cantonment fund:

Provided that—

(a) 1[ \* \* ] he shall not act under this section without the previous sanction of the President or, in his absence, of the Vice-President;

(b) he shall not act under this section in contravention of any order of the Board prohibiting the execution of any particular work or the doing of any particular act; and

(c) he shall report forthwith the action taken under this section and the reasons therefor to the Board.

### *Elections.*

26. (1) 2[\* \*] 3[The Board or where a Board is not constituted in any place declared by notification under sub-section (1) of S. 3 to be a Cantonment, the Officer Commanding the station] shall prepare and publish an electoral roll showing the names of persons qualified to vote at elections to the Board. Such roll shall be prepared, revised and finally published in such manner and on such date in each year as the Central Government may by rule prescribe.

(2) Every person whose name appears in the final electoral roll shall, so long as the roll remains in force, be entitled to vote at an election to the Board, and no other person shall be so entitled.

(3) When a cantonment has been divided into wards, or the inhabitants into classes, the electoral roll shall be divided into separate lists for each ward or class, as the case may be.

(4) If a new electoral roll is not published in any year on the date prescribed, the Central Government may direct that the old electoral roll shall continue in operation until the new roll is published.

27. (1) The following persons shall, if not otherwise disqualified, be entitled to be enrolled as electors, namely:—

(a) every person who in any year has, on or before such date as may be fixed by the Central Government in this behalf by notification in the official Gazette (hereinafter in this section referred to as the aforesaid date), been assessed directly and on his own account to taxes under this Act (other than octroi, toll or terminal tax), the aggregate value whereof is not less than such amount as the Central Government may by rule prescribe, and who on the aforesaid date is not in arrears in the payment of any such tax;

(b) every person who has for a period of not less than twelve months immediately preceding the aforesaid date resided in the cantonment and on the aforesaid date—

(i) is the owner or the mortgagee in possession or the lessee of any building or land in the cantonment, of an annual value calculated in such manner, and of not less than such amount, as the Central Government may by rule prescribe; or

(ii) is carrying on any business in the cantonment from which he derives an annual income calculated in such manner, and of not less than such amount, as the Central Government may by rule prescribe; or

### LEG. REF.

<sup>1</sup> Words 'where there is a Board' omitted by Act XXIV of 1936.

<sup>2</sup> Omitted by Act XXIV of 1936.

<sup>3</sup> Substituted for 'Cantonment Authority' by Act XXIV of 1936.



(iii) <sup>1</sup>[has passed the Matriculation or other equivalent examination] of any University established by law in British India; or

<sup>2</sup>[(iv) is a person whose name is entered on the current electoral roll of the constituency of which the cantonment forms part for the purposes of the Central or Provincial Legislatures; or]

<sup>2</sup>(v) is a retired or pensioned officer, whether commissioned or non-commissioned, of His Majesty's forces;

(c) every person who has, <sup>3</sup>[for] a period of not less than twelve months immediately preceding the aforesaid date, resided in the cantonment and has <sup>3</sup>[for] that period been assessed to income-tax.

(2) A person, notwithstanding that he is otherwise qualified, shall not be entitled to be enrolled as an elector if he on the aforesaid date—

(i) <sup>4</sup>[is not either a British subject, or a subject of an Indian State]

(ii) is less than 21 years of age, or

(iii) has been adjudged by a competent Court to be of unsound mind or

(iv) is an undischarged insolvent, or

(v) has been sentenced by a Criminal Court to imprisonment for a term exceeding <sup>5</sup>[two years] or to transportation <sup>6</sup>[for an offence which is declared by the Central Government to be such as to unfit him to become an elector] <sup>7</sup>[\* \*], or has been sentenced by a Criminal Court for any offence under Chapter IX-A of the Indian Penal Code:

Provided that the Central Government may, by order in writing, remove any disqualification incurred by a person under clause (v).

<sup>8</sup>[Provided further that any disqualification incurred by a person under clause (v) shall terminate on the lapse of three years from the expiry of the sentence or order.]

(3) If any person having been enrolled as an elector in any electoral roll subsequently becomes subject to any of the disqualifications referred to in clauses (i), (iii), (iv) and (v) of sub-section (2), his name shall be removed from the electoral roll unless, in the case referred to in clause (v), the disqualification is removed by the Central Government.

28. (1) Save as hereinafter provided, every person, not being <sup>9</sup>[a person in the military or civil service of the Crown in India] whose name is entered on the electoral roll of a cantonment shall be qualified for election as a member of the Board in that cantonment.

(2) No person shall be qualified for election or nomination as a member of a Board, if he—

(a) has been dismissed from <sup>10</sup>[service of the Crown] and is debarred from re-employment therein, or is a dismissed servant of <sup>11</sup>[a Board or an authority which, before the commencement of the Cantonments (Amendment) Act, 1936, exercised and performed the powers and duties of a Cantonment Authority under this Act];

(b) is debarred from practising as a legal practitioner by order of any competent authority;

#### LEG. REF.

<sup>1</sup> Substituted for 'is a graduate' by Act XXIV of 1936.

<sup>2</sup> Inserted by Act XXIV of 1936.

<sup>3</sup> Substituted for 'during' by Act XXIV of 1936.

<sup>4</sup> Substituted by Act XXXI of 1940.

<sup>5</sup> Substituted for 'six months' by Act XXIV of 1936.

<sup>6</sup> Inserted by Act XXIV of 1936.

<sup>7</sup> Words 'or has been ordered to find se-

curity for good behaviour under Cr. P. Code, 1898 omitted by Act XXIV of 1936.

<sup>8</sup> Inserted by Act XXIV of 1936.

<sup>9</sup> Substituted by Act XXIV of 1936 for words 'a stipendiary Magistrate or a military officer or a soldier'.

<sup>10</sup> Substituted for 'Government service' by A.O., 1937.

<sup>11</sup> Substituted for 'the Cantonment Authority' by Act XXIV of 1936.



(c) holds any place of profit in the gift or at the disposal of the Board, or is a <sup>1</sup>[\* \*] police officer, or is the servant or employer of a member of the Board; or

(d) is interested in a subsisting contract made with, or in work being done for, the Board except as a shareholder (other than a director) in an incorporated company; or

<sup>2</sup>[(dd) is an officer or servant, permanent or temporary, of a Board; or]

(e) is disqualified under any other provision of this Act:

Provided that—

(i) any of the disqualifications referred to in clauses (a) and (b) may be removed by an order of the Central Government in this behalf; and

(ii) a person shall not be deemed to have any interest in such a contract or work as is referred to in clause (d) by reason only of his having a share or interest in—

(a) any lease or sale or purchase of immovable property or any agreement for the same; or

(b) any agreement for the loan of money or any security for the payment of money only; or

(c) any newspaper in which any advertisement relating to the affairs of the Board is inserted; or

(d) the sale to the Board of any articles in which he regularly trades or the purchase from the Board of any articles, to a value in either case not exceeding Rs. 1,500 in the aggregate in any year during the period of the contract or work.

Interpretation.

28— 29. For the purposes of sections 26, 27 and

(a) "person" means an individual human being, and

(b) a person shall be deemed to pay a tax directly if he pays the tax either himself or through a legally appointed agent.

30. Notwithstanding anything hereinbefore contained, the Central Government may make rules conferring on the manager or representative of an undivided family or of any company or firm or other association or body or on any trustee of any land a right to be enrolled as an elector or to be nominated as a candidate at elections to a Board.

31. The Central Government may, either generally or specially for any cantonment or group of cantonments, after previous publication, make rules consistent with this Act to regulate all or any of the following matters for the purpose of the holding of elections under this Act, namely:—

(a) the division of a cantonment into wards, or of the inhabitants of a cantonment into classes, or both;

(b) the determination of the number of members to be elected by each ward or class of persons;

(c) the method by which the annual value of buildings and lands shall be calculated for the purposes of section 27;

(d) the preparation, revision and final publication of electoral rolls;

(e) the registration of electors, the nomination of candidates, the time and manner of holding elections and the method by which votes shall be recorded;

(f) the authority by which and the manner in which disputes relating to electoral rolls or arising out of elections shall be decided, and the powers and duties of such authority and the circumstances in which such authority may

LEG. REF.

<sup>1</sup> Omitted by Act VII of 1925.

<sup>2</sup> Cl. (dd) of S. 28 inserted by Act XXIV of 1936.



declare a casual vacancy to have been created or any candidate to have been elected;

(g) any other matter relating to elections or election disputes in respect of which the Central Government is empowered to make rules under this Chapter or in respect of which this Act makes no provision or makes insufficient provision and provision is, in the opinion of the Central Government necessary.

### *Members.*

32. No member of a Board shall vote at meeting of the Board <sup>1</sup>[or of any committee of the Board] on any question relating to his own conduct or on any matter, other than a matter affecting generally the inhabitants of the cantonment, which affects his own pecuniary interest or the valuation of any property in respect of which he is directly or indirectly interested, or of any property of or for which he is a manager or agent.

Member not to vote on matter in which he is interested.

33. Every member of a Board shall be liable for the loss, waste or misapplication of any money or other property belonging to the Board if such loss, waste or misapplication is a direct consequence of his neglect or misconduct while such member; and a suit for compensation for the same may be instituted against him either by the Board or by the <sup>2</sup>[Central Government].

Liability of members.

34. <sup>3</sup>[(1) The Central Government may remove from a Board any member thereof who—  
(a) becomes subject to any of the disqualifications specified in sub-section (2) of section 27, [or in section 28]<sup>4</sup>; or  
(b) has absented himself for more than three consecutive months from the meetings of the Board and is unable to explain such absence to the satisfaction of the Board; or  
(c) has knowingly contravened the provisions of section 32; or  
(d) being a legal practitioner, acts or appears on behalf of any other person against the Board in any legal proceedings or against the <sup>5</sup>[Crown] in any such proceeding relating to any matter in which the Board is or has been concerned, or acts or appears on behalf of any person in any criminal proceeding instituted by or on behalf of the Board against such person.]

Removal of members.

(2) The Central Government may remove from a Board any member who, in the opinion of the Central Government, has so flagrantly abused in any manner his position as a member of the Board as to render his continuance as a member detrimental to the public interests.

<sup>6</sup>[(2-A) The Central Government may, on receipt of a report from the Officer Commanding the station, through the Officer Commanding-in-Chief, the Command, remove from a Board any military officer nominated a member of the Board who is, in the opinion of the Officer Commanding the station, unable to discharge his duties as member of the Board and has failed to resign his office.]

(3) No member shall be removed from a Board under this section unless he has been given a reasonable opportunity of showing cause against his removal.

35. <sup>7</sup>[(1) A member removed under clause (b) of sub-section (1) [or under sub-section (2-A)]<sup>8</sup> of section 34 shall, if otherwise qualified, be eligible for re-election or re-nomination.

Consequence of removal.

### LEG. REF.

<sup>1</sup> Inserted by Act XXXI of 1940.

<sup>2</sup> Substituted for 'Secretary of State for India in Council' by A.O., 1937.

<sup>3</sup> Substituted by Act XXVI of 1927.

<sup>4</sup> Substituted by Act XXXI of 1940.

<sup>5</sup> Substituted for 'Secretary of State in Council' by A.O., 1937.

<sup>6</sup> S. 34, Sub-Sec. (2-A) inserted by Act XXXI of 1940.

<sup>7</sup> Section substituted by Act XXVI of 1927.



(2) A member removed under clause (c) or clause (d) of sub-section (1) of section 34 shall not be eligible for re-election or nomination for the period during which, but for such removal, he would have continued in office.

(3) A member removed under sub-section (2) of section 34 shall not be eligible for re-election or nomination until the expiry of three years from the date of his removal.]

### *Servants.*

36. (1) No person who has directly or indirectly by himself or his partner any share or interests in a contract with, by or on behalf of a Board or in any employment under, by or on behalf of a Board, otherwise than as a servant of the Board, shall become or remain a servant of such Board.

(2) A servant of a Board who knowingly acquires or continues to have directly or indirectly by himself or his partner any share or interest in a contract with, by or on behalf of the Board or, in any employment under, by or on behalf of, the Board, otherwise than as a servant of the Board, shall be deemed to have committed an offence under section 168 of the Indian Penal Code.

(3) Nothing in this section shall apply to any share or interest in any contract with, by or on behalf of, or employment under, by or on behalf of a Board if the same is a share in a company contracting with, or employed by, or on behalf of, the Board or is a share or interest acquired or retained with the permission of the <sup>1</sup>[Officer Commanding-in-Chief, the Command,] in any lease or sale to, or purchase by, the Board of land or buildings or in any agreement for the same.

<sup>2</sup>[(4) Every person applying for employment as a servant of a Board shall, if he is related by blood or marriage to any member of the Board or to any person, not being a menial servant, in receipt of remuneration from the Board, notify the fact and the nature of such relationship to the appointing authority before the appointment is made, and if he has failed to do so, his appointment shall be invalid but without prejudice to the validity of anything previously done by him.]

<sup>3</sup>[36-A. Every officer or servant, permanent or temporary, of a Board shall be deemed to be a public servant within the meaning of the Indian Penal Code, and in the definition of "legal remuneration" in section 161 of that Code the word "Government" shall, for the purposes of this section, be deemed to include a Board.]

### *Procedure.*

37. (1) Every Board shall ordinarily hold at least one meeting in every month on such day as may be fixed, and of which notice shall be given in such manner as may be provided, by regulations made by the Board under this Chapter.

(2) The President may, whenever he thinks fit, and shall, upon a requisition in writing by not less than one-fourth of the members of the Board, convene a special meeting.

(3) Any meeting may be adjourned until the next or any subsequent day, and an adjourned meeting may be further adjourned in like manner.

38. Subject to any regulation made by the Board under this Chapter, any business may be transacted at any meeting:

### LEG. REF.

<sup>1</sup> Substituted by Act XXXV of 1926.

<sup>2</sup> Sub-sec. (4) of S. 36 inserted by Act C. C. M.—27

XXIV of 1936.

<sup>3</sup> Sec. 36-A inserted by Act VII of 1925.



Provided that no business relating to the imposition, abolition or modification of any tax shall be transacted at a meeting unless notice of the same and of the date fixed therefor has been sent to each member not less than seven days before that date.

39. (1) The quorum necessary for the transaction of business at a meeting of a Board <sup>1</sup>[in which there is more than one elected member] shall be five or one-half of the number of members of the Board actually holding office at the time, whichever is the greater number.

Quorum.

<sup>2</sup>[\* \* \* \* \*]

<sup>2</sup>[(1-A) The quorum necessary for the transaction of business at a meeting of the Board constituted under sub-section (5) of section 13 or under sub-section (1) of section 14, shall be two.]

(2) If a quorum is not present, the President shall adjourn the meeting and the business which would have been brought before the original meeting if there had been a quorum present thereat shall be brought before, and may be transacted at, an adjourned meeting, whether there is a quorum present or not.

Presiding officer.

<sup>3</sup>[40. In the absence of—

(a) both the President and the Vice-President from any meeting of a Board in which there is more than one elected member,

(b) the President from a meeting of a Board constituted under sub-section (5) of section 13 or sub-section (1) of section 14, the members present shall elect one from among their own number to preside.]

41. (1) Minutes of the proceedings of each meeting shall be recorded in a book and shall be signed by the President before the close of the meeting, and shall, at such times, and in such place as may be fixed by the Board, be open to inspection free of charge by any inhabitant of the cantonment.

Minutes.

(2) Copies of the minutes shall, as soon as possible after each meeting, be forwarded for information to <sup>4</sup>[the Officer Commanding-in-Chief, the Command,] the Officer Commanding the District, the Officer Commanding the brigade area, <sup>5</sup>[\* \*] the District Magistrate <sup>6</sup>[and the Military Estates Officer].

42. Every meeting of a Board shall be open to the public unless in any case the President, for reasons to be recorded in the minutes, otherwise directs.

Meetings to be public.

Method of deciding questions.

43. (1) All questions coming before a meeting shall be decided by the majority of the votes of the members present and voting.

(2) In the case of an equality of votes, the President shall have a second or casting vote.

(3) The dissent of any member from any decision of the Board shall, if the member so requests, be entered in the minutes, together with a short statement of the grounds for such dissent.

<sup>7</sup>[43-A. (1) Every Board constituted under section 13 in a Class I Cantonment or Class II Cantonment shall appoint a committee consisting of the elected members of the Board, the Health Officer and the Executive Engineer for the administration of such areas in the cantonment as the Central Government may, by notifica-

LEG. REF.  
<sup>1</sup> Inserted by Act XXIV of 1936.  
<sup>2</sup> Proviso to sub-sec. (1) of S. 39 omitted and sub-sec. 1-A added by Act XXIV of 1936.  
<sup>3</sup> S. 40 substituted by Act XXIV of 1936.

<sup>4</sup> Inserted by Act XXXV of 1926.  
<sup>5</sup> Word 'and' omitted by Act XXIV of 1936.  
<sup>6</sup> Inserted by Act XXIV of 1936.  
<sup>7</sup> S. 43-A inserted by Act XXIV of 1936.



tion in the Official Gazette, declare to be bazaar areas, and may delegate its powers and duties to such committee in the manner provided in clause (e) of sub-section (1) of section 44.

(2) The Vice-President of the Board shall be the Chairman of the committee appointed under sub-section (1).]

44. (1) A Board may make regulations con-

Power to make regula-  
tions.

sistent with this Act and with the rules made there-  
under to provide for all or any of the following

matters, namely:—

- (a) the time and place of its meetings;
- (b) the manner in which notice of the meeting shall be given;
- (c) the conduct of proceedings at meetings and the adjournment of meetings;

(d) the custody of the common seal of the Board and the purposes for which it shall be used; and

(e) the appointment of committees for any purpose and the determination of all matters relating to the constitution and procedure of such committees, and the delegation to such committees, subject to any conditions which the Board thinks fit to impose, of any of the powers or duties of the Board under this Act other than a power to make regulations or bye-laws.

(2) No regulation made under clause (e) of sub-section (1) shall take effect until it has been approved by the Central Government.

(3) No regulation made under this section shall take effect until it has been published in such manner as the Central Government may direct.

Joint action with other  
local authority.

45. (1) A Board may—

(a) join with any other local authority—

(i) in appointing a joint committee for any purpose in which they are jointly interested and in appointing a chairman of such committee;

(ii) in delegating to such committee power to frame terms binding on the Board and such other local authority as to the construction and future maintenance of any joint work or to exercise any power which might be exercised by <sup>1</sup>[the Board or by such other local authority]; and

(iii) in making rules for regulating the proceedings of any such committee relating to the purposes for which it has been appointed; or

(b) with the previous sanction of <sup>2</sup>[the Officer Commanding-in-Chief, the Command, and] the <sup>3</sup>[Provincial Government concerned], enter into an agreement with any other local authority regarding the levy of any tax or toll whereby the said tax or toll respectively leviable by the <sup>4</sup>[Board and by such other local authority] may be levied together instead of separately within the limits of the aggregate area comprising the areas subject to the control of the <sup>4</sup>[Board and such other local authority].

(2) If any difference of opinion arises between any <sup>5</sup>[Board and other local authority] acting together under this section, the decision thereon of the Central Government or of an officer appointed by the Central Government in this behalf shall be final.

(3) When any agreement such as is referred to in clause (b) of sub-section (1) has been entered into, then—

(a) where the agreement relates to an octroi or terminal tax or toll, the other local authority with which the Board has made such agreement shall have

#### LEG. REF.

<sup>1</sup> Substituted for 'either of the said authorities' by Act XXIV of 1936.

<sup>2</sup> Inserted by Act XXIV of 1936.

<sup>3</sup> Substituted for the words "Local Government" by A.O., 1937.

<sup>4</sup> The words "Board and by such other local authority" were substituted for the words "authorities so contracting" and "such authorities" respectively by Act XXIV of 1936.

<sup>5</sup> Substituted by Act XXIV of 1936.



the same powers to establish octroi limits and octroi stations and places for the collection of the terminal tax and terminal toll within the cantonment, as it has within the area ordinarily subject to its control;

(b) such other local authority shall have the same power of collecting such tax or toll in the cantonment, and the provisions of any enactment in force relating to the levy of such tax or toll by such other local authority shall apply in the same manner, as if the cantonment were comprised within the area ordinarily subject to its control; and

(c) the total of the collection of such tax and toll made in the cantonment and in the area ordinarily subject to the control of such other local authority and the costs thereby incurred shall be divided between the cantonment fund and the fund subject to the control of such other local authority, in such proportion as may have been determined by the agreement.

<sup>1</sup>[45-A. Every Board shall, as soon as may be after the close of the year and not later than the date fixed in this behalf by the Report on administration. Central Government, submit to the Central Government through the Officer Commanding-in-Chief, the Command, a report on the administration of the cantonment during the preceding financial year, in such form and containing such details as the Central Government may direct. The comments, if any, of the Officer Commanding-in-Chief, the Command, on such report shall be communicated by him to the Board which shall be allowed a reasonable time to furnish a reply thereto, and the comments together with the reply, if any, shall be forwarded to the Central Government along with the report.]

#### Control.

Power of Central Government to require production of documents.

46. The Central Government <sup>2</sup>[\* \*] may at any time require a Board—

(a) to produce any record, correspondence, plan or other document in its possession or under its control;

(b) to furnish any return, plan, estimate, statement, account or statistics relating to its proceedings, duties or works;

(c) to furnish or obtain and furnish any report.

47. The <sup>3</sup>[Central Government or the Officer Commanding-in-Chief, the Command,] may depute any person in the service of the <sup>4</sup>[Crown] to inspect or examine any department of the office of, or any service or work undertaken by, or thing belonging to a Board, and to report thereon, and the Board and its officers and servants shall be bound to afford the person so deputed access at all reasonable times to the premises and property of the Board and to all records, accounts and other documents the inspection of which he may consider necessary to enable him to discharge his duties.

Power to call for documents.

48. <sup>5</sup>[\* \*] The Officer Commanding-in-Chief, the Command, may, by order in writing—

(a) call for any book or document in the possession or under the control of the Board;

(b) require the Board to furnish such statements, accounts, reports and copies of documents relating to its proceedings, duties or works as he thinks fit.

49. If, on receipt of any information or report obtained under <sup>6</sup>[section 46 or section 47] or section 48, the <sup>7</sup>[Central Government or the Officer Commanding-in-Chief, the Command,] is of opinion—

Power to require execution of work, etc.

#### LEG. REF.

<sup>1</sup> S. 45-A inserted by Act XXIV of 1936.  
<sup>2</sup> Words 'or the Local Government' omitted by A.O., 1937.  
<sup>3</sup> Substituted by Act XXXV of 1926.  
<sup>4</sup> Substituted for 'Government' by A.O.,

1937.

<sup>5</sup> Words "Governor-General in Council or" omitted by Act XXIV of 1936.

<sup>6</sup> Substituted by Act XXIV of 1936.

<sup>7</sup> These words were substituted by S. 5 of Act XXXV of 1926.



(a) that any duty imposed on a Board by or under this Act has not been performed or has been performed in an imperfect, inefficient or unsuitable manner, or

(b) that adequate financial provision has not been made for the performance of any such duty,

<sup>1</sup>[it or] he may, <sup>2</sup>[\* \*] direct the Board, within such period as <sup>1</sup>[it or] he thinks fit, to make arrangements to <sup>1</sup>[its or] his satisfaction for the proper performance of the duty, or, as the case may be, to make financial provision to <sup>1</sup>[its or] his satisfaction for the performance of the duty:

Provided that, unless in the opinion of the <sup>3</sup>[Central Government or the Officer Commanding-in-Chief, the Command, as the case may be], the immediate execution of such order is necessary, <sup>1</sup>[it or] he shall, before making any direction under this section, give the Board an opportunity of showing cause why such direction should not be made.

50. If, within the period fixed by a direction made under section 49, any action the taking of which has been directed under that section has not been duly taken, the <sup>3</sup>[Central Government or the Officer Commanding-in-Chief, the Command, as the case may be,] may make arrangements for the taking of such action, and may direct that all expenses connected therewith shall be defrayed out of the cantonment fund.

51. (1) If the President dissents from any decision of the Board, which he considers prejudicial to the health, welfare or discipline of the troops in the cantonment, he may, for reasons to be recorded in the minutes, by order in writing, direct the suspension of action thereon for any period not exceeding one month and, if he does so, shall forthwith refer the matter to the Officer Commanding-in-Chief, the Command, <sup>4</sup>[the reference being made, save in cases where the Officer Commanding the District is himself the Officer Commanding-in-Chief, the Command, for the purposes of this Act,] through the Officer Commanding the District, who may make such recommendations thereon as he thinks fit.

(2) If the District Magistrate considers any decision of a Board to be prejudicial to the public health, safety or convenience, he may, after giving notice in writing of his intention to the Board, refer the matter to the Central Government; and pending the disposal of the reference to the Central Government, no action shall be taken on the decision.

(3) If any Magistrate who is a member of a Board, being present at a meeting, dissents from any decision which he considers prejudicial to the public health, safety or convenience, he may, for reasons to be recorded in the minutes and after giving notice in writing of his intention to the President, report the matter to the District Magistrate; and the President shall, on receipt of such notice, direct the suspension of action on the decision for a period sufficient to allow of a communication being made to the District Magistrate and of his taking proceedings as provided by sub-section (2).

Power of Officer Commanding-in-Chief, the Command, on reference under section 51 or otherwise.

52. (1) The Officer Commanding-in-Chief, the Command, may at any time <sup>5</sup>[\* \* \*].

#### LEG. REF.

- <sup>1</sup> Inserted by A.O., 1937.  
<sup>2</sup> Words 'after consultation with the Local Government' omitted by A.O., 1937.  
<sup>3</sup> Substituted by A.O., 1937.  
<sup>4</sup> Inserted by Act X of 1927.  
<sup>5</sup> In sub-S. (1) of S. 52, the words 'on a

recommendation made to him in this behalf by the Officer Commanding the District or where the Officer Commanding the District is himself the Officer Commanding-in-Chief, the Command, for the purposes of this Act, of his own motion" have been omitted by Act VII of 1931.



(a) direct that any matter or any specific proposal other than one which has been referred to the Central Government under sub-section (2) of section 51 be considered or re-considered by the Board; or

(b) direct the suspension, for such period as may be stated in the order, of action on any decision of a Board, other than a decision which has been referred to him under sub-section (1) of section 51, and thereafter cancel the suspension or <sup>1</sup>[after giving the Board a reasonable opportunity of showing cause why such direction should not be made], direct that the decision shall not be carried into effect or that it shall be carried into effect with such modifications as he may specify.

(2) When any decision of a Board has been referred to him under sub-section (1) of section 51, the Officer Commanding-in-Chief, the Command, may, by order in writing,—

(a) cancel the order given by the President directing the suspension of action; or

(b) extend the duration of the order for such period as he thinks fit; or

(c) <sup>2</sup>[after giving the Board a reasonable opportunity of showing cause why such direction should not be made, direct that the decision shall not be carried into effect or that it shall be carried into effect by the Board with such modifications as he may specify.]

53. When any decision of a Board has been referred to the Central Government under sub-section (2) of section 51, the Central Government may, after consulting the Officer Commanding-in-Chief, the Command, by order in writing,—

Powers of Central Government on a reference made under section 51.

(a) direct that no action be taken on the decision; or

(b) direct that the decision be carried into effect either without modification or with such modifications as it may specify.

54. (1) If, in the opinion of the Central Government, any Board is not competent to perform or persistently makes default in the performance of the duties imposed on it by or under this Act or otherwise by law, or exceeds or abuses its powers, the Central Government may <sup>3</sup>[\* \*] by an order published, together with the statement of the reasons therefor, in the Official Gazette, declare the Board to be incompetent or in default or to have exceeded or abused its powers, as the case may be, and supersede it for such period as may be specified in the order:

Supersession of Board. Provided that no Board shall be superseded unless a reasonable opportunity has been given to it to show cause against the supersession.

(2) When a Board is superseded by an order under sub-section (1)—

(a) all members of the Board shall, on such date as may be specified in the order, vacate their offices as such members but without prejudice to their eligibility for election or nomination under clause (c);

(b) during the supersession of the Board, all powers and duties conferred and imposed upon the Board by or under this Act or otherwise by law shall be exercised and performed by the <sup>4</sup>[Officer Commanding the station] subject to such reservation, if any, as the Central Government may prescribe in this behalf; and

(c) before the expiry of the period of supersession elections shall be held and nominations made for the purpose of reconstituting the Board.

LEG. REF.

<sup>1</sup> Inserted by Act XXIV of 1936.

<sup>2</sup> Substituted by Act XXIV of 1936.

<sup>3</sup> Words 'with the previous sanction of the

Governor-General in Council' omitted by A. O., 1937.

<sup>4</sup> Substituted by Act VII of 1925.



*Validity of proceedings.*

55. (1) No act or proceeding of a Board or of any committee of a Board shall be invalid by reason only of the existence of a vacancy in the Board or committee.

(2) No disqualification or defect in the election, nomination or appointment of a person acting as the President or a member of a Board or of any such committee shall vitiate any act or proceeding of the Board or committee if the majority of the persons present at the time of the act being done or the proceeding being taken were duly qualified members thereof.

(3) Any document or minutes which purport to be the record of the proceedings of a Board or of any committee of a Board shall, if made and signed substantially in the manner prescribed for the making and signing of the record of such proceedings, be presumed to be a correct record of the proceedings of a duly convened meeting, held by a duly constituted Board or committee, as the case may be, whereof all the members were duly qualified.

## CHAPTER IV.

## SPIRITUOUS LIQUORS AND INTOXICATING DRUGS.

56. If within a cantonment, or within such limits adjoining a cantonment as the Central Government may, by notification in the Official Gazette define, any person not subject to military or air-force law or any person subject to military or air-force law otherwise than as a military officer or a soldier knowingly barter, sells or supplies, or offers or attempts to barter, sell or supply, any spirituous liquor or intoxicating drug to or for the use of any soldier or follower or soldier's wife or minor child without the written permission of the <sup>1</sup>[Officer Commanding the station] or of some person authorised by the <sup>1</sup>[Officer Commanding the station] to grant such permission, he shall be punishable with fine which may extend to one hundred rupees, or with imprisonment for a term which may extend to three months, or with both.

57. If within a cantonment, or within any limits defined under section 56,—

(a) any person subject to military or air-force law otherwise than as a military officer or a soldier, or

(b) the wife or servant of any such person or of a soldier, has in his or her possession, except on behalf of the <sup>2</sup>[Central] Government or for the private use of a military officer, more than one quart of any spirituous liquor, other than fermented malt-liquor, without the written permission of the <sup>1</sup>[Officer Commanding the station] or of some person authorised by the <sup>1</sup>[Officer Commanding the station] to grant such permission, he or she shall be punishable, in the case of a first offence, with the fine which may extend to fifty rupees, and, in the case of a subsequent offence, with imprisonment for a term which may extend to three months, or with fine which may extend to one hundred rupees.

## LEG. REF.

<sup>1</sup> Substituted by Act VII of 1925.

<sup>2</sup> Word 'Central' inserted by A.O., 1937.

## NOTES.

SEC. 55 (2).—Assessment proceedings under an invalid constitution of Assessment Committee are not cured by S. 55 (2). 1939 A.M.L.J. 1. "Committee of a board," meaning

of. See 1939 A.M.L.J. 1.

SEC. 56.—Meaning of terms "Barter" or "Sells." 9 Bom.L.R. 703=31 B. 523; "Supplies"—Servant supplying liquor to master is no offence, 31 B. 523.; "Soldier," who is. 3 A. 214; "Spirituous liquor," Beer not such. 7 M.H.C. (App.) 15; "Sentence," whipping not proper under the section. Rat. 682.



58. (1) Any police officer or excise officer may, without an order from a magistrate and without a warrant, arrest any person whom he finds committing an offence under section 56 or section 57, and may seize and detain any spirituous liquor or intoxicating drug in respect of which such an offence has been committed and any vessels or coverings in which the liquor or drug is contained.

Arrest of persons and seizure and confiscation of things for offences against the two last foregoing sections.

(2) Where a person accused of an offence under section 56 has been previously convicted of an offence under that section, an officer in charge of a police station may, with the written permission of a Magistrate, seize and detain any spirituous liquor or intoxicating drug within the cantonment or within any limits defined under that section which, at the time of the alleged commission of the subsequent offence, belonged to, or was in the possession of, such person.

(3) The Court convicting a person of an offence under section 56 or section 57 may order the confiscation of the whole or any part of anything seized under sub-section (1) or sub-section (2).

(4) Subject to the provisions of Chapter XLIII of the Code of Criminal Procedure, 1898, anything seized under sub-section (1) or sub-section (2) and not confiscated under sub-section (3) shall be restored to the person from whom it was taken.

59. The foregoing provisions of this Chapter shall not apply to the sale or supply of any article in good faith for medicinal purposes by a medical practitioner, chemist or druggist authorised in this behalf by a general or special order of the <sup>1</sup>[Officer Commanding the station].

Saving of articles sold or supplied for medicinal purposes.

## CHAPTER V.

### TAXATION.

#### *Imposition of Taxation.*

<sup>2</sup>[60. (1) The Board may, with the previous sanction of the Central Government, impose in any cantonment any tax which, under any enactment for the time being in force, may be imposed in any municipality in the province wherein such cantonment is situated:

<sup>3</sup>[\* \*]

(2) Any tax imposed under this section shall take effect from the date of its notification in the Official Gazette.]

<sup>2</sup>[51. When a resolution has been passed by the Board proposing to impose a tax under section 60, the Board shall in the manner prescribed in section 255 publish a notice specifying—

- Framing of preliminary proposals.
- (a) the tax which it is proposed to impose;
  - (b) the persons or classes of persons to be made liable and the description of the property or other taxable thing or circumstance in respect of which they are to be made liable; and
  - (c) the rate at which the tax is to be levied.

#### LEG. REF.

- <sup>1</sup> Substituted by Act VII of 1925.
- <sup>2</sup> Substituted by Act XXIV of 1936.
- <sup>3</sup> Proviso to S. 60 omitted by A.O., 1937.

#### NOTES.

SEC. 60.—Cantonment Committee empowered to levy tax on water—Tax cannot be increased or varied without sanction from the Government. 20 S.L.R. 325=92 I.C. 361=1926 Sind 130.



<sup>1</sup>[62. (1) Any inhabitant of the cantonment may, within thirty days from the publication of the notice under section 61, submit to the Board an objection in writing to all or any of the proposals contained therein and the Board shall take any objection into consideration and pass orders thereon by special resolution.

(2) If the Board decides to modify its proposals or any of them, it shall re-publish the modified proposals in the manner provided by section 61 indicating that the proposals are in modification of the proposals previously published; and the provisions of sub-section (1) of this section shall apply to such modified proposals.

(3) When the Board has finally settled the proposals, it shall submit them along with the objections, if any, made in connection therewith to the Central Government through the Officer Commanding-in-Chief, the Command.]

<sup>1</sup>[63. The Central Government may authorise the Board to impose the tax either in the original form or, if any objection has been submitted, in that form or any such modified form as it thinks fit.]

Imposition of tax.  
Definition of "annual value."

64. For the purposes of this Chapter "annual value" means—

(a) in the case of railway stations, hotels, colleges, schools, hospitals, factories and any other buildings which a Board decides to assess under this clause, one-twentieth of the sum obtained by adding the estimated present cost of erecting the building to the estimated value of the land appertaining thereto, and

(b) in the case of a building or land not assessed under clause (a), the gross annual rent for which such building (exclusive of furniture or machinery therein) or such land is actually let or, where the building or land is not let or in the opinion of the Board, is let for a sum less than its fair letting value, might reasonably be expected to let from year to year:

Provided that, where the annual value of any building is, by reason of exceptional circumstances, in the opinion of the Board, excessive if calculated in the aforesaid manner, the Board may fix the annual value at any less amount which appears to it to be just.

65. (1) Save as otherwise expressly provided in the notification imposing the tax, every tax <sup>2</sup>[assessed] on the annual value of buildings or lands or of both shall be leviable primarily upon the actual occupier of the property upon which the said tax is assessed, if he is the owner of the buildings or lands or holds them on a building or other lease<sup>3</sup> [granted by or on behalf of the <sup>4</sup>[Crown] or] the Board or on a building lease from any person.

(2) In any other case, the tax shall be primarily leviable as follows, namely:—

- (a) if the property is let, upon the lessor;
- (b) if the property is sub-let, upon the superior lessor;
- (c) if the property is unlet, upon the person in whom the right to let the same vests.

(3) On failure to recover any sum due on account of such tax from the person primarily liable, there may be recovered from the occupier of any part of the buildings or lands in respect of which the tax is due such portion of the

#### LEG. REF.

<sup>1</sup> Substituted by Act XXIV of 1936.

<sup>2</sup> Inserted by Act XXVI of 1927.

<sup>3</sup> Substituted for 'from the Secretary of C. C. M.—28

State in Council or from' by Act XXIV of 1936.

<sup>4</sup> For 'Secretary of State in Council' the word 'Crown' substituted by A.O., 1937.



sum due as bears to the whole amount due the same ratio which the rent annually payable by such occupier bears to the aggregate amount of rent so payable in respect of the whole of the said buildings or lands, or to the aggregate amount of the letting value thereof, if any, stated in the authenticated assessment list.

(4) An occupier who makes any payment for which he is not primarily liable under this section shall, in the absence of any contract to the contrary, be entitled to be reimbursed by the person primarily liable for the payment, and, if so entitled, may deduct the amount so paid from the amount of any rent from time to time becoming due from him to such person.

#### *Assessment List.*

66. When a tax <sup>1</sup>[assessed] on the annual value of buildings or lands or both is imposed, the Board shall cause an assessment list of all buildings or lands in the cantonment, or of both, as the case may be, to be prepared in such form<sup>2</sup> as the Central Government may by rule prescribe.

67. When the assessment list has been prepared, the Board shall give public notice thereof, and of the place where the list or a copy thereof may be inspected, and every person claiming to be the owner, lessee or occupier of any property included in the list, and any authorised agent of such person, shall be at liberty to inspect the list and to make extracts therefrom free of charge.

68. (1) The Board shall, at the same time, give public notice of a date, not less than one month thereafter, when it will proceed to consider the valuations and assessments entered in the assessment list, and, in all cases in which any property is for the first time assessed or the assessment is increased, it shall also give written notice thereof to the owner and to any lessee or occupier of the property.

(2) Any objection to a valuation or assessment shall be made in writing to the Board before the date fixed in the notice, and shall state in what respect the valuation or assessment is disputed, and all objections so made shall be recorded in a register to be kept for the purpose by the Board.

(3) The objections shall be inquired into and investigated, and the persons making them shall be allowed an opportunity of being heard either in person or by authorised agent, by an Assessment Committee appointed by the Board.

(4) The Assessment Committee shall consist of not less than three persons, and <sup>3</sup>[\* \*] it shall not be necessary to appoint to the Assessment Committee any member <sup>4</sup>[of the Board].

#### LEG. REF.

<sup>1</sup> Inserted by Act XXVI of 1927.

<sup>2</sup> For such form for Shillong Cantonment, see *Assam Gazette*, 1925, Pt. II, p. 904.

<sup>3</sup> Words 'where there is a Board' omitted by Act XXIV of 1936.

<sup>4</sup> Substituted for 'thereof' by Act XXIV of 1936.

#### NOTES.

SECS. 66 AND 104.—When a list fails to show that which the law expressly directs, it should show, there is an illegality and not merely an irregularity such as might be condoned under S. 104 of the Act. Hence the omission to enter in the list framed under

S. 66 of the Act, the amount of the assessment is an illegality affecting the merits of the case. 1939 A.M.L.J. 1.

SEC. 68 (3).—Where the Cantonment Board appointed an Assessment Committee under S. 68 (3) to which nominations were permitted to be made by persons not belonging to the Cantonment Board, the Committee is not a validly constituted one. But the defect is not cured by S. 55 (2) of the Act for the words 'Committee of a Board' occurring therein means only a Committee appointed by the Cantonment Board under S. 44 (1)(e) of the Act. Hence the assessment proceedings of the Board are illegal. 1939 A.M.L.J. 1.



69. (1) When all objections made under section 68 have been disposed of, and the revision of the valuation and assessment has been completed, the assessment list shall be authenticated by the signature of the members of the Assessment Committee who shall, at the same time, certify that they have considered all objections duly made and have amended the list so far as is required by their decisions on such objections.

(2) The assessment list so authenticated shall be deposited in the office of the Board, and shall there be open, free of charge, during office hours to all owners, lessees and occupiers of property comprised therein or the authorised agents of such persons, and a public notice that it is so open shall forthwith be published.

70. Subject to such alterations as may thereafter be made in the assessment list under the provisions of this Chapter and to the result of any appeal made thereunder, the entries in the assessment list authenticated and deposited as provided in section 69 shall be accepted as conclusive evidence—

(i) for the purpose of assessing any tax imposed under this Act, of the annual value or other valuation of all buildings and lands to which such entries respectively refer, and

(ii) for the purposes of any tax imposed on buildings or lands, of the amount of each such tax leviable thereon during the year to which such list relates.

Amendment of assessment list.

71. <sup>1</sup>[(1) The Board may amend the assessment list at any time—

(a) by inserting or omitting the name of any person whose name ought to have been or ought to be inserted or omitted, or

(b) by inserting or omitting any property which ought to have been or ought to be inserted or omitted, or

(c) by altering the assessment on any property which has been erroneously valued or assessed through fraud, accident or mistake, whether on the part of the Board or of the Assessment Committee or of the assessee, or

(d) by revaluing or reassessing any property the value of which has been increased, or

(e) in the case of a tax payable by an occupier, by changing the name of the occupier:

Provided that no person shall by reason of any such amendment become liable to pay any tax or increase of tax in respect of any period prior to the commencement of the year in which the assessment is made.

(1-a) Before making any amendment under sub-section (1) the Board shall give to any person affected by the amendment notice of not less than one month that it proposes to make the amendment.]

(2) Any person interested in any such amendment may tender an objection to the Board in writing before the time fixed in the notice, and shall be allowed an opportunity of being heard in support of the same in person or by authorised agent.

72. The Board shall prepare a new assessment list at least once in every three years, and for this purpose the provisions of sections 66 to 71 shall apply in like manner as they apply for the purpose of the preparation of an assessment list for the first time.

Preparation of new assessment list.

LEG. REF.

<sup>1</sup> Present sub-sections (1) and (1-a) have

been substituted in place of old sub-sec. (1) of S. 71 by Act XXIV of 1936.



73. (1) Whenever the title of any person primarily liable for the payment of a tax on the annual value of any building or land to or over such building or land is transferred, the person whose title is transferred and the person to whom the same is transferred shall, within three months after the execution of the instrument of transfer or after its registration, if it is registered, or after the transfer is effected, if no instrument is executed, give notice of such transfer to the Executive Officer.

(2) In the event of the death of any person primarily liable as aforesaid, the person on whom the title of the deceased devolves shall give notice of such devolution to the Executive Officer within six months from the death of the deceased.

(3) The notice to be given under this section shall be in such form as the Executive Officer may direct, and the transferee or other person on whom the title devolves shall, if so required, be bound to produce before the Executive Officer any documents evidencing the transfer or devolution.

(4) Every person who makes a transfer as aforesaid without giving such notice to the Executive Officer shall continue liable for the payment of all taxes assessed on the property transferred until he gives notice or until the transfer has been recorded in the registers of the Board, but nothing in this section shall be held to affect the liability of the transferee for the payment of the said tax.

1[(5) The Executive Officer shall record 2[every transfer on devolution] of title notified to him under sub-section (1) on sub-section (2) in the assessment list and other tax registers of the Board.]

74. (1) If any building is erected or re-erected within the meaning of section 179, the owner shall give notice thereof to the Executive Officer within thirty days from the date of its completion or occupation, whichever is earlier.

(2) Any person failing to give the notice required by sub-section (1) shall be punishable with fine which may extend to fifty rupees or ten times the amount of the tax payable on the said building, as erected or re-erected, as the case may be, in respect of a period of three months, whichever is greater.

#### *Remission and Refund.*

75. If any building is wholly or partly demolished or destroyed or otherwise deprived of value, the Board may, on the application 3[in writing] of the owner 4[or occupier], remit or refund such portion of 5[any tax assessed on the annual value thereof] as it thinks fit.

76. In a cantonment 6[\* \*], when any building or land has remained vacant and unproductive of rent for 7[sixty] or more consecutive days 8[\* \*], the Board shall remit or refund, as the case may be, such portion of 5[any tax assessed on the annual value thereof] 9[\* \*], as may be proportionate to the number of the days during which the said building or land has remained vacant and unproductive of rent.

#### LEG. REF.

- 1 Inserted by Act XXIV of 1936.  
 2 Substituted by Act XXXII of 1940.  
 3 Inserted by Act VII of 1931.  
 4 Inserted by Act XXIV of 1936.  
 5 Substituted by Act XXVI of 1927.  
 6 Words 'other than a hill cantonment'

- omitted by Act XXIV of 1936.  
 7 Substituted for 'ninety' by Act XXIV of 1936.  
 8 Words 'during any year' omitted by Act XXIV of 1936.  
 9 Words 'and payable in respect of that year' omitted by Act XXIV of 1936.



77. For the purpose of obtaining a partial remission or refund of tax, the

Power to require entry in assessment list of details of buildings.

owner of a building composed of separate tenements may request the Board, at the time of the assessment of the building, to enter in the assessment list, in addition to the annual value of the whole building, a

note recording in detail the annual value of each separate tenement. When any tenement, the annual value of which has been thus separately recorded, has remained vacant and unproductive of rent for 1[sixty] or more consecutive days 2[\* \*], such portion of 3[any tax assessed on the annual value of the whole building 4[\* \*]] shall be remitted or refunded as would have been remitted or refunded if the tenement had been separately assessed.

5[77-A]. 3[No remission or refund under 6[\* \*], section 76, or section 77] shall be made unless notice in writing of the

Notice to be given of the circumstances in which remission or refund is claimed.

7[fact that the building, land or tenement has become vacant and unproductive of rent] has been given to the Board, and no remission or refund shall take effect in respect of any period commencing more than fifteen days before the delivery of such notice.

78. (1) For the purposes of sections 76 and 77 no building, tenement or

What buildings, etc., are to be deemed vacant.

land shall be deemed vacant if maintained as a pleasure resort or town or country house, or be deemed unproductive of rent if let to a tenant who has a continuing right of occupation thereof, whether he is in actual occupation or not.

(2) The burden of proving all facts entitling any person to claim relief under section 75, or section 76, or section 77, shall be upon him.

79. (1) The owner of any building, tenement or land in respect of which

Notice to be given of every occupation of vacant building or house.

a remission or refund of tax has been given under section 76 or section 77 shall give notice of the re-occupation of such building, 8[tenement] or land within fifteen days of such re-occupation.

(2) Any owner failing to give the notice required by sub-section (1) shall be punishable with fine which shall not be less than twice the amount of the tax payable on such building, tenement or land in respect of the period during which it has been re-occupied and which may extend to fifty rupees, or to ten times the amount of the said tax, whichever sum is greater.

#### *Charge on Immovable Property.*

80. A tax assessed on the annual value of any building or land shall, sub-

Tax on buildings and land to be a charge thereon.

ject to the prior payment of the land revenue, if any, due to the Government thereon, be a first charge upon the building or land.

#### *Octroi, Terminal Tax and Toll.*

81. Every person bringing or receiving any goods, vehicles or animals

Inspection of imported goods, etc.

within the limits of any cantonment in which octroi or terminal tax or toll is leviable, shall, when so

required by an officer duly authorised by the Cantonment Authority in this behalf, so far as may be necessary for ascertaining the amount of tax chargeable—

#### LEG. REF.

<sup>1</sup> Substituted for "Ninety" by Act XXIV of 1936.

<sup>2</sup> Words "during any year" omitted by Act XXIV of 1936.

<sup>3</sup> Substituted by Act XXVI of 1927.

<sup>4</sup> Words "and payable in respect of that year" omitted by Act XXIV of 1936.

<sup>5</sup> Numbered by Act XXVI of 1927.

<sup>6</sup> The word and figures "section 75" omitted by Act VII of 1931.

<sup>7</sup> Substituted for words "circumstances in which it is claimed" by Act VII of 1931.

<sup>8</sup> Inserted by Act XXIV of 1934.

#### NOTES.

SEC. 81.—Liability to Octroi duty of goods passing through cantonment. 22 Bom, 843.



(a) permit that officer to inspect, examine or weigh such goods, vehicles or animals; and

(b) communicate to that officer any information, and exhibit to him any bill, invoice or document of a like nature, which such person may possess relating to such goods, vehicles or animals.

82. (1) Any person who takes or attempts to take past any octroi station or any other place appointed within a cantonment for the collection of octroi, terminal tax or toll any goods, vehicles or animals, on account of which octroi, terminal tax or toll is leviable and thereby evades, or attempts to evade, the payment of such octroi, terminal tax or toll, and any person who abets any such evasion or attempt at evasion, shall be punishable with fine which may extend either to ten times the value of such octroi, terminal tax or toll, or to fifty rupees, whichever is greater, and which shall not be less than twice the value of such octroi, terminal tax or toll, as the case may be.

(2) In case of non-payment of any octroi or terminal tax or toll on demand, the officer empowered to collect the same may seize any goods, vehicles or animals on which the octroi, terminal tax or toll is chargeable or any part or number thereof which is of sufficient value to satisfy the demand <sup>1</sup>[and shall give a receipt specifying the items seized].

(3) The Board, after the lapse of five days from the seizure, and after the issue of a notice in writing to the person in whose possession the goods, vehicles or animals were at the time of seizure, fixing the time and place of sale, may cause the property so seized, or so much thereof as may be necessary, to be sold by auction to satisfy the demand and any expenses occasioned by the seizure, custody and sale thereof, unless the demand and expenses are in the meantime paid:

Provided that the Executive Officer may, in any case, order that any article of a perishable nature which cannot be kept for five days without serious risk of damage, or which cannot be kept save at a cost which, together with the amount of octroi, terminal tax or toll, is likely to exceed its value, shall be sold after the lapse of such shorter time as he may, having regard to the nature of the article, think proper.

(4) If, at any time before the sale has begun, the person whose property has been seized tenders to the Executive Officer the amount of all expenses incurred and of the octroi, terminal tax or toll, the Executive Officer shall release the property seized.

(5) The surplus, if any, of the sale-proceeds shall be credited to the cantonment fund, and shall, on application made to the Board within one year after the sale, be paid to the person in whose possession the property was at the time of seizure, and, if no such application is made, shall be the property of the Board.

83. It shall be lawful for the Board, with the previous sanction of the <sup>2</sup>[Officer Commanding-in-Chief, the Command,] to lease the collection of any octroi, terminal tax or toll for any period not exceeding one year; and the lessee and all persons employed by him in the management and collection of the octroi, terminal tax or toll shall, in respect thereof,—

(a) be bound by any orders made by the Board for their guidance;

(b) have such powers exerciseable by officers or servants of the Board under this Act as the Board may confer upon them; and

(c) be entitled to the same remedies and be subject to the same responsibilities as if they were employed by the Board for the management and collection of the octroi, terminal tax or toll, as the case may be:



Provided that no article distrained may be sold except under the orders of the Board.

### Appeals.

84. (1) An appeal against the assessment or levy of, or against the refusal to refund, any tax under this Act shall lie to the District Magistrate or to such other officer as may be empowered by the Central Government in this behalf:

Appeals against assessment. Provided that, where, <sup>1</sup>[\* \*] the person to whom the appeal would ordinarily lie is, or was when the tax was imposed, a member of the Board, the appeal shall lie to the Commissioner of the Division, or, in a Province where there are no Commissioners, to the District Judge.

(2) If, on the hearing of an appeal under this section, any question as to the liability to, or the principle of assessment of, a tax arises on which the officer hearing the appeal entertains reasonable doubt, he may, either of his own motion or on the application of the appellant, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer the statement with his own opinion on the point for the decision of the High Court.

(3) On a reference being made under sub-section (2), the subsequent proceedings in the case shall be, as nearly as may be, in conformity with the rules relating to references to the High Court contained in Order XLVI of the First Schedule to the Code of Civil Procedure, 1908.

Costs of appeal.

85. In every appeal the costs shall be in the discretion of the officer hearing the appeal.

86. If the Board fails to pay any costs awarded to an appellant within ten days after the date of the order for payment thereof, the officer awarding the costs may order the person having the custody of the balance of the cantonment fund to pay the amount.

Recovery of costs from Board.

87. No appeal shall be heard or determined under this Chapter unless—

(a) the appeal is, in the case of a tax assessed on the annual value of buildings or lands or both, brought within thirty days next after the date of the authentication of the assessment list under section 69 (exclusive of the time requisite for obtaining a copy of the relevant entries therein), or, as the case may be, within thirty days of the date on which an amendment is finally made under section 71, and, in the case of any other tax, within thirty days next after the date of the receipt of the notice of assessment or of alteration of assessment or, if no notice has been given, within thirty days next after the date of the presentation of the first bill in respect thereof;

Provided that an appeal may be admitted after the expiration of the period prescribed therefor by this section if the appellant satisfies the Court before whom the appeal is preferred that he had sufficient cause for not preferring it within that period;

### LEG. REF.

<sup>1</sup> Words 'there is Board and' omitted by Act XXIV of 1936.

### NOTES.

SEC. 84.—It is a very narrow construction of the words 'assessment' and 'levy', if S. 84 is construed to mean that an appeal lies only against the quantum of the tax or against the legality of its imposition. 'Levy' means imposition, but not merely general imposition of a tax but the particular imposition on the individual affected. 1938 A.M.L.J. 18. It is difficult to hold that S. 84

applies only to valuations of immovable property or questions of the legality of a tax. S. 84 is a general section on giving a right of appeal in all cases. Nor is there any restriction on the grounds for such an appeal. (*Ibid.*) A single reference under S. 84 (2) of the Act by the Income-tax Officer in respect of several appeals is irregular. He should either make as many references as there are appeals, or should make a reference in one of them and then decide the rest in accordance with the answer received. 1939 A.M.L.J. 1.



(b) the amount, if any, in dispute in the appeal has been deposited by the appellant in the office of the Board.

88. The order of an appellate authority confirming, setting aside or modifying an order in respect of any valuation or assessment or liability to assessment or taxation shall be final:

Finality of appellate orders.

Provided that it shall be lawful for the appellate authority, upon application or on its own motion, to review any order passed by it in appeal if application in this behalf is made within three months from the date of the original order.

#### *Payment and Recovery of Taxes.*

89. Save as otherwise expressly provided under this Act, any tax imposed under the provisions of this Act shall be payable on such dates and in such instalments, if any, as the Board may, by public notice, direct.

Time and manner of payment of taxes.

90. (1) When any tax has become due, the Executive Officer shall cause to be presented to the person liable for the payment thereof a bill for the amount due.

Presentation of bill.

(2) Every such bill shall specify the particulars of the tax and the period for which the charge is made.

91. (1) If the amount of the tax for which any bill has been presented is not paid to the Board within thirty days from the presentation thereof, the Executive Officer may cause to be served upon the person liable for the payment of the same a notice of demand in the form set forth in Schedule I.

Notice of demand.

(2) For every notice of demand which the Executive Officer causes to be served on any person under this section, a fee of such amount, not exceeding one rupee, as shall in each case be fixed by the Executive Officer, shall be payable by the said person and shall be included in the costs of recovery.

92. (1) If the person liable for the payment of any tax does not, within thirty days from the service of the notice of demand, pay the amount due, or show sufficient cause for non-payment of the same to the satisfaction of the Executive Officer, such sum, with all costs of recovery, may be recovered under a warrant, issued in the form set forth in Schedule II, by distress and sale of the movable property of the defaulter:

Recovery of tax.

Provided that the Executive Officer shall not recover any sum the liability for which has been remitted on appeal under this Chapter.

(2) Every warrant issued under this section shall be signed by the Executive Officer.

93. (1) It shall be lawful for any servant of the Board to whom a warrant issued under section 92 is addressed to distress, wherever it may be found <sup>1</sup>[ in the cantonment],

- Distress.

#### LEG. REF.

<sup>1</sup> Inserted by Act XXIV of 1936.

#### NOTES.

SECS. 84 AND 88.—The jurisdiction of the Civil Court is excluded in all matters relating to any valuation, assessment, liability to assessment or taxation by a Cantonment Board. And if a decree is passed granting an injunction against the Board in respect of any such matter, it is wholly without jurisdiction and *ultra vires* and cannot be put into execution. 144 I.C. 1016=1933 A.L.J. 162=1933 All. 163; 1937 Sind 305. See also

19 9 A.M.L.J. 1.

SEC. 88.—See 144 I.C. 1016=1933 All. 163, cited under S. 84, *supra*. In cases where the plaintiff is demanding a refund of the amount of assessment or tax levied under the Cantonments Act, if the Court is of opinion that the tax is *ultra vires* of the Act, then the Civil Court will have jurisdiction. If however the Court is of opinion that the tax is *intra vires* of the Act, then it would not be open to the Civil Court to go into the question whether the tax is excessive or whether it has been rightly levied. 184 I.C. 469=41 P.L.R. 597=1939 Lah. 147.



any movable property of 1[or standing timber, growing crops or grass belonging to] the person therein named as defaulter, subject to the following conditions, exceptions and exemptions, namely:—

(a) the following property shall not be distrained:—

(i) the necessary wearing apparel and bedding of the defaulter, his wife and children,

(ii) tools of artisans,

(iii) books of accounts, or

(iv) when the defaulter is an agriculturist, his implements of husbandry, seed-grain, and such cattle as may be necessary to enable the defaulter to earn his livelihood;

(b) the distress shall not be excessive, that is to say, the property distrained shall be as nearly as possible equal in value to the amount recoverable under the warrant, and if any property has been distrained which, in the opinion of the Executive Officer, should not have been distrained, it shall forthwith be returned.

(2) The person charged with the execution of a warrant of distress shall forthwith make an inventory of the property which he seizes under such warrant, and shall, at the same time, give a written notice in the form set forth in Schedule III to the person in possession thereof at the time of seizure that the said property will be sold as therein mentioned.

94. (1) When the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is, when added to the amount to be recovered, likely to exceed its value, the Executive Officer shall give notice to the person in whose possession the property was at the time of seizure that it will be sold at once, and shall sell it accordingly by public auction unless the amount mentioned in the warrant is forthwith paid.

(2) If the warrant is not in the meantime suspended by the Executive Officer, or discharged, the property seized shall, after the expiry of the period named in the notice served under sub-section (2) of section 93, be sold by public auction by order of the Executive Officer.

(3) The surplus of the sale-proceeds, if any, shall forthwith be credited to the cantonment fund, and notice of such credit shall be given at the same time to the person from whose possession the property was taken, and, if the same is claimed by written application to the Board within one year from the date of the notice, a refund thereof shall be made to such person. Any surplus not claimed within one year as aforesaid shall be the property of the Board.

(4) For every distraint made under this Chapter a fee of such amount, not exceeding one rupee, as shall in each case be fixed by the Executive Officer shall be charged, and the said fee shall be included in the costs of recovery.

95. (1) If the Executive Officer has reason to believe that any person from whom any sum is due 2[or is about to become due] on account of any tax is about to remove from the cantonment, he may direct the immediate payment by such person of the sum so due or about to become due, and cause a bill for the same to be served on such person.

(2) If, on the service of such bill, such person does not forthwith pay the sum so due or about to become due, the amount shall be leviable by distress and sale in the manner hereinbefore provided in this Chapter, except that it shall not be necessary to serve upon the defaulter any notice of demand and the warrant for distress and sale may be issued and executed without any delay.

LEG. REF.

<sup>1</sup> Inserted by Act XXIV of 1936.  
C. C. M.—29

<sup>2</sup> Inserted by Act VIII of 1930.



96. Instead of proceeding against a defaulter by distress and sale as here-  
 inbefore provided in this Chapter, or after a defaulter  
 Power to institute suit for recovery. has been so proceeded against unsuccessfully or with  
 only partial success, any sum due or the balance of  
 any sum due, as the case may be, from such defaulter on account of a tax  
 may be recovered from him by a suit in any Court of competent jurisdiction.

*Special Provisions relating to Taxation.*

97. Every Board shall be deemed to be a  
 Municipal Committee for the purposes of the Muncipi-  
 Power to prohibit or exempt from taxation. pal Taxation Act, 1881.

98. A Board may make special provision for the cleansing of any factory,  
 hotel, club or group of buildings or lands used for  
 any one purpose and under one management, and may  
 Power to make special provision for conservancy in certain cases. fix a special rate and the rates and other conditions  
 for periodical payment thereof, which shall be deter-  
 mined by a written agreement with the person liable for the payment of the  
 conservancy or scavenging tax in respect of such factory, hotel, club or group  
 of buildings or lands:

Provided that, in fixing the amount, proper regard shall be had to the  
 probable cost to the Board of the services to be rendered.

99. (1) When, in pursuance of section 98, a Board has fixed a special rate  
 for the cleansing of any factory, hotel, club or group  
 of buildings or lands, such premises shall be exempted  
 Exemption in the case of buildings. from the payment of any conservancy or scavenging  
 tax imposed in the Cantonment.

(2) The following buildings and lands shall be exempt from any tax on  
 property, namely:—

(a) places set apart for public worship and either actually so used or  
 used for no other purpose;

(b) buildings used for educational purposes and public libraries, play-  
 grounds and dharmshalas which are open to the public and from which no income  
 is derived;

(c) hospitals and dispensaries maintained wholly by charitable contribu-  
 tions;

(d) burning and burial grounds, not being the property of <sup>1</sup>[the Crown]  
 or a Board, which are controlled under the provisions of this Act;

(e) buildings or lands vested in a Board; and

(f) any buildings or lands used or acquired for the public service or for  
 any public purpose, which are the property of <sup>2</sup>[the Crown], or in the occupa-  
 tion of, <sup>3</sup>[the Central or any Provincial Government].

<sup>4</sup>[99-A. The Central Government may, by notification in the Official  
 Gazette, exempt, either wholly or in part from the  
 General power of exemp- payment of any tax imposed under this Act, any per-  
 tion. son or class of persons or any property or goods or  
 class of property or goods <sup>5</sup>[\* \* \*].

LEG. REF.

<sup>1</sup> Substituted for 'Government' by A.O., 1937.

<sup>2</sup> Inserted by A.O., 1937.

<sup>3</sup> Substituted for "the Government" by A.O., 1937.

<sup>4</sup> Section inserted by Act XXXV of 1926.

<sup>5</sup> In S. 99-A words, "belonging to the Secretary of State for India in Council"

omitted by Act VII of 1931.

NOTES.

SEC. 99 (2).—*Water tax is payment for water received and not a tax on property, for the notification imposing the tax provides that the tax shall not be levied in respect of such period during which water, owing to shortage of supply or any other cause, has not been available. 1939 A.M.L.J. 1.*



100. A Board may exempt, for a period not exceeding one year at a time from the payment of any tax or any portion of a tax imposed under this Act, any person who is in its opinion by reason of poverty unable to pay the same.

Exemption of poor persons.

101. (1) A Board may, with the previous sanction of the <sup>1</sup>[Officer Commanding-in-Chief, the Command], allow any person to compound for any tax.

Composition.

(2) Every sum due by reason of the composition of a tax under sub-section (1) shall be recoverable as if it were a tax.

102. A [Cantonment Authority] may write off any sum due on account of any tax <sup>2</sup>[or rate] or of the costs of recovering any tax <sup>2</sup>[or rate] if such sum is, in its opinion, irrecoverable.

Irrecoverable debts.

<sup>2</sup>[Provided that, where the sum written off in favour of any one person exceeds fifty rupees, the sanction of the Officer Commanding-in-Chief, the Command shall be first obtained.]

103. (1) The Executive Officer may, by written notice, call upon any inhabitant of the cantonment to furnish such information as may be necessary for the purpose of ascertaining:—

Obligation to disclose liability.

(a) whether such inhabitant is liable to pay any tax imposed under this Act;

(b) at what amount he should be assessed; or

(c) the annual value of the building or land which he occupies and the name and address of the owner or lessee thereof.

(2) If any person, when called upon under sub-section (1) to furnish information, neglects to furnish it or furnishes information which is not true to the best of his knowledge or belief, he shall be punishable with fine which may extend to one hundred rupees.

104. No assessment and no charge or demand on account of any tax or fee shall be impeached or affected by reason only of any mistake in the name of any person liable to pay such tax or fee, or in the description of any property or thing, or any mistake in the amount of the assessment, charge or demand, if the directions contained in this Act and the rules and bye-laws made thereunder have in substance and effect been complied with; but any person who sustains any special damage by reason of any such mistake shall be entitled to recover compensation for the same by suit in a Court of competent jurisdiction.

Immaterial error not to affect liability.

105. No distress levied under this Chapter shall be deemed unlawful, nor shall any person making the same be deemed a trespasser, on account only of any defect of form in the notice of demand, warrant of distress or other proceeding relating thereto; nor shall any such person be deemed a trespasser *ab initio* on account of any irregularity afterwards committed by him; but any person who sustains any special damage by reason of any such irregularity shall be entitled to recover compensation for the same by suit in a Court of competent jurisdiction.

Distrainment not to be invalid by reason of immaterial defect.

## LEG. REF.

- <sup>1</sup> Substituted by Act XXXV of 1926.  
<sup>2</sup> Inserted by Act XXIV of 1936.

## NOTES.

Sec. 104.—See 1939 A.M.L.J. 1 cited under S. 66 *supra*.



CHAPTER VI.  
CANTONMENT FUND AND PROPERTY.  
*Cantonment Fund.*

106. There shall be formed for every cantonment a cantonment fund, and there shall be placed to the credit thereof the following sums, namely:—

(a) the balance, if any, of the cantonment fund formed for the cantonment under the Cantonments Act, 1910.

(b) all sums received by or on behalf of the Board.

<sup>1</sup>[\* \* \*]

107. (1) Where in or near a cantonment there is a Government treasury or sub-treasury, or a branch of the Imperial Bank of India, the cantonment fund shall be kept in such treasury, sub-treasury or bank, as the case may be.

(2) Where there is no such treasury, sub-treasury or bank, the cantonment fund may be deposited with any bank to which the Government treasury business has been entrusted, and, in the absence of such a bank, with any banker or person acting as a banker who has given such security for the safe custody of the fund and the payment on demand of the funds so deposited as the Central Government may in each case direct.

<sup>2</sup>(3) A Board may, from time to time, with the previous sanction of the <sup>3</sup>[Officer Commanding-in-Chief, the Command], invest any portion of its cantonment fund in securities of the <sup>4</sup>[Central Government] or in such other securities, including fixed deposits in banks, as the Central Government may approve in this behalf, and may dispose of such investments or vary them for others of a like nature.]

LEG. REF.

<sup>1</sup> Cl. (c) of S. 106 omitted by A.O., 1937.

<sup>2</sup> Sub-section substituted by Act XXVI of 1927.

<sup>3</sup> Substituted for 'Local Government' by Act XXIV of 1936.

<sup>4</sup> Substituted for "G" of "I" by A.O., 1937.

NOTES.

SEC. 106 (c).—Under the Devolution rules framed under the Government of India Act, 1919, 'cantonments' was a central subject and so were criminal law including procedure and all other matters not included among provincial subjects. On the other hand, 'administration of justice' was a provincial subject and in express terms included constitution, powers, maintenance and organisation of Civil and Criminal Courts, subject to legislation by the Indian Legislature as regards Courts of criminal jurisdiction. The Indian Legislature passed an enactment, the Cantonments Act, S. 106 (c) of which provided for the formation of cantonment funds to which were to be credited all fines recovered from persons convicted of certain offences committed within each cantonment. The United Provinces instituted a suit against the Central Government represented by the Governor-General in Council for a declaration that S. 106 (c) of the Cantonments Act was *ultra vires* the then Indian Legislature, that all fines imposed and realised by Criminal Courts for offences committed within the cantonment areas should be credited to the provincial revenues and

that the plaintiffs were entitled to recover and adjust all such sums wrongly credited to the cantonment funds since 1924. *Held*, (i) that under the Devolution Rules fines imposed by Criminal Courts could be properly credited to provincial revenues as receipts accruing in respect of the administration of justice only if not otherwise appropriated by competent authority; the central subject criminal law, including criminal procedure, included the power to legislate with respect to the destination of fines imposed for criminal offences, and S. 106 (c) of the Act was not *ultra vires*; (ii) even assuming that S. 106 (c) related to a provincial subject, under the provisions of S. 84 (2) of the Government of India Act, 1919 the competence of Indian Legislature to enact that section could not be questioned in a Court of law; (iii) that S. 106 (c) was a law in force immediately before the commencement of Part III of the Constitution Act, under the India and Burma (Transitory Provisions) Order, 1937, para. 4 (a), such fines credited to the cantonment funds must be deemed not to form part of the revenues of the United Provinces till 31st of March, 1939; (iv) as S. 106 (c) has been deleted by the Government of India (Adaptation of Indian Laws) Order, 1937, all such fines must be credited to the provincial revenues from 1st April, 1939. 1919 F.C.R. 124=2 Fed.L.J. 123=50 L.W. 209=A.I.R. 1939 F.C. 58= (1939) 2 M.L.J. (Supp.) 1.



(4) The income resulting from any fixed deposit or from any such security as is referred to in sub-section (3) or from the proceeds of the sale of any such security shall be credited to the cantonment fund.

*Property.*

108. Subject to any special reservation made by the Central Government <sup>1</sup>[\* \*], all property of the nature hereinafter in this section specified which has been acquired or provided or is maintained by a Board shall vest in and belong to that Board, and shall be under its direction, management and control, that is to say,—

(a) all markets, slaughter-houses, manure and nightsoil depots, and buildings of every description;

(b) all water-works for the supply, storage or distribution of water for public purposes and all bridges, buildings, engines, materials and things connected therewith or appertaining thereto;

(c) all sewers, drains, culverts and water-courses, and all works, materials and things appertaining thereto;

(d) all dust, dirt, dung, ashes, refuse, animal matter, filth and rubbish of every kind, and dead bodies of animals collected by the Board from the streets, houses, privies, sewers, cess-pools or elsewhere, or deposited in places appointed by the Board for such purpose;

(e) all lamps and lamp-posts and apparatus connected therewith or appertaining thereto;

(f) all land or other property transferred to the Board by <sup>2</sup>[the Central or a Provincial Government], or by gift, purchase or otherwise for local public purposes; and

(g) all streets and the pavements, stones and other materials thereof, and also all trees, erections, materials, implements, and things existing on or appertaining to streets.

109. The cantonment fund and all property vested in a Board shall be applied for the purposes, whether express or implied for which, by or under this Act or any other law for the time being in force, powers are conferred or duties or obligations are imposed upon the Board:

Provided that the Board shall not incur any expenditure for acquiring or renting land beyond the limits of the cantonment or for constructing any work beyond such limits except—

(a) with the sanction of the Central Government, and

(b) on such terms and conditions as the Central Government may impose:

Provided, further, that priority shall be given in the order hereinafter set forth to the following liabilities and obligations of a Board, that is to say,—

(a) to the liabilities and obligations arising from a trust legally imposed upon or accepted by the Board;

(b) to the repayment of, and the payment of interest on, any loan incurred under the provisions of the Local Authorities Loans Act, 1914;

(c) to the payment of establishment charges;

(d) to the payment of such expenses on account of pauper lunatics sent from the cantonment to public lunatic asylums and mental hospitals as the Central Government directs the Board to pay; and

(e) to the payment of any sum the payment of which is expressly required by the provisions of this Act or any rule or bye-law made thereunder.

LEG. REF.

<sup>1</sup> Words 'or the Local Government' omitted by A.O., 1937.

<sup>2</sup> Substituted for 'His Majesty' by A. O., 1937.



110. When there is any hindrance to the permanent or temporary acquisition upon payment of any land required by a Board for the purposes of this Act, the Central Government may, at the request of the Board, <sup>1</sup>[procure the acquisition thereof] under the provisions of the Land Acquisition Act, 1894, and, on payment by the Board of the compensation awarded under that Act and of the charges incurred by the Government in connection with the proceedings, the land shall vest in the Board.

Acquisition of immovable property.

111. The Central Government may make rules<sup>2</sup> consistent with this Act to provide for all or any of the following matters, namely:—

(a) the conditions on which property may be acquired by Boards or on which property vested in a Board may be transferred by sale, mortgage, lease, exchange or otherwise; and

(b) any other matter relating to the cantonment fund or cantonment property in respect of which no provision or insufficient provision is made by or under this Act, and provision is, in the opinion of the Central Government, necessary.

Power to make rules regarding cantonment fund and property.

## CHAPTER VII.

### CONTRACTS.

112. Subject to the provisions of this Chapter, every Board shall be competent to enter into and perform any contract necessary for the purposes of this Act.

Contracts by whom to be executed.

Sanction.

113. (1) Every contract—

(a) for which budget provision does not exist, or  
(b) which involves a value or amount exceeding one hundred rupees, shall require the sanction of the Board.

(2) Every contract other than a contract such as is referred to in sub-section (1) shall be sanctioned by the Board or by the Executive Officer on behalf of the Board.

114. (1) Every contract made by or on behalf of a Board, the value or amount of which exceeds fifty rupees, shall be in writing, and every such contract shall <sup>3</sup>[\* \*] be signed by two members, of whom the President or the Vice-President shall be one, and be countersigned by the Executive Officer and be sealed with the common seal of the Board <sup>4</sup>[\* \*]:

Execution of contracts.

Provided that, <sup>3</sup>[\*] the Executive Officer may in a case of urgency, with the previous sanction of the President of the Board, execute on behalf of the Board any contract the value or amount of which does not exceed two hundred rupees.

(2) Where an Executive Officer executes a contract on behalf of a Board under sub-section (1), he shall submit a report of his action and of the reasons therefor to the Board at its next meeting.

Contracts improperly executed not to be binding on a Board.

115. If any contract is executed by or on behalf of a Board otherwise than in conformity with the provisions of this Chapter, it shall not be binding on the Board.

#### LEG. REF.

<sup>1</sup> Substituted for 'proceed to acquire it' by A.O., 1937.

<sup>2</sup> For such rules, see *Gen. R. and O.* Vol. V, p. 467.

<sup>3</sup> Words 'where there is a Board' omitted by Act XXIV of 1936.

<sup>4</sup> Words 'or, where there is no Board, etc.,' omitted by Act XXIV of 1936.



## CHAPTER VIII.

## DUTIES AND DISCRETIONARY FUNCTIONS OF BOARDS.

## Duties of Board.

116. It shall be the duty of every Board, so far as the funds at its disposal permit, to make reasonable provision within the cantonment for—

- (a) lighting streets and other public places;
- (b) watering streets and other public places;
- (c) cleansing streets, public places and drains, abating nuisances and removing noxious vegetation;
- (d) regulating offensive, dangerous or obnoxious trades, callings and practices;
- (e) removing, on the ground of public safety, health or convenience, undesirable obstructions and projections in streets and other public places;
- (f) securing or removing dangerous buildings and places;
- (g) acquiring, maintaining, changing and regulating places for the disposal of the dead;
- (h) constructing, altering and maintaining streets, culverts, markets, slaughter-houses, latrines, privies, urinals, drains, drainage works and sewerage works;
- (i) planting and maintaining trees on roadsides and other public places;
- (j) providing or arranging for a sufficient supply of pure and wholesome water, where such supply does not exist, guarding from pollution water used for human consumption, and preventing polluted water from being so used;
- (k) registering births and deaths;
- (l) establishing and maintaining a system of public vaccination;
- (m) establishing and maintaining or supporting public hospitals and dispensaries, and providing public medical relief;
- (n) establishing and maintaining <sup>1</sup>[or assisting] primary schools;
- (o) rendering assistance in extinguishing fires, and protecting life and property when fires occur;
- (p) maintaining and developing the value of property vested in, or entrusted to the management of, the Board; and
- (q) fulfilling any other obligation imposed upon it by or under this Act or any other law for the time being in force.

<sup>2</sup>[116-A. A Board may, subject to any conditions imposed by the Central Government, manage any property entrusted to its management by the Central Government on such terms as to the sharing of rents and profits accruing from such property as may be determined by rule made under section 280.]

## Discretionary functions of Board.

117. A Board may, within the cantonment, make provision for—

- (a) laying out in areas, whether previously built upon or not, new streets, and acquiring land for that purpose and for the construction of buildings, and compounds of buildings, to abut on such streets;
- (b) constructing, establishing or maintaining public parks, gardens, offices, dairies, bathing or washing places, drinking fountains, tanks, wells and other works of public utility;
- (c) reclaiming unhealthy localities;
- (d) furthering educational objects by measures other than the establishment and maintenance of primary schools;
- (e) taking a census and granting rewards for information which may tend to secure the correct registration of vital statistics;

LEG. REF.

<sup>1</sup> Inserted by Act XXIV of 1936.

<sup>2</sup> Inserted by Act VII of 1925.



- (f) making a survey;
- (g) giving relief on the occurrence of local epidemics by the establishment or maintenance of relief works or otherwise;
- (h) securing or assisting to secure suitable places for the carrying on of any offensive, dangerous or obnoxious trade, calling or occupation;
- (i) establishing and maintaining a farm or other place for the disposal of sewage;
- (j) constructing, subsidising or guaranteeing tramways or other means of locomotion, and electric lighting or electric power works;
- (k) adopting any measure, other than a measure specified in section 116 or in the foregoing provisions of this section, likely to promote the safety, health or convenience of the inhabitants of the cantonment; or
- (l) the doing of anything on which expenditure is declared by the Central Government, or by the Board, with the sanction of the Central Government to be an appropriate charge on the cantonment fund.

Power of expenditure for educational purposes outside the cantonment.

<sup>1</sup>[117-A. A Board may make provision for educational objects outside the cantonment if it is satisfied that the interests of the residents of the cantonment will be served thereby.]

## CHAPTER IX.

### PUBLIC SAFETY AND SUPPRESSION OF NUISANCES.

#### *General Nuisance.*

Penalty for causing nuisances.

118. (1) Whoever—

- (a) in any street or other public place within a cantonment,—
  - (i) is drunk and disorderly or drunk and incapable of taking care of himself; or
  - (ii) uses any threatening, abusive or insulting words, or behaves in a threatening or insulting manner with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be occasioned; or
  - (iii) eases himself or wilfully or indecently exposes his person; or
  - (iv) loiters, or begs importunately, for alms; or
  - (v) exposes or, exhibits, with the object of exciting charity, any deformity or disease or any offensive sore or wound; or
  - (vi) carries meat-exposed to public view; or
  - (vii) is found gaming; or
  - (viii) pickets animals, or collects carts; or
  - (ix) being engaged in the removal of night-soil or other offensive matter or rubbish, wilfully or negligently permits any portion thereof to spill or fall or neglects to sweep away or otherwise effectually to remove any portion thereof which may spill or fall in such street or place; or
  - (x) without proper authority affixes upon any building, monument, post, wall, fence, tree or other thing, any bill, notice or other document; or
  - (xi) without proper authority defaces or writes upon or otherwise marks any building, monument, post, wall, fence, tree or other thing; or
  - (xii) without proper authority removes, destroys, defaces or otherwise obliterates any notice or other document put up or exhibited under this act; or

#### LEG. REF.

<sup>1</sup> Inserted by Act XXXV of 1926.

#### NOTES.

SEC. 118 (1) (a) (iii): INGREDIENTS.—The giving of offence by the exposure of the

person is not a necessary ingredient of the offence under S. 118 (1) (a) (iii). The offence is complete if the exposure is "wilful or indecent" and in a public place. 27 Cr.L. J. 107=1926 All. 263.



(xiii) without proper authority displaces, damages, or makes any alteration in, or otherwise interferes with, the pavement, gutter, storm water-drain, flags or other materials of any such street, or any lamp, bracket, direction-post, hydrant or water-pipe maintained by the Board in any such street or public place, or extinguishes a public light; or

(xiv) carries any corpse not decently covered or without taking due precautions to prevent risk of infection or injury to the public health or annoyance to passers-by or to persons dwelling in the neighbourhood; or

(xv) carries night-soil or other offensive matter or rubbish at any hour prohibited by the Board by public notice, or in any pattern of cart or receptacle which has not been approved for the purpose by the Board, or fails to close such cart or receptacle when in use; or

(b) carries night-soil or other offensive matter or rubbish along any route in contravention of any prohibition made in this behalf by the Board by public notice; or

(c) deposits, or causes or permits to be deposited, earth or materials of any description, or any offensive matter or rubbish, in any place not intended for the purpose in any street or other public place or waste or unoccupied land under the management of the Board; or

(d) having charge of a corpse fails to bury, burn or otherwise lawfully dispose of the same within twenty-four hours after death; or

(e) makes any grave or buries or burns any corpse in any place not set apart for such purpose; or

(f) keeps or uses, or knowingly permits to be kept or used, any place as a common gaming house, or assists in conducting the business of any common gaming house; or

(g) at any time or place at which the same has been prohibited by the Board by public or special notice, beats a drum or tom-tom, or blows a horn or trumpet, or beats any utensil, or sounds any brass or other instrument, or plays any music; or

(h) disturbs the public peace or order by singing, screaming or shouting; or

(i) lets loose any animal so as to cause, or negligently allows any animal to cause injury, danger, alarm or annoyance to any person; or

(j) being the occupier of any building or land in or upon which an animal dies, neglects within three hours of the death of the animal, or, if the death occurs at night, within three hours after sunrise, either,—

(i) to report the occurrence to the Executive Officer or to an officer, if any, appointed by him in this behalf with a view to securing the removal and disposal of the carcase by the public conservancy establishment; or

(ii) to remove and dispose of the carcase in accordance with any general directions given by the Board by public notice or any special directions given by the Executive Officer on receipt of such report as aforesaid; or

(k) save with the written permission of the Board and in such manner as it may authorise, stores or uses night-soil, manure, rubbish or any other substance emitting an offensive smell; or

(l) uses or permits to be used as a latrine any place not intended for that purpose;

#### NOTES.

SEC. 118 (1) (c).—A takhtposh or movable wooden platform cannot be held to be "earth, or material of any description, or any offensive matter, or rubbish" within the meaning of cl. (c), S. 118 (1). 28 Cr.L.J. 683=103 I.C. 411=1927 Lah. 647.

A verandah of a private house accessible  
C. C. M.—30

to a public street is not a public place within the meaning of S. 118 and the mere fact that it is open to the road, and can be entered by the public is not sufficient for holding it to be anything but a private place. [11 P.R. 1890 (Cr.); (1881) A.W.N. 17; (1881) A.W.N. 8 and (1887) A.W.N. 75, Ref.] 1931 Lah. 576.



shall be punishable with fine which may extend to fifty rupees.

(2) Whoever does not take reasonable means to prevent any child under the age of twelve years being in his charge from casing himself in any street or other public place within the cantonment shall be punishable with fine which may extend to twenty-five rupees.

(3) The owner or keeper of any animal found picketed or straying without a keep in a street or other public place in a cantonment shall be punishable with fine which may extend to twenty-rupees.

(4) Any animal found picketed as aforesaid may be removed by any officer or servant of the Board or by any police officer to a pound as if the animal had been found straying.

#### *Dogs.*

Registration and control of dogs. 119. (1) A Board may make bye-laws to provide for the registration of all dogs kept within the cantonment.

(2) Such bye-laws shall—

(a) require the registration, by the Officer Commanding each military unit, of all dogs kept in the lines occupied by that unit;

(b) require that every registered dog shall wear a collar to which shall be attached a metal token to be issued by the registration authority, and fix the fee payable for the issue thereof;

(c) require that any dog which has not been registered or which is not wearing such token shall, if found in any public place, be detained at a place set apart for the purpose; and

(d) fix the fee which shall be charged for such detention and provide that any such dog shall be liable to be destroyed or otherwise disposed of unless it is claimed and the fee in respect thereof is paid within one week; and may provide for such other matters as the Board thinks fit.

(3) A Board may—

(a) cause to be destroyed, or to be confined for such period as<sup>1</sup> [it] may direct, any dog or other animal which is, or is reasonably suspected to be, suffering from rabies, or which has been bitten by any dog or other animal suffering or suspected to be suffering from rabies;

(b) by public notice direct that, after such date as may be specified in the notice, dogs which are without collars or without marks distinguishing them as private property and are found straying on the streets or beyond the enclosures of the houses of their owners, if any, may be destroyed, and cause them to be destroyed accordingly.

(4) No damages shall be payable in respect of any dog or other animal destroyed or otherwise disposed of under this section.

(5) Whoever, being the owner or person in charge of any dog, neglects to restrain it so that it shall not be at large in any street without being muzzled and without being secured by a chain lead in any case in which—

(a) he knows that the dog is likely to annoy or intimidate any person, or

(b) the Board has, by public notice during the prevalence of rabies, directed that dogs shall not be at large without muzzles and chain leads, shall be punishable with fine which may extend to one hundred rupees.

(6) Whoever in a cantonment—

(a) allows any ferocious dog which belongs to him or is in his charge to be at large without being muzzled, or

(b) sets on or urges any dog or other animal to attack, worry or intimidate any person, or



(c) knowing or having reason to believe that any dog or animal belonging to him or in his charge has been bitten by an animal suffering or reasonably suspected to be suffering from rabies, neglects to give immediate information of the fact to the Executive Officer or gives information which is false, shall be punishable with fine which may extend to two hundred rupees.

*Traffic.*

*Rule of the road.*

120. Whoever in driving, leading or propelling a vehicle along a street fails, except in a case of actual necessity,—

(a) to keep to the left when passing a vehicle coming from the opposite direction, or

(b) to keep to the right when passing a vehicle going in the same direction as himself, shall be punishable with fine which may extend to fifty rupees.

*Prevention of Fire, etc.*

121. (1) A Board may, by public notice, direct that within such limits in the cantonment as may be specified in the notice, the roofs and external walls of huts or other buildings shall not, without the permission in writing of the Board, be made or renewed of grass, mats, leaves or other inflammable materials, and may, by notice in writing, require any person who has disobeyed any such direction as aforesaid to remove or alter the roofs or walls so made or renewed.

(2) A Board may, by notice in writing, require the owner of any building in the cantonment which has an external roof or wall made of any such material as aforesaid to remove such roof or wall within such time as may be specified in the notice, notwithstanding that a public notice under sub-section (1) has not been issued or that such roof or wall was made with the consent of the Board or before the issue of such public notice:

Provided that, in the case of any such roof or wall in existence before the issue of such a public notice or made with the consent of the Board, that authority shall make compensation, not exceeding the original cost of constructing the roof or wall, for any damage caused by the removal.

122. A Board may, by public notice, prohibit in any case where such prohibition appears to it to be necessary for the prevention of danger to life or property, the stacking or collecting of wood, dry grass, straw or other inflammable materials, or the placing of mats or thatched huts or the lighting of fires in any place in the cantonment, or within any limits therein, which may be specified in the notice.

123. No person shall set a naked light on or near any building in any street or other public place in a cantonment in such manner as to cause danger of fire:

Provided that nothing in the section shall be deemed to prohibit the use, subject to the permission in writing of the Board, of lights for purposes of illumination on the occasion of a festival or public or private entertainment.

124. (1) Notwithstanding anything contained in the Cinematograph Act, 1918, no exhibition of pictures or other optical effects by means of a cinematograph or other like apparatus for the purpose of which inflammable films are used, and no public dramatic performance or pantomime, shall be given in any cantonment elsewhere than in premises for which a licence has been granted by the Board under this section.



(2) If the owner of a cinematograph or other apparatus uses the apparatus or allows it to be used, or if any person takes any part in any public dramatic performance or pantomime, in contravention of the provisions of this section, or if the occupier of any premises allows them to be used in contravention of the provisions of this section or of any condition of any licence granted under this section, he shall be punishable with fine which may extend to two hundred rupees, and, in the case of a continuing offence, with an additional fine which may extend to fifty rupees for each day after the first during which the offence continues.

(3) Nothing in this section shall be deemed to prohibit the giving of any exhibition or any dramatic performance or pantomime in any theatre or institute which is the property of <sup>1</sup>[the Crown] where the exhibition, performance or pantomime is held with the permission and under the control of the military authorities.

125. Whoever in a cantonment discharges any fire-arm or lets off fireworks or fire-balloons, or engages in any game in such manner as to cause or to be likely to cause danger to persons passing by or dwelling or working in the neighbourhood or risk of injury to property shall be liable to fine which may extend to fifty rupees.

126. Where in a cantonment any building, or wall, or any thing affixed thereto, or any well, tank, reservoir, pool, depression, or excavation, or any bank or tree, is, in the opinion of the Board, <sup>2</sup>[in a ruinous state or] for want of sufficient repairs, protection or enclosure, <sup>2</sup>[a nuisance or] dangerous to persons passing by or dwelling or working in the neighbourhood, the Board may, by notice in writing, require the owner <sup>3</sup>[or part owner or person claiming to be the owner or part owner thereof, or, failing any of them, the occupier] thereof <sup>2</sup>[either to remove the same or] to repair, <sup>4</sup>[or to protect or to enclose] the same in such manner as it thinks necessary; and, if the danger is, in the opinion of the Board, imminent, it shall forthwith take such steps as it thinks necessary to avert the same.

127. A Board may, by notice in writing, require the owner or part owner, or person claiming to be the owner or part owner, of any building or land in the cantonment, or the lessee or the person claiming to be the lessee of any such land, which, by reason of disuse or disputed ownership or other cause, has remained unoccupied and has become the resort of idle and disorderly persons or of persons who have no ostensible means of subsistence or cannot give a satisfactory account of themselves, or is used for gaming or immoral purposes, or otherwise occasions or is likely to occasion a nuisance, to secure and enclose the same within such time as may be specified in the notice.

## CHAPTER X.

### SANITATION AND THE PREVENTION AND TREATMENT OF DISEASE.

#### *Sanitary Authorities.*

128. The following officers shall, for the purposes of sanitation, have control over, and be responsible for maintaining in a sanitary condition, those parts of a cantonment respectively, which are specified in the case of each, that is to say:—

#### LEG. REF.

<sup>1</sup> Substituted for 'Government' by A.O., 1937.

<sup>2</sup> Inserted by Act VII of 1925.

<sup>3</sup> Inserted by Act XXIV of 1936.

<sup>4</sup> Substituted for "protect or enclose" by Act XXIV of 1936.



(a) the <sup>1</sup>[Officer Commanding the station]—all buildings and lands which are occupied or used for military purposes;

(b) the Officer Commanding the air forces in the cantonment—all buildings and lands which are occupied or used for air-force purposes;

(c) the head of any civil department or railway administration occupying as such any part of the cantonment—all buildings and lands in his charge as head of that department or administration.

129. (1) The Health Officer shall exercise a general sanitary supervision over the whole cantonment, and shall submit monthly to the Board a report as to the sanitary condition of the cantonment, together with such recommendations in connection therewith as he thinks fit.

(2) The Assistant Health Officer shall perform such duties in connection with the sanitation of a cantonment as are, subject to the control of the Board, allotted to him by the Health Officer.

*Conservancy and Sanitation.*

130. All public latrines and urinals provided or maintained by a Board shall be so constructed as to provide separate compartments for each sex and not be a nuisance, and shall be provided with all necessary conservancy establishments, and shall regularly be cleansed and kept in proper order.

131. (1) On the application or with the consent of the occupier of any building or land, or, where the occupier of any building or land fails to make arrangements to the satisfaction of the Board for the matters referred to in this section, without such consent, after and giving notice in writing to the occupier, a Board may undertake the house scavenging of any building or land in the cantonment for such period as it thinks fit on such terms as it may prescribe in this behalf.

(2) Where the Board has undertaken the duties referred to in this section, all matter removed in the performance of such duties shall be the property of <sup>2</sup>[that Board].

(3) For the purposes of this section, "house scavenging" means the removal of filth or rubbish or other offensive matter from a privy, latrine, urinal drain, cesspool, or other common receptacle for such matter.

132. (1) Every Board shall provide or appoint, in proper and convenient situations, public receptacles, depots or places for the temporary deposit or disposal of household rubbish, offensive matter, carcases of dead animals and sewage.

(2) The Board may, by public notice, issue directions as to the time at which, the manner in which and the conditions subject to which, any matter referred to in sub-section (1) may be removed along a street or may be deposited or otherwise disposed of.

(3) All matter deposited in receptacles, depots or places provided or appointed under this section shall be the property of the Board.

133. The Executive Officer of any cantonment may, by notice in writing—

(a) require any person having the control whether as owner, lessee or occupier of any land or building in the cantonment—

LEG. REF.  
<sup>1</sup> Substituted by Act VII of 1925.

<sup>2</sup> Substituted by Act XXXIV of 1939.



(i) to close any cesspool appertaining to the land or building which is, in the opinion of the Executive Officer, a nuisance, or

(ii) to keep in a clean condition, in such manner as may be prescribed by the notice, any receptacle for filth or sewage accumulating on the land or in the building, or

(iii) to prevent the water of any private latrine, urinal, sink or bath room or any other offensive matter, from soaking, draining or flowing, or being put, from the land or building upon any street or other public place, or into any water-course or into any drain not intended for the purpose; or

(iv) to collect and deposit for removal by the conservancy establishment of the Board, within such time and in such receptacle or place, situate at not more than one hundred feet from the nearest boundary of the premises, as may be specified in the notice, any offensive matter or rubbish which such person has allowed to accumulate or remain under, in or on such building or land; or

(b) require any person to desist from making or altering any drain leading into a public drain; or

(c) require any person having the control of a drain in the cantonment to cleanse, purify, repair or alter the same, or otherwise put it in good order, within such time as may be specified in the notice.

134. (1) Where any well, tank, cistern, reservior, receptacle, or other place in the cantonment where water is stored or accumulates, whether within any private enclosure or not, is in such a condition as to create a nuisance or, in the opinion of the Health Officer, or the Assistant Health Officer, is or is likely to be a breeding place for mosquitoes, the Board may, by notice in writing, require the owner, lessee or occupier thereof, within such period as may be specified in the notice, to fill up or cover the well, cistern, reservoir or receptacle, or to fill up the tank, or to drain off or remove the water, as the case may be.

(2) The Board may, if it thinks fit, with the previous sanction of the <sup>1</sup>[Officer Commanding-in-Chief, the Command], meet the whole or any portion of the expenses incurred in complying with a requisition under sub-section (1).

135. A Board may, by notice in writing, require the owner or lessee of any building or land in the cantonment to provide, in such manner as may be specified in the notice, any latrine, urinal, cesspool, dust-bin or other receptacle for filth, sewage, or rubbish, or any additional latrine, urinal, cesspool or other receptacle as aforesaid, which should, in its opinion, be provided for the building or land.

136. Every person employing, whether on behalf of the Government or otherwise, more than ten workmen or labourers, and every person managing or having control of a market, school, theatre or other place of public resort, in a cantonment shall give notice of the fact to the Board, and shall provide such latrines and urinals, and shall employ such number of sweepers, as the Board thinks fit, and shall cause the latrines and urinals to be kept clean and in proper order:

Provided that nothing in this section shall apply in the case of a factory to which the Indian Factories Act, 1911, applies.

Private latrines.

137. A Board may, by notice in writing,—

(a) require the owner or other person having the control of any private latrine or urinal in the cantonment not to put the same to public use; or

(b) where any plan for the construction of private latrines or urinals has been approved by the Board, and copies thereof may be obtained free of charge on application,—



(i) require any person repairing or constructing any private latrine or urinal not to allow the same to be used until it has been inspected by or under the direction of the Health Officer and approved by him as conforming with such plan; or

(ii) require any person having control of any private latrine or urinal to re-build or alter the same in accordance with such plan; or

(c) require the owner or other person having the control of any such private latrine or urinal which, in the opinion of the Board, constitutes a nuisance, to remove the latrine or urinal; or

(d) require any person having the control whether as owner, lessee or occupier of any land or building in the cantonment—

(i) to have any latrines provided for the same shut out by a sufficient roof and wall or fence from the view of persons passing by or dwelling in the neighbourhood, or

(ii) to cleanse in such manner as the Board may specify in the notice any latrine or urinal belonging to the land or building;

(e) require any person being the owner and having the control of any drain in the cantonment to provide, within ten days from the service of the notice, such covering as may be specified in the notice.

138. (1) Where it appears to a Board that any block of buildings in the cantonment is in an unhealthy condition by reason of the manner in which the buildings are crowded together, or of the narrowness or closeness of the street, or of the want of proper drainage or ventilation, or of the impracticability of cleansing the buildings or other similar cause, it may cause the block to be inspected by a committee consisting of—

(a) the Health Officer,

(b) the Civil Surgeon of the district or, if his services are not available, some other medical officer <sup>1</sup>[in the service of the Crown],

(c) the Executive Engineer or a person deputed by the Executive Engineer in this behalf, and

<sup>2</sup>[(d) Where the cantonment is a class I or class II cantonment, two non-official members of the Board, or where the cantonment is a class III cantonment, one non-official member of the Board].

(2) The committee shall make a report in writing to the Board regarding the sanitary condition of the block, and if it considers that the condition thereof is likely to cause risk of disease to the inhabitants of the building or of the neighbourhood or otherwise to endanger the public health, it shall clearly indicate on a plan verified by the Executive Engineer or the person deputed by him to serve on the committee, the buildings which should in its opinion wholly or in part be removed in order to abate the unhealthy condition of the block.

(3) If, upon receipt of such report, the Board is of opinion that all or any buildings indicated should be removed, it may, by notice in writing, require the owners thereof to remove them:

Provided that the Board shall make compensation to the owners for any buildings so removed which may have been erected under proper authority:

Provided, further, that the Board may, if it considers it equitable in the circumstances so to do, pay to the owners such sum as it thinks fit as compensation for any buildings so removed which have not been erected under proper authority.

(4) For the purposes of this section "buildings" includes enclosure walls and fences appertaining to buildings.

LEG. REF.

<sup>1</sup> Substituted for 'of the Government' by

A.O., 1937.

<sup>2</sup> Substituted by Act XXIV of 1936.



139. (1) Where it appears to a Board that any building or part of a building in the cantonment which is used as a dwelling house is so over-crowded as to endanger the health of the inmates thereof, it may, after such inquiry as it thinks fit, by notice in writing require the owner or occupier of the building or part thereof, as the case may be, within such time not being less than one month as may be specified in the notice, to abate the over-crowding of the same by reducing the number of lodgers, tenants, or other inmates to such number as may be specified in the notice.

(2) Any person who fails, without reasonable cause, to comply with a requisition made upon him under sub-section (1) shall be punishable with fine which may extend to fifty rupees, and, in the case of a continuing offence, to an additional fine which may extend to five rupees for every day after the first during which the failure has continued.

140. (1) Where any building in a cantonment is so ill-constructed or dilapidated as to be, in the opinion of the Board, in an insanitary state, the Board may, by notice in writing, require the owner, within such time as may be specified in the notice, to execute such repairs or to make such alterations as it thinks necessary for the purpose of removing such defects.

(2) A copy of every notice issued under sub-section (1) shall be conspicuously posted on the building to which it relates.

(3) A notice issued under sub-section (1) shall be deemed to have been complied with if the owner of the building to which it relates has, instead of executing the repairs or making the alterations directed by the notice, removed the building.

141. (1) The Executive Officer may, by notice in writing, require the owner, lessee or occupier of any building or land in the cantonment, which appears to him to be in a filthy or insanitary state, within twenty-four hours to cleanse the same or otherwise put it in a proper state, in such manner as may be specified in the notice.

(2) If, within three months from the date of the service of a notice under sub-section (1), any building or land in respect of which the notice was issued is again in a filthy or insanitary state, the owner, lessee or occupier as the case may be, shall be punishable with fine which may extend to two hundred rupees.

142. If a Board is satisfied that any building or part of a building in the cantonment which is intended for or used as a dwelling place is unfit for human habitation, it may cause a notice to be posted on some conspicuous part of the building prohibiting the owner or occupier thereof from using the building or room for human habitation, or allowing it to be so used, until it has been rendered fit for such use to the satisfaction of the Board.

143. A Board may, by notice in writing, require the owner, lessee, or occupier of any land in the cantonment to clear away and remove any thick or noxious vegetation or undergrowth which appears to it to be injurious to health or offensive to persons residing in the neighbourhood.

#### NOTES.

SEC. 141.—Where a person fails to comply with the notice served under S. 141 (1) of the Act, he can be fined under S. 141 (1) read with S. 268 of the Act. He cannot be prosecuted for the same failure under S. 141

(2) and his conviction under this sub-section is clearly illegal. The word "again" used in sub-sec. (2) suggests that the offence contemplated in that sub-section is a recurring and not a continuing offence. 158 I.C. 1010=36 Cr.L.J. 1493=1935 A. 905.



144. Where, in the opinion of a Board, the cultivation in the cantonment of any description of crop or the use therein of any kind of manure or the irrigation of any land therein in any specified manner is likely to be injurious to the health of persons dwelling in the neighbourhood, the Board may, by public notice, prohibit such cultivation, use or irrigation after such date as may be specified in the notice, or may, by a like notice, direct that it shall be carried out subject to such conditions as the Board thinks fit:

Provided that if, when a notice is issued under this section, any land to which it relates has been lawfully prepared for cultivation or any crop is sown therein or is standing thereon, the Board shall, if it directs that the notice is to take effect on a date earlier than that by which the crop would ordinarily be sown or reaped, as the case may be, make compensation to all persons interested in the land or crop for the loss, if any, incurred by them respectively by reason of compliance with the notice.

*Burial and Burning Grounds.*

145. A Board may, by notice in writing, require the owner or person in charge of any burial or burning ground in the cantonment to supply such information as may be specified in the notice concerning the condition, management or position of such ground.

Power to call for information regarding burial and burning grounds.

Permission for use of new burial or burning ground.

146. (1) No place in a cantonment which has not been used as a burial or burning ground before the commencement of this Act shall be so used without the permission in writing of the Board.

(2) Such permission may be granted subject to any conditions which the Board thinks fit to impose for the purpose of preventing annoyance to, or danger to the health of, persons residing in the neighbourhood.

147. (1) Where a Board, after making or causing to be made local inquiry, is of opinion that any burial or burning ground in the cantonment has become offensive to, or dangerous to the health of, persons living in the neighbourhood, it may, with the previous sanction of the Central Government, by notice in writing, require the owner or person in charge of such ground to close the same from such date as may be specified in the notice.

Power to require closing of burial or burning ground.

(2) Where the Central Government sanctions the issue of any notice under sub-section (1), it shall declare the conditions on which the burial or burning ground may be re-opened, and a copy of such declaration shall be annexed to the notice.

(3) Where the Central Government sanctions the issue of any such notice, it shall require a new burial or burning ground to be provided at the expense of the cantonment fund, or, if the community concerned is willing to provide a new burial or burning ground, the Central Government shall require a grant to be made from the cantonment fund towards the cost of the same.

(4) No corpse shall be buried or burnt in any burial or burning ground in respect of which a notice issued under this section is for the time being in force.

148. The provisions of sections 145, 146 and 147 shall not apply in the case of any burial ground which is for the time being managed by or on behalf of the Government.

Exemption from operation of sections 145 to 147.

149. A Board may, by public notice, prescribe routes in the cantonment by which alone corpses may be removed to burial or burning grounds.

Removal of corpses.



*Prevention of Infectious or Contagious Diseases.*

150. <sup>1</sup>[Any person], being in charge of, or in attendance, whether as a medical practitioner or otherwise, upon any person in a cantonment whom he knows or has reason to believe to be suffering from a contagious or infectious disease, or being the owner, lessee or occupier of any building in a cantonment in which he knows that any such person is so suffering, shall, if he fails to give information, or if he gives false information, to the Board respecting the existence of such disease, be punishable with fine which may extend to one hundred rupees:

Provided that no person shall be punishable under this section for failure to give information if he had reasonable cause to believe that the information had already been duly given:

Provided, further, that this section shall not apply in the case of venereal disease where the person suffering therefrom is under specific and adequate medical treatment and is, by reason of his habits and conditions of life and residence, unlikely to spread the disease.

151. (1) In the event of a cantonment being visited or threatened by an outbreak of any infectious or contagious disease among the inhabitants thereof or of any epidemic disease among any animals therein, the <sup>2</sup>[Officer Commanding-in-Chief, the Command], if he thinks that the provisions of this Act or of any law for the time being in force in the cantonment are insufficient for the purpose, may, with the previous sanction of the Central Government,—

- (a) take such special measures, and
  - (b) by public notice, make such temporary regulations to be observed by the public or by any class or section of the public,
- as he thinks necessary to prevent the outbreak or the spread of the disease:

Provided that, where in the opinion of the <sup>2</sup>[Officer Commanding-in-Chief, the Command], immediate measures are necessary, he may take action without such sanction as aforesaid and, if he does so, shall forthwith report such action to the Central Government.

(2) Whoever commits a breach of any temporary regulation made under sub-section (1) shall be deemed to have committed an offence under section 188 of the Indian Penal Code.

152. Where it is certified to the Executive Officer by a medical practitioner that the outbreak or spread of any infectious or contagious disease in the cantonment is, in the opinion of such medical practitioner, attributable to the milk supplied by any dairyman, the Executive Officer may, by notice in writing, require the dairyman, within such time as may be specified in the notice, to furnish him with a full and complete list of the names and addresses of all his customers within the cantonment, or to give him such information as will enable him to trace the persons to whom the dairyman has sold milk.

153. Where it is certified to the Executive Officer by the Health Officer that it is desirable, with a view to prevent the spread of any infectious or contagious disease in the cantonment, that the Health Officer should be furnished with a list of the customers of any washerman, the



Executive Officer may, by notice in writing, require the washerman, within a time to be specified in the notice, to furnish the Health Officer with a full and complete list of the names and addresses of all owners within the cantonment of clothes and other articles which the washerman washes or has washed during the six weeks immediately preceding the date of the notice.

154. Where, after inspection, the Health Officer is of opinion that any infectious or contagious disease is caused or is likely to arise in the cantonment from the consumption of the milk supplied from a dairy or from the washing of clothes or other articles in any place, or from any process employed by a washerman, he shall report the matter to the Executive Officer.

Report after inspection of dairy or washerman's place of business.

155. Upon receipt of a report submitted by the Health Officer under section 154, the Executive Officer may, by notice in writing,—

(a) prohibit the supply of milk from the dairy until the notice has been withdrawn; or

(b) prohibit the washerman from washing clothes or other articles in any such place or by any such process as aforesaid until the notice has been withdrawn or unless he uses such place in such manner, or washes by such process, as the Executive Officer may direct in the notice.

156. The Health Officer may take possession of any milk, clothes or other articles which are or have recently been in the possession of any dairyman on whom a notice has been served under section 152, or of any clothes or other articles which are or have recently been in the possession of any washerman, on whom a notice has been served under section 153, and may subject the same or cause the same to be subjected to such chemical or other process as he may think necessary; and the Board shall pay from the cantonment fund all the costs of the process and shall also pay to the owner of the milk, clothes or <sup>1</sup>[other] articles such sum as compensation for any loss occasioned by such process as may appear to it to be reasonable.

Examination of milk or washed clothes.

157. Whoever in a cantonment—

(a) uses a public conveyance while suffering from an infectious or contagious disease, or

(b) uses a public conveyance for the carriage of a person who is suffering from any such disease, or

(c) uses a public conveyance for the carriage of the corpse of a person who has died from any such disease, shall be bound to take proper precautions against the communication of the disease to other persons using or who may thereafter use the conveyance and to notify such use to the owner, driver or person in charge of the conveyance, and further to report without delay to the Executive Officer the number of the conveyance and the name of the person so notified.

158. (1) Where any person suffering from, or the corpse of any person who has died from, an infectious or contagious disease has been carried in a public conveyance which ordinarily plies in a cantonment, the driver thereof shall forthwith report the fact to the Executive Officer who shall forthwith cause the conveyance to be disinfected if that has not already been done.

(2) No such conveyance shall be brought again into use until the Executive Officer has granted a certificate stating that it can be used without causing risk of infection.



159. Whoever fails to make to the Executive Officer any report which he is required to make by section 157 or section 158, shall be punishable with fine which may extend to one hundred rupees.

Penalty for failure to report.

160. Notwithstanding anything contained in any law for the time being in force, no owner, driver or person in charge of a public conveyance shall be bound to convey or to allow to be conveyed in such conveyance in or in the vicinity of a cantonment any person suffering from an infectious or contagious disease or the corpse of any person who has died from such disease unless and until such person pays or tenders a sum sufficient to cover any loss and expense which would ordinarily be incurred in disinfecting the conveyance.

Driver of conveyance not bound to carry person suffering from infectious or contagious disease.

161. Where a Board is, upon the advice of the Health Officer, of opinion that the cleansing and disinfection of any building or part of a building in the cantonment or of any articles in any such building or part which are likely to retain infection, or the renewal of the flooring of any such building or part of such building, would tend to prevent or check the spread of any infectious or contagious disease, he may, by notice in writing, require the owner or occupier to cleanse and disinfect the said building, part or articles, as the case may be, or to renew the said flooring, within such time as may be specified in the notice:

Disinfection of building or articles therein.

Provided that where, in the opinion of the Board, the owner or occupier is from poverty or any other cause unable effectually to carry out any such requisition, the Board may, at the expense of the cantonment fund, cleanse and disinfect the building, part or articles, or, as the case may be, renew the flooring.

162. (1) Where the destruction of any hut or shed in a cantonment is, in the opinion of the Board, necessary to prevent the spread of any infectious or contagious disease, the Board may, by notice in writing, require the owner to destroy the hut or shed and the materials thereof within such time as may be specified in the notice.

Destruction of infectious hut or shed.

(2) Where the President of a Board 1[\* \*] is satisfied that the destruction of any hut or shed in the cantonment is immediately necessary for the purpose of preventing the spread of any infectious or contagious disease, he may order the owner or occupier of the hut or shed to destroy the same forthwith, or may himself cause it to be destroyed after giving not less than two hours' notice to the owner or occupier thereof.

(3) The Board shall pay compensation to the owner of any hut or shed destroyed under this section.

163. The Board shall provide free of charge temporary shelter or house accommodation for the members of any family in which an infectious or contagious disease has appeared who have been compelled to leave their dwelling by reason of any proceedings taken under section 161 or section 162, and who desire such shelter or accommodation as aforesaid to be provided for them.

Temporary shelter for inmates of disinfected or destroyed building or shed.

164. (1) Where in a cantonment any building or part of a building is intended to be let in which any person has, within the six weeks immediately preceding, been suffering from an infectious or contagious disease, the person

Disinfection of building before letting the same.



letting the building or part shall, before doing so, disinfect the same in such manner as the Board may, by public or special notice, direct together with all articles therein liable to retain infection.

(2) For the purposes of this section, the keeper of an hotel, lodging house or sarai shall be deemed to let to any person who is admitted as a guest therein that part of the building in which such person is permitted to reside.

165. No person shall, without previous disinfection of the same, give, lend, sell, transmit or otherwise dispose of to another person any article or thing which he knows or has reason to believe has been exposed to contamination by any infectious or contagious disease and is likely to be used in, or taken into, a cantonment.

Means of disinfection.

166. (1) Every Board shall—

(a) provide proper places with necessary attendants and apparatus for the disinfection of conveyances, clothing, bedding or other articles which have been exposed to infection;

(b) cause conveyances, clothing or other articles brought for disinfection to be disinfected either free of charge or on payment of such charges as it may fix.

(2) A Board may notify places at which articles of clothing, bedding, conveyances, or other articles which have been exposed to infection shall be washed, and, if it does so, no person shall wash any such thing at any place not so notified without having previously disinfected such thing.

(3) The President of a Board <sup>1</sup>[\* \*] may direct the destruction of any clothing, bedding or other article in the cantonment likely to retain infection, and may give such compensation as he thinks fit for any article so destroyed.

Making or selling of food, etc., or washing clothes by infected person. 167. Whoever, while suffering from, or in circumstances in which he is likely to spread, any infectious or contagious disease,—

(a) makes, carries, or offers for sale in a cantonment or takes any part in the business of making, carrying or offering for sale therein any article of food or drink or any medicine or drug for human consumption, or any article of clothing or bedding for personal use or wear, or

(b) takes any part in the business of the washing or carrying of clothes, shall be punishable with fine which may extend to one hundred rupees.

168. When a cantonment is visited or threatened by an outbreak of any infectious or contagious disease, the Board may, by public notice, restrict in such manner or prohibit for such period, as may be specified in the notice, the sale or preparation of any article of food or drink for human consumption specified in the notice or the sale of any flesh of any description of animals so specified.

Control over wells, tanks, etc. 169. (1) If a Board is of opinion that the water in any well, tank or other place is likely, if used for drinking, to engender, or cause the spread of, any disease, it may,—

(a) by public notice, prohibit the removal or use of such water for drinking;

(b) by notice in writing require the owner or person having control of such well, tank or place to take such steps as may be directed by the notice to prevent the public from having access to or using such water; or

(c) take such other steps as it may consider expedient to prevent the outbreak or spread of any such disease.



(2) In the event of a cantonment or any part of a cantonment being visited or threatened by an outbreak of any infectious or contagious disease, the Health Officer or any person authorised by him in this behalf may, without notice and at any time, inspect and disinfect any well, tank or other place from which water is, or is likely to be, taken for the purposes of drinking, and may further take such steps as he thinks fit to ensure the purity of the water or to prevent the use of the same for drinking purposes.

Disposal of infectious corpse. 170. Where any person has died in a cantonment from any infectious or contagious disease, the Executive Officer may, by notice in writing,—

(a) require any person having charge of the corpse to convey the same to a mortuary, thereafter to be disposed of in accordance with law; or

(b) prohibit the removal of the corpse from the place where death occurred except for the purpose of being buried or burned or of being conveyed to a mortuary.

### *Hospitals and Dispensaries.*

Maintenance or aiding of hospitals or dispensaries.

171. (1) A Board may—

(a) provide and maintain either within or without the cantonment as many hospitals and dispensaries as it thinks fit; or

(b) make, upon such terms as it thinks fit to impose, a grant-in-aid to any hospital or dispensary <sup>1</sup>[or veterinary hospital], whether within or without the cantonment, not maintained by it.

(2) Every hospital or dispensary maintained or aided under sub-section (1) shall have attached to it a ward or wards for the treatment of persons suffering from infectious or contagious diseases.

(3) A medical officer, appointed in such manner as the Central Government may direct, shall be in charge of every hospital or dispensary maintained or aided under this section.

172. (1) Every hospital or dispensary maintained or aided under section 171 shall be maintained in accordance with any Medical supplies, appliances, etc. general or special orders of the Central Government <sup>2</sup>[\* \*] for the conduct of hospitals and dispensaries or in accordance with the said orders modified in such manner as the Central Government <sup>2</sup>[\* \*] <sup>3</sup>[\* \*], thinks fit.

(2) The Board shall cause every such hospital or dispensary to be provided with all requisite drugs, instruments, apparatus, furniture and appliances and with sufficient costs, bedding and clothing for in-patients.

173. At every hospital or dispensary maintained or aided under section 171, the sick poor of the cantonment, and other inhabitants of the cantonment suffering from infectious or contagious diseases, and, with the sanction of the Board, any other sick persons, may receive medical or <sup>4</sup>[surgical] treatment free of costs, and, if treated as in-patients, shall be either dieted gratuitously or, if the medical officer in charge so directs, shall be granted subsistence allowance on such scale as the Board may fix:

Free patients. Provided that the subsistence allowance shall not be less than the lowest allowance for the time being fixed for the subsistence of judgment-debtors by the <sup>5</sup>[Provincial] Government under section 57 of the Code of Civil Procedure, 1908.

#### LEG. REF.

<sup>1</sup> Inserted by Act XXIV of 1936.

<sup>2</sup> Words 'or the Local Government' omitted by A.O., 1937.

<sup>3</sup> Words "as the case may be" omitted by A.O., 1937.

<sup>4</sup> Inserted by Act XXIV of 1936.

<sup>5</sup> Substituted for 'Local' by A.O., 1937.



174. Any sick person who is ineligible to receive medical <sup>1</sup>[or surgical] treatment free of costs in any hospital or dispensary under section 173 may be admitted to treatment therein upon such terms as the Board thinks fit.

Paying patients.

175. (1) If the Health Officer or the medical officer in charge of a hospital or dispensary maintained or aided under section 171 has reason to believe that any person living in the cantonment is suffering from an infectious or contagious disease, he may, by notice in writing, call upon such person to attend for examination at any such hospital or dispensary at such time as may be specified in the notice and not to quit it without the permission of the medical officer in charge; and, on the arrival of such person at the hospital or dispensary, the medical officer in charge thereof may examine him for the purpose of satisfying himself whether or not such person is suffering from an infectious or contagious disease:

Power to order person to attend hospital or dispensary.

Provided that, if, having regard to the nature of the disease or the condition of the person suffering therefrom, or the general environment and circumstances of such person, the Health Officer or medical officer, as the case may be, considers that the attendance of such person at a hospital or dispensary is likely to prove unnecessary or inexpedient, he shall examine such person at such person's own residence.

(2) If any person, on examination under sub-section (1), is found to be suffering from an infectious or contagious disease, the Health Officer or medical officer, as the case may be, may cause him to be detained in hospital until he is free from the infection or contagion:

Provided that, if having regard to the nature of the disease or the condition of the person suffering therefrom, or the general environment and circumstances of such person, he considers that the detention of such person at a hospital or dispensary is unnecessary or inexpedient, he shall discharge such person and take such measures or give such directions in the matter as he thinks necessary.

176. (1) If the Health Officer or the medical officer in charge of a hospital or dispensary maintained or aided under section 171 reports in writing to the <sup>2</sup>[Officer Commanding the station] that any person having received a notice under section 175 has refused or omitted to attend at the hospital or dispensary, specified in the notice, or that such person, having attended the hospital or dispensary, has quitted it without the permission of such medical officer, or that any person has failed to comply with any direction given to him under section 175, the <sup>2</sup>[Officer Commanding the station] may, by order in writing, direct such person to remove from the cantonment within twenty-four hours and not to re-enter it without his permission in writing.

Power to exclude from cantonment persons refusing to attend hospital or dispensary.

(2) No person who has under sub-section (1) been ordered to remove from and not to re-enter a cantonment shall enter any other cantonment in British India without the written permission of the <sup>2</sup>[Officer Commanding the station].

#### *Control of Traffic for Hygienic Purposes.*

Routes for pilgrims and others.

177. (1) A Board may provide or prescribe suitable routes for the use of persons passing through the cantonment—

(a) on their way to or from fairs or places of pilgrimage or other places of public resort; or

LEG. REF.

<sup>1</sup> Inserted by Act XXIV of 1936.

<sup>2</sup> Substituted by Act VII of 1925.



(b) during times when an infectious or contagious disease is prevalent; and may, by public notice, require such persons as aforesaid to use such routes and no others.

(2) All routes provided or prescribed under sub-section (1) shall be clearly and sufficiently indicated by the Board.

*Special Conditions regarding Essential Services.*

178. (1) Whoever, being a sweeper employed by a Board, in the absence of a written contract authorising him so to do and without reasonable cause, resigns his employment or absents himself from his duty without having given one month's notice to the Board, or neglects or refuses to perform his duties, or any of them, shall, be punishable with imprisonment which may extend to one month.

(2) The Central Government may, by notification in the Official Gazette, direct that on and from such date as may be specified in the notification, the provisions of this section shall apply in the case of any specified class of servants employed by a Board whose functions intimately concern the public health or safety.

(3) For the purpose of this section, "sweeper" includes any menial servant employed by a Board in the removal or disposal of filth or rubbish.

## CHAPTER XI.

### CONTROL OVER BUILDINGS, STREETS, BOUNDARIES, TREES, ETC.

#### *Buildings.*

1[178-A. No person shall erect or re-erect a building on any land in a cantonment, except with the previous sanction of the Board, nor otherwise than in accordance with the provisions of this Chapter and of the rules and bye-laws made under this Act relating to the erection and re-erection of buildings.]

179. (1) Whoever intends to erect or re-erect any building in a cantonment shall <sup>2</sup>[apply for sanction by giving] notice in writing of his intention to the Board.

(2) For the purpose of this Act, a person shall be deemed to erect or re-erect a building who—

(a) makes any material alteration or enlargement of any building, or  
(b) converts into a place for human habitation any building not originally constructed for that purpose, or

(c) converts into more than one place for human habitation a building originally constructed as one such place, or

(d) converts two or more places of human habitation into a greater number of such places, or

(e) converts into a stable, cattle-shed or cowhouse any building originally constructed for human habitation, or

(f) makes any alteration which there is reason to believe is likely to affect prejudicially the stability or safety of any building or the condition of any building in respect of drainage, sanitation or hygiene, or

(g) makes any alteration to any building which increases or diminishes the height of, or area covered by, or the cubic capacity of, the building, or which reduces the cubic capacity of any room in the building below the minimum prescribed by any bye-law made under this Act.

180. (1) A person giving the notice required by section 179 shall specify the purpose for which it is intended to use the building to which such notice relates.

<sup>1</sup> Inserted by Act XXIV of 1936.

<sup>2</sup> Substituted for the word 'give' by Act XXIV of 1936.



(2) No notice shall be valid until the information required under subsection (1) and any further information and plans which may be required under bye-laws made under this Act have been furnished to the satisfaction of the Board along with the notice.

181. (1) The Board may either refuse to sanction the erection or re-erection, as the case may be, of the building, or may sanction it either absolutely or subject to such directions as it thinks fit to make in writing in respect of all or any of the following matters, namely:—

- (a) the free passage or way to be left in front of the buildings;
  - (b) the space to be left about the building to secure free circulation of air and facilitate scavenging and the prevention of fire;
  - (c) the ventilation of the building, the minimum cubic area of the rooms and the number and height of the storeys of which the building may consist;
  - (d) the provision and position of drains, latrines, urinals, cesspools or other receptacles for filth;
  - (e) the level and width of the foundation, the level of the lowest floor and the stability of the structure;
  - (f) the line of frontage with neighbouring buildings if the building abuts on a street;
  - (g) the means to be provided for egress from the building in case of fire;
  - (h) the materials and method of construction to be used for external and party walls for rooms, floors, fireplaces, and chimneys;
  - (i) the height and slope of the roof above the uppermost floor upon which human beings are to live or cooking operations are to be carried on; and
  - (j) any other matter affecting the ventilation and sanitation of the buildings;
- and the person erecting or re-erecting the building shall obey all such written directions in every particular.

<sup>1</sup>[(2) The Board may refuse to sanction the erection or re-erection of any building, either on grounds sufficient in the opinion of the Board affecting the particular building, or in pursuance of a general scheme sanctioned by the Officer Commanding-in-Chief, the Command, restricting the erection or re-erection of buildings within specified limits for the prevention of overcrowding or in the interests of persons residing within such limits or for any other public purpose.

(3) The Board, before sanctioning the erection or re-erection of a building on land which is under the management of the Military Estates Officer, shall refer the application to the Military Estates Officer for ascertaining whether there is any objection on the part of Government to such erection or re-erection; and the Military Estates Officer shall return the application together with his report thereon to the Board within thirty days after it has been received by him.

(4) The Board may refuse to sanction the erection or re-erection of any building—

- (a) when the land on which it is proposed to erect or re-erect the building is held on a lease from <sup>2</sup>[the Crown] if the erection or re-erection constitutes a breach of the terms of the lease, or

#### LEG. REF.

<sup>1</sup> Substituted by Act XXIV of 1936.

<sup>2</sup> Substituted for the word 'Government' by the A.O., 1937.

#### NOTES.

SEC. 181.—Where Cantonment Authority  
C. C. M.—32

grants permission without any reservation so far as the use of the building for shops was concerned, its subsequent resolution modifying the previous one by adding the words "shops rejected" is *ultra vires*. 126 I.C. 525 = 1930 Lah. 822; 52 P.R. 1900.



(b) when the land on which it is proposed to erect or re-erect the building is not held on a lease from <sup>1</sup>[the Crown], if the right to build on such land is in dispute between the person applying for sanction and the Government.

(5) If the Board decides to refuse to sanction the erection or re-erection of the building, it shall communicate in writing the reasons for such refusal to the person by whom notice was given.

(6) Where the Board neglects or omits, for one month after the receipt of a valid notice, to make and to deliver to the person who has given the notice any order of any nature specified in this section, and such person thereafter by a written communication sent by registered post to the Board calls the attention of the Board to the neglect or omission, then, if such neglect or omission continues for a further period of fifteen days from the date of such communication the Board shall be deemed to have given sanction to the erection or re-erection, as the case may be, unconditionally:

Provided that, in any case to which the provisions of sub-section (3) apply, the period of one month herein specified shall be reckoned from the date on which the Board has received the report referred to in that sub-section].

182. (1) No compensation shall be claimable by any person for any damage or loss which he may sustain in consequence of the refusal of the Board of sanction to the erection of any building or in respect of any direction issued by it under sub-section (1) of section 181.

(2) The Board shall make compensation to the owner of any building for any actual damage or loss sustained by him in consequence of the prohibition of the re-erection of any building or of its requiring any land belonging to him to be added to the street:

Provided that the Board shall not be liable to make any compensation in respect of the prohibition of the re-erection of any building which for a period of three years or more immediately preceding such refusal has not been in existence or has been unfit for human habitation.

183. Every sanction for the erection or re-erection of a building given or deemed to have been given by the Board as hereinbefore provided shall be available for one year from the date on which it is given, and, if the building so sanctioned is not begun by the person who has obtained the sanction or some one lawfully claiming under him within that period, it shall not thereafter be begun <sup>2</sup>[unless the Board on application made therefor has allowed an extension of that period].

<sup>3</sup>[183-A. A Board, when sanctioning the erection or re-erection of a building as hereinbefore provided, shall specify a reasonable period after the work has commenced within which the erection or re-erection is to be completed, and, if the erection or re-erection is not completed within the period so fixed, it shall not be continued thereafter without fresh sanction obtained in the manner hereinbefore provided, unless the Board on application made therefor has allowed an extension of that period:

Provided that not more than two such extensions shall be allowed by the Board in any case].

Illegal erection and re-erection.

184. Whoever begins, continues or completes the erection or re-erection of a building—

(a) without having given a valid notice as required by sections 179 and 180, or before the building has been sanctioned or is deemed to have been sanctioned, or

LEG. REF.

<sup>1</sup>Substituted for 'Government' by A.O., 1937.

<sup>2</sup>Substituted for words 'without fresh

sanction obtained in the manner hereinbefore provided by Act XXIV of 1936.

<sup>3</sup>Inserted by Act XXIV of 1936.



(b) without complying with any direction made under sub-section (1) of section 181, or

(c) when sanction has been refused, or has ceased to be available,<sup>1</sup> [or has been suspended by the Officer Commanding-in-Chief, the Command, under clause (b) of sub-section (1) of section 52], shall be punishable with fine which may extend to five hundred rupees.

185. <sup>2</sup>[(1)] A Board may, at any time, by notice in writing, direct the owner, lessee or occupier of any land in the cantonment to stop the erection or re-erection of a building in any case in which the Board considers that such erection or re-erection is an offence under section 184 and may in any such case <sup>3</sup>[or in any other case in which the Board considers that the erection or re-erection of a building is an offence under section 184, within six months of the completion of such erection or re-erection], in like manner direct the alteration or demolition, as it thinks necessary, of the building, or any part thereof, so erected or re-erected:

Provided that the Board may, instead of requiring the alteration or demolition of any such building or part thereof, accept by way of composition such sum as it thinks reasonable.

<sup>2</sup>[Provided further that the Board shall not, without the previous concurrence of the Officer Commanding-in-Chief, the Command, accept any sum by way of composition under the foregoing proviso in respect of any building on land which is not under the management of the Board].

<sup>2</sup>[(2)] A Board shall by notice in writing direct the owner, lessee or occupier of any land in the cantonment to stop the erection or re-erection of a building in any case in which the order under section 181 sanctioning the erection or re-erection has been suspended by the Officer Commanding-in-Chief, the Command, under clause (b) of sub-section (1) of section 52, and shall in any such case in like manner direct the demolition or alteration, as the case may be, of the building or any part thereof so erected or re-erected where the Officer Commanding-in-Chief, the Command, thereafter directs that the order of the Board sanctioning the erection or re-erection of the building shall not be carried into effect or shall be carried into effect with modifications specified by him:

Provided that the Board shall pay to the owner of the building compensation for any loss actually incurred by him in consequence of the demolition or alteration of any building which has been erected or re-erected prior to the date on which the order of the Officer Commanding-in-Chief, the Command has been communicated to him.]

Power to make bye-laws. 186. A Board may make bye-laws prescribing—

#### LEG. REF.

<sup>1</sup> Inserted by Act XXIV of 1936.

<sup>2</sup> Old S. 185 was re-numbered as sub-sec. (1), and second proviso and sub-sec. (2) inserted by Act XXIV of 1936.

<sup>3</sup> Inserted by Act XXIV of 1936.

#### NOTES.

SEC. 184 (b): SCOPE OF.—S. 184 (b) does not provide a punishment for mere non-compliance with a direction made under sub-S. (1) of S. 181, but for the beginning, continuation, or completion of the erection of a building without complying with such a direction. 35 Cr.L.J. 666=1934 Oudh 29.

SECS. 184 AND 185.—There is a clear distinction between the offences under Ss. 184 and 185 of the Act. One relates to the erection or re-erection of a building without the

permission of the Cantonment Authority; the other offence is the failure to comply with a notice issued by authority. Where a building was erected before 1924 but the prosecution was for the offence of disobeying a notice after the Act came into force, *held*, that the prosecution was sustainable and that the time-limit for the same was six months from the date of the disobedience 136 I.C. 713=33 Cr.L.J. 336=1932 Lah. 370.

SECS. 184 AND 268.—S. 184 provides no penalty for a continuing failure or contravention, although such a penalty is provided in S. 268. 35 Cr.L.J. 666=1934 Oudh 29. It is not proper to substitute a conviction under S. 268 for the one under S. 184 (b). (*Ibid.*).



(a) the manner in which notice of the intention to erect or re-erect a building in the cantonment shall be given to the Board and the information and plans to be furnished with the notice;

(b) the type or description of buildings which may or may not, and the purpose for which a building may or may not, be erected or re-erected [in the cantonment or any part thereof]<sup>1</sup>

(c) the minimum cubic capacity of any room or rooms in a building which is to be erected or re-erected; 2[\* \*]

(d) the fees payable on provision by the Board of plans or specifications of the type of buildings which may be erected in the cantonment or any part thereof;

2[(e) the circumstances in which a mosque, temple or church or other sacred building may be erected or re-erected; and

(f) with reference to the erection or re-erection of buildings, or of any class of building, all or any of the following matters, namely:—

(i) the line of frontage where the building abuts on a street;

(ii) the space to be left about the building to secure free circulation of air and facilities for scavenging and for the prevention of fire;

(iii) the materials and method of construction to be used for external and party-walls, roofs and floors;

(iv) the position, the material and the method of construction of fire-places, chimneys, drains, latrines privies, urinals and cesspools;

(v) height and slope of the roof above the uppermost floor upon which human beings are to live or cooking operations are to be carried on;

(vi) the level and width of the foundation, the level of the lowest floor and the stability of the structure;

(vii) the number and height of the storeys of which the building may consist;

(viii) the means to be provided for egress from the building in case of fire,

(ix) the safeguarding of wells from pollution; or

(x) the materials and method, of construction to be used for godowns intended for the storage of foodgrains in excess of fifty maunds in order to render them rat proof.]

187. (1) No owner or occupier of any building in a cantonment shall, without the permission in writing of the Board, add to or place against or in front of the building any projection or structure overhanging, projecting into, or encroaching on, any street or any drain, sewer or aqueduct therein.

#### LEG. REF.

<sup>1</sup> Substituted by Act XXXI of 1940.

<sup>2</sup> Word 'and' omitted and Cls. (e) and (f) of S. 186 inserted by Act XXIV of 1936.

#### NOTES.

SEC. 187.—Where on an application to the Cantonment Authority, for sanction to construct a platform, the applicant receives such sanction by means of a letter from the executive officer of the Cantonment, under whose signature all orders of the Cantonment Authority are normally communicated, it is not his business to enquire from the executive officer whether the sanction conveyed by him had been granted by the Cantonment Authority. He is entitled to assume that the executive officer was acting in accordance with the authority conferred on him by the Cantonment Board and to act on such sanction. 35 P.L.R. 414=1934 Lah. 510.

A person is not bound to comply with any notice whatever, however illegal or peremptory merely because it is issued to him by a Municipal Board or a Cantonment authority, and if he fails to comply with it he does not render himself liable to a fine under the Act. 146 I.C. 2=34 Cr.L.J. 1191=1933 All. 486 distinguishing 1932 A. 623. The petitioner, without the permission in writing of the Cantonment Board paved with burnt bricks a plot of land which was situate between two houses which he had constructed with the sanction of the Board. There were gates to the two streets on either side of the land in question which the petitioner had put up some years ago. On a charge under S. 187 of "placing a structure, encroaching on the street," held that in view of the fact that the gates have been in existence on both sides for a number of years it cannot be presumed that the public have a



(2) The Board may, by notice in writing, require the owner or occupier of any such building to alter or remove any such projection or encroachment as aforesaid:

Provided that, in the case of any projection or encroachment lawfully in existence at the commencement of this Act, the Board shall make compensation for any damage caused by the removal or alteration.

(3) The Board may, by order in writing, give permission to the owners or occupiers of buildings in any particular street to put up open verandahs, balconies or rooms projecting from any upper storey thereof to an extent beyond the line of the plinth or basement wall at such height from the level ground or street as may be specified in the order.

188. A Board may, by notice in writing, require any person who has without its permission in writing, newly erected or re-  
 Unauthorised buildings, erected any [structure]<sup>1</sup> over any public sewer, drain,  
 over drains, etc. culvert, water-course or water-pipe in the cantonment  
 to pull down or otherwise deal with the same as it thinks fit.

189. (1) A Board may, by notice in writing, require the owner or lessee of any building or land in any street, at his own expense and in such manner as the Board thinks fit, to put up and keep in good condition proper troughs and pipes for receiving and carrying rain water from the building or land and for discharging the same or to establish and maintain any other connection or communication between such building or land and any drain or sewer.

(2) For the purpose of efficiently draining any building or land in the cantonment, the Board may, by notice in writing, require the owner or lessee of the building or land—

(a) to pave, with such materials and in such manner as it thinks fit, any courtyard, alley or passage between two or more buildings, or  
 (b) to keep any such paving in proper repair.

190. A Board may attach to the outside of any building, or to any tree in the cantonment, brackets for lamps in such manner as not to occasion injury thereto or inconvenience.

#### Streets.

191 A Board may, by order in writing, permit the temporary occupation of any street, or of any land vested in the Board, for the purpose of depositing any building materials or making any temporary excavation therein or erection thereon, subject to such conditions as it may prescribe for the safety or convenience of the public, and may charge a fee for such permission and may in its discretion withdraw such permission.

192. (1) A Board shall not permanently close any street, or open any new street without the previous sanction of the <sup>2</sup>[Officer Commanding-in-Chief, the Command].

#### LEG. REF.

<sup>1</sup> Substituted by Act XXXI of 1940.

<sup>2</sup> Substituted by Act XXV of 1926.

#### NOTES.

right of way over this space and the prosecution have failed to establish that the land in question is a "street" as defined in the Act. 158 I.C. 858=36 Cr.L.J. 1475=1935 Lah. 858.

SECS. 187 AND 268—Notice for removal of encroachment issued by executive officer not

valid—Disobedience to—Conviction for, not proper. See 1933 Lah. 545. Subsequent confirmation of the action of the Executive Officer by the Cantonment Board is of no avail, as the notice disobeyed is the invalid notice of the executive officer. (*ibid.*) But see 1926 Cal. 1073; 32 P.R. 1881. Qualified sanction to construct—Construction—Notice to demolish "unauthorized construction"—Validity of—Non-compliance with it is no offence. See 146 I.C. 2=34 Cr.L.J. 1191.



(2) A Board may, by public notice, temporarily close any street or any part of a street for repair or for the purpose of carrying out any work connected with drainage, water-supply or lighting or any other work which it is by or under this Act required or permitted to carry out:

Provided that where, owing to any works or repairs or from any other cause, the condition of any street or of any water-works, drain, culvert or premises vested in the Board, is such as to be likely to cause danger to the public, the Board shall—

(a) take all reasonable means for the protection of the adjacent buildings and land and provide reasonable means of access thereto;

(b) cause sufficient barriers or fences to be erected for the security of life and property, and cause such barriers or fences to be sufficiently lighted from sunset to sunrise.

193. (1) A Board may cause a name to be given to any street and to be affixed on any building in the cantonment in such place as it thinks fit, and may also cause a number to be affixed to any such building.

Names of streets and numbers of buildings.

(2) Whoever destroys, pulls down, defaces or alters any such name or number or puts up any name or number differing from that put up by the order of the Board shall be punishable with fine which may extend to twenty rupees.

<sup>1</sup>[(3) When a number has been affixed to any building under sub-section (1), the owner of the building shall maintain the number in order, and shall replace it if removed or defaced, and if he fails to do so the Board may by notice in writing require him to replace it].

#### *Boundaries and Trees.*

Boundary walls, hedges and fences.  
Board.

194. (1) No boundary wall, hedge or fence of any material or description shall be erected in a cantonment without the permission in writing of the

(2) A Board may, by notice in writing, require the owner or lessee of any land in the cantonment—

(a) to remove from the land any boundary wall, hedge or fence which is, in its opinion, unsuitable, unsightly or otherwise objectionable; or

(b) to construct on the land sufficient boundary walls, hedges or fences of such material, description or dimensions as may be specified in the notice; or

(c) to maintain the boundary walls, hedges or fences of such lands in good order:

Provided that, in the case of any such boundary wall, hedge or fence which was erected with the consent or under the orders of the Board or which was in existence at the commencement of this Act, the Board shall make compensation for any damage caused by the removal thereof.

(3) The Board may, by notice in writing, require the owner, lessee or occupier of any such land to cut or trim any hedge on the land in such manner and within such time as may be specified in the notice.

195. (1) Where, in the opinion of a Board, the felling of any tree of mature growth standing in a private enclosure in the cantonment is necessary for any reason, the Board may, by notice in writing, require the owner, lessee or occupier of the land to fell the tree within such time as may be specified in the notice.

Felling, lopping, and trimming of trees.



(2) A Board may—

(a) cause to be lopped or trimmed any tree standing on land in the cantonment which belongs to the <sup>1</sup>[Crown]; or

(b) by public notice require all owners, lessees or occupiers of land in the cantonment, or by notice in writing require the owner, lessee or occupier of any such land, to lop or trim, in such manner as may be specified in the notice, all or any trees standing on such land or to remove any dead trees from such land.

196. Whoever, without the permission in writing of the Board, digs up the surface of any open space in the cantonment, which is not private property, shall be punishable with fine which may extend to twenty rupees, and, in the case of a continuing offence <sup>2</sup>[with an additional fine] which may extend to five rupees for every day after the first during which the offence continues.

197. (1) If, in the opinion of a Board, the working of a quarry in the cantonment, or the removal of stone, earth or other material from the soil in any place in the cantonment, is dangerous to persons residing in or frequenting the neighbourhood of such quarry or place, or creates, or is likely to create, a nuisance, the Board may, by notice in writing, prohibit the owner, lessee or occupier of such quarry or place of the person responsible for such <sup>2</sup>[working] or removal, from continuing or permitting the working of such quarry or the moving of such material, or require him to take such steps in the matter as the Board may direct for the purpose of preventing danger or abating the nuisance arising or likely to arise therefrom.

(2) If, in any case referred to in sub-section (1), the Board is of opinion that such a course is necessary in order to prevent imminent danger, it may, by order in writing, require a proper hoarding or fence to be put up for the protection of passers-by.

## CHAPTER XII.

### MARKETS, SLAUGHTER-HOUSES, TRADES AND OCCUPATIONS.

198. (1) A Board may provide and maintain, either within or without the cantonment, public markets and public slaughter-houses, to such number as it thinks fit, together with stalls, shops, sheds, pens and other buildings or conveniences for the use of persons carrying on trade or business in or frequenting such markets or slaughter-houses, and may provide and maintain in any such market buildings, places, machines, weights, scales and measures for the weighing or measurement of goods sold therein.

(2) When such market or slaughter-house is situated beyond cantonment limits, the Board shall have the same power for the inspection and proper regulation of the same as if it were situated within those limits.

(3) The Board may at any time, by public notice, close any public market or public slaughter-house or any part thereof.

(4) Nothing in this section shall be deemed to authorise the establishment of a public market or public slaughter house within the limits of any area administered by any local authority other than the Board without the permission of such local authority or otherwise than on such conditions as such local authority may approve.

199. (1) No person shall, without the general or special permission in writing of the Board, sell or expose for sale any animal or article in any public market.

(2) Any person contravening the provisions of this section, and any animal or article exposed for sale by such person, may be summarily removed

LEG. REF.

<sup>1</sup>Substituted for 'Government' by the A.O.

1937.

<sup>2</sup>Substituted by Act VIII of 1930,



from the market by or under the orders of the Executive Officer or any officer or servant of the Board authorised by it in this behalf.

Levy of stallages, rents and fees.

200. A Board may—

(a) charge for the occupation or use of any stall, shop, standing, shed or pen in a public market, or public slaughter-house, or for the right to expose goods for sale in a public market, or for weighing or measuring goods sold therein, or for the right to slaughter animals in any public slaughter-house, such stallages, rents and fees as it thinks fit; or

(b) with the sanction of the <sup>1</sup>[Officer Commanding-in-Chief, the Command] farm the stallages, rents and fees leviable as aforesaid or any portion thereof for any period not exceeding one year at a time; or

(c) put up to public auction, or with the sanction of the <sup>1</sup>[Officer Commanding-in-Chief, the Command], dispose of by private sale, the privilege of occupying or using any stall, shop, standing, shed or pen in a public market or public slaughter-house for such term and on such conditions as it thinks fit.

201. A copy of the table of stallages, rents and fees, if any, leviable in any public market or public slaughter-house, and of the bye-laws made under this Act for the purpose of regulating the use of such market or slaughter-house, printed in the English language and in such other language or languages as the Board may direct, shall be affixed in some conspicuous place in the market or slaughter-house.

202. (1) No place in a cantonment other than a public market shall be used as a market, and no place in a cantonment other than a public slaughter-house, shall be used as a slaughter-house, unless such place has been licensed as a market or slaughter-house, as the case may be, by the Board:

Provided that nothing in this sub-section shall apply in the case of a slaughter-house established and maintained by the Government.

(2) Nothing in sub-section (1) shall be deemed—

(a) to restrict the slaughter of any animal in any place on the occasion of any festival or ceremony, subject to such conditions as to prior or subsequent notice as the Executive Officer with the previous sanction of the District Magistrate may by public or special notice, impose in this behalf, or

(b) to prevent the Executive Officer, with the sanction of the Board, from setting apart places for the slaughter of animals in accordance with religious custom, when such animals are slaughtered for consumption by the troops or for the purpose of the sale of the flesh thereof to the troops.

(3) Whoever omits to comply with any condition imposed by the Executive Officer under clause (a) of sub-section (2) shall be punishable with fine which may extend to fifty rupees and, in the case of a continuing offence, with an additional fine which may extend to ten rupees for every day after the first during which the offence is continued.

203. (1) A Board may charge such fees as it thinks fit to impose for the grant of a licence to any person, to open a private market or private slaughter-house in the cantonment, and may grant such licence subject to such conditions, consistent with this Act and any bye-laws made thereunder, as it thinks fit to impose.

Conditions of grant of licence for private market or slaughter-house.

#### LEG. REF.

<sup>1</sup>Substituted by Act XXXV of 1926.

#### NOTES.

SECS. 200 AND 210—Lease of shed—Destruction of shed—Liability of lessee for rent. See 1933 Lah. 517.



(2) The Board may refuse to grant any such licence without giving reasons for such refusal.

204. (1) Any person who keeps open for public use any market or slaughter-house in respect of which a licence is required by or under this Act, without obtaining licence therefor, or while the licence therefor is suspended, or after the same has been cancelled, shall be punishable with fine which may extend to fifty rupees and, in the case of a continuing offence, with an additional fine which may extend to five rupees for every day after the first during which the offence is continued.

Penalty for keeping market or slaughter-house open without licence, etc.

(2) When a licence to open a private market or private slaughter-house is granted or refused or is suspended or cancelled, the Board shall cause a notice of the grant, refusal, suspension or cancellation to be posted in English, and in such other language or languages as it thinks necessary, in some conspicuous place by or near the entrance to the place to which the notice relates.

205. Whoever, knowing that any market or slaughter-house has been opened to the public without a licence having been obtained therefor when such licence is required by or under this Act, or that the licence granted therefor is for the time being suspended or that it has been cancelled, sells or exposes for sale any article in such market, or slaughters any animal in such slaughter-house, shall be punishable with fine which may extend to fifty rupees and, in the case of a continuing offence, with an additional fine which may extend to five rupees for every day after the first during which the offence is continued.

Penalty for using unlicensed market or slaughter-house.

206. (1) Where, in the opinion of the Board, it is necessary on sanitary grounds so to do, it may, by public notice, prohibit for such period, not exceeding one month, as may be specified in the notice, or for such further period, not exceeding one month, as it may specify by a like notice, the use of any private slaughter-house specified in the notice, or the slaughter therein of any animal of any description so specified.

(2) A copy of every notice issued under sub-section (1) shall be conspicuously posted in the slaughter-house to which it relates.

207. (1) Any servant of a Board, authorised by order in writing in this behalf by the President of the Board, 1[\* \*] or the Health Officer, may, if he has reason to believe that any animal has been, is being, or is about to be slaughtered in any place in contravention of the provisions of this Chapter, enter into and inspect any such place at any time, whether by day or by night.

(2) Every such order shall specify the place to be entered and the locality in which the same is situated and the period, which shall not exceed seven days, for which the order is to remain in force.

208. A Board may, with the approval of the Central Government, make bye-laws consistent with this Act to provide for all or any of the following matters, namely:—

(a) the days on, and the hours during, which any private market or private slaughter-house may be kept open for use;

(b) the regulation of the design, ventilation and drainage of such markets and slaughter-houses, and the material to be used in the construction thereof;

(c) the keeping of such markets and slaughter-houses and lands and buildings appertaining thereto in a clean and sanitary condition, the removal of

LEG. REF.

<sup>1</sup> Words 'if any' omitted by Act XXIV of 1936.

C. C. M.—33



filth and refuse therefrom, and the supply therein of pure water and of a sufficient number of latrines and urinals for the use of persons using or frequenting the same ;

(d) the manner in which animals shall be stalled at a slaughter-house ;

(e) the manner in which animals may be slaughtered ;

(f) the disposal or destruction of animals offered for slaughter which are, from disease or any other cause, unfit for human consumption ; and

(g) the destruction of carcasses which from disease or any other cause are found after slaughter to be unfit for human consumption.

### *Trades and Occupations.*

209. (1) A Board may provide suitable places for the exercise by washermen of their calling, and may require payment of such fees for the use thereof as it thinks fit.

Provision of washing places.

(2) Where the Board has provided such places as aforesaid it may, by public notice, prohibit the washing of clothes by washermen at any other place in the cantonments :

Provided that such prohibition shall not be deemed to apply to the washing by a washerman of his own clothes or of the clothes of any other person who is an occupier of the place at which they are washed.

(3) Whoever contravenes any prohibition contained in a notice issued under sub-section (2) shall be punishable with fine which may extend to twenty rupees.

Licences required for carrying on of certain occupations.

210. (1) No person of any of the following classes, namely :—

(a) butchers and vendors of poultry, game or fish ;

(b) persons keeping pigs for profit, and dealers in the flesh of pigs which have been slaughtered in India ;

(c) persons keeping milch cattle or milch goats for profit ;

(d) persons keeping for profit any animals other than pigs, milch cattle or milch goats ;

(e) dairymen, buttermen and makers and vendors of ghee ;

(f) makers of bread, biscuits or cake, and vendors of bread, biscuits or cake made in India ;

(g) vendors of fruit or vegetables ;

(h) manufacturers of aerated or other potable waters or of ice or ice-cream, and vendors of the same ;

<sup>1</sup>[(i) vendors of any medicines, drugs or articles of food or drink for human consumption (other than the flesh of pigs, milk, butter, bread, biscuits, cake, fruit, vegetables, aerated or other potable waters or ice or ice-cream) which are of a perishable nature ;

(j) vendors of water to be used for drinking purposes ;

(k) washermen ;

(l) dealers in hay, straw, wood, charcoal or other inflammable material ;

### LEG. REF.

<sup>1</sup> Old Cls. (j) to (r) of S. 210 have been re-numbered as (i) to (q) by Act XXIV of 1934.

### NOTES.

SEC. 210 (l).—A merchant who is selling bamboos, rafters, wooden boards and beams within the limits of the Cantonment without any licence is liable to prosecution under S. 268 of this Act for being a dealer in wood

within the meaning of S. 210 (l). 1934 All. 987 (1). On this section, *see also* 1933 Lah. 517. A person was served with a notice by the Cantonment Authority prohibiting him from selling fruit in his shop. The person represented to the authority that he had been carrying on business for a long time whereupon he was allowed to continue business. He then applied to the authority for a licence but did not pay the prescribed fee



(m) dealers in fire-works, kerosene oil, petroleum or any other inflammable oil or spirit;

(n) tanners and dyers;

(o) persons carrying on any trade or occupation from which offensive or unwholesome smells arise;

(p) vendors of wheat, rice and other grain or of flour; <sup>1</sup>[\*]

(q) makers and vendors of sugar or sweetmeats; <sup>2</sup>[and]

<sup>2</sup>[(r) barbers and keepers of shaving saloons;]

shall carry on his trade, calling or occupation in any part of a cantonment unless he has applied for and obtained a licence in this behalf from the Board.

(2) A licence granted under sub-section (1) shall be valid <sup>3</sup>[until the end of the year in which it is issued] and the grant of such licence shall not be withheld by the Board unless it has reason to believe that the business which it is intended to establish or maintain would be offensive or dangerous to the public.

(3) Notwithstanding anything contained in sub-section (1),—

(a) no person who was, at the commencement of this Act, carrying on his trade, calling or occupation in any part of a cantonment shall be bound to apply for a licence for carrying on such trade or occupation in that part until he has received from the Board not less than three months' notice in writing of his obligation to do so, and if the Board refuses to grant him a licence, it shall pay compensation for any loss, incurred by reason of such refusal;

(b) no person shall be required to take out a licence for the sale or storage of petroleum or for the sale or possession for sale of poisons or white arsenic in any case in which he is required to take out a licence for such sale, storage or possession for sale by or under the Indian Petroleum Act, 1899, or the Poisons Act, 1919.

(4) The Board may charge for the grant of licences under this section such fees <sup>4</sup>[not exceeding the cost of granting the licences], as it may fix with the previous sanction of the Central Government.

211. A licence granted to any person under section 210 shall specify the part of the cantonment in which the licensee may carry on his trade, calling or occupation, and may regulate the hours and manner of transport within the cantonment of any specified articles intended for human consumption, and may contain any other conditions which the Board thinks fit to impose in accordance with bye-laws made under this Act.

#### General Provisions.

212. If a Board is satisfied that any place used under a licence granted under this Chapter is a nuisance or is likely to be dangerous to life, health or property, the Board may, by notice in writing, require the owner, lessee or occupier thereof to discontinue the use of such place or to effect such alterations, additions, or improvements as will, in the opinion of the Board, render it no longer a nuisance or dangerous.

#### LEG. REF.

<sup>1</sup>Word 'and' omitted by Act XXIV of 1936.

<sup>2</sup>Inserted by Act XXIV of 1936.

<sup>3</sup>Substituted for "for one year" by Act XXIV of 1936.

<sup>4</sup>Inserted by Act XXIV of 1936.

#### NOTES.

and no licence was issued. He was tried summarily under Ss. 210 (1) (g) and 213 and

was convicted. *Held*, that the conviction could not be interfered with in revision as under the circumstances the person could not take advantage of S. 210 (3) owing to his own conduct in applying for licence and not taking it out subsequently. *Held, further*, that the case should not have been tried summarily as the question of compensation might have arisen under certain circumstances. 1938 Lah. 427=175 I.C. 544.



213. Whoever carries on any trade, calling or occupation for which a licence is required without obtaining a licence therefor or while the licence therefor is suspended or after the same has been cancelled, and whoever, after receiving a notice under section 212, uses or allows to be used any building or place in contravention thereof, shall be punishable with fine which may extend to two hundred rupees and, in the case of a continuing offence, with an additional fine which may extend to forty rupees for every day after the first during which the offence is continued.

214. Whoever feeds or allows to be fed on filthy or deleterious substances any animal, which is kept for the purpose of supplying milk to, or which is intended to be used as food for, the inhabitants of a cantonment or allows it to graze in any place in which grazing has, for sanitary reasons, been prohibited by public notice by the Board, shall be punishable with fine which may extend to fifty rupees.

*Entry, Inspection and Seizure.*

215. (1) The President or the Vice-President <sup>1</sup>[ \* \* ] the Executive Officer, the Health Officer, the Assistant Health Officer, or any other officer or servant of a Board authorised by it in writing in this behalf,—

(a) may at any time enter into any market, building, shop, stall or other place in the cantonment for the purpose of inspecting, and may inspect, any animals, article or thing intended for human food or drink or for medicine, whether exposed or hawked about for sale or deposited in or brought to any place for the purpose of sale, or of preparation for sale, or any utensil or vessel for preparing, manufacturing or containing any such article, or thing, and may enter into and inspect any place used as a slaughter-house and may examine any animal or article therein;

(b) may seize any such animal, article or thing which appears to him to be diseased, or unwholesome or unfit for human food or drink or medicine, as the case may be, or to be adulterated or to be not what it is represented to be, or any such utensil or vessel which is of such a kind or in such a state as to render any article prepared, manufactured or contained therein unwholesome or unfit for human food or for medicine, as the case may be.

(2) Any article seized under sub-section (1) which is of a perishable nature may, under the orders of the Health Officer or the Assistant Health Officer, forthwith be destroyed if, in his opinion, it is diseased, unwholesome or unfit for human food, drink or medicine, as the case may be.

(3) Every animal, article, utensil, vessel or other thing seized under sub-section (1) shall, if it is not destroyed under sub-section (2), be taken before a Magistrate.

(4) The owner or person in possession, at the time of seizure under sub-section (1), of any animal or carcass which is diseased or of any article or thing which is unwholesome or unfit for human food, drink or medicine, as the case may be, or is adulterated or is not what it is represented to be, or of any utensil or vessel which is of such kind or in such state as is described in clause (b) of sub-section (1), shall be punishable with fine which may extend to one hundred rupees, and the animal, article, utensil, vessel or other thing shall be liable to be

LEG. REF.

<sup>1</sup> Words 'of a Board' omitted by Act XXIV of 1936.

NOTES.

SECS. 213 AND 216.—Where a butcher, having no licence as required by Ss. 213 and 216 of the Act, imports meat in far larger quantities

than would be required for his personal use and distributes it, but there is no evidence to show that he actually received any money, it could be presumed that he actually imported and sold meat. 118 I.C. 223=30 Cr.L.J. 906=1929 Sind 150.



forfeited to the Board or to be destroyed or to be so disposed of as to prevent its being exposed for sale or used for the preparation of food, drink or medicine, as the case may be.

*Explanation I.*—If any such article, having been exposed or stored in, or brought to, any place mentioned in sub-section (1) for sale as ghee, contains any substance not exclusively derived from milk, it shall be deemed, for the purposes of this section, to be an article which is not what it is represented to be.

*Explanation II.*—Meat subjected to the process of blowing shall be deemed to be unfit for human food.

*Explanation III.*—The article of food or drink shall not be deemed to be other than what it is represented to be merely by reason of the fact that there has been added to it some substance not injurious to health:

Provided that—

(a) such substance has been added to the article because the same is required for the preparation or production thereof as an article of commerce in a state fit for carriage or consumption and not fraudulently to increase the bulk, weight or measure of the food or drink or conceal the inferior quality thereof, or

(b) in the process of production, preparation or conveyance of such article of food or drink, the extraneous substance has unavoidably become inter-mixed therewith, or

(c) the owner or person in possession of the article has given sufficient notice by means of a label distinctly and legibly written or printed thereon or therewith, or by other means of a public description, that such substance has been added, or

(d) such owner or person has purchased the article with a written warranty that it was of a certain nature, substance and quality and had no reason to believe that it was not of such nature, substance and quality, and has exposed it or hawked it about or brought it for sale in the same state and by the same description as that in and by which he purchased it.

*Import of Cattle and Flesh.*

216. (1) No person shall, without the permission in writing of the Board  
Import of cattle and flesh. bring into a cantonment any animal intended for human consumption, or the flesh of any animal slaughtered outside the cantonment otherwise than in a slaughter-house maintained by the Government or the Board.

(2) Any animal or flesh brought into a cantonment in contravention of sub-section (1) may be seized by the Executive Officer or by any servant of the Board and sold or otherwise disposed of as the Board may direct, and, if it is sold, the sale proceeds may be credited to the cantonment fund.

(3) Whoever contravenes the provisions of sub-section (1) shall be punishable with fine which may extend to fifty rupees.

(4) Nothing in this section shall be deemed to apply to cured or preserved meat or to animals driven or meat carried through a cantonment for consumption outside thereof, or to meat brought into a cantonment by any person for his immediate domestic consumption:

Provided that the Board may, by public notice, direct that the provisions of this section shall apply to cured or preserved meat of any specified description or brought from any specified place.

NOTES.

SEC. 216.—See Notes under S. 213, *supra*.



## CHAPTER XIII.

## WATER-SUPPLY, DRAINAGE AND LIGHTING.

*Water-supply.*

217. (1) In every cantonment where a sufficient supply of pure water for domestic use does not already exist, the Board shall provide or arrange for the provision of such a supply.

Maintenance of water-supply.

(2) The Board shall, as far as possible, make adequate provision that such supply shall be continuous throughout the year, and that the water shall be at all times pure and fit for human consumption.

218. (1) The Board may, with the previous sanction of the Central Government, by public notice, declare any lake, stream, spring, well, tank, reservoir or other source, whether within or without the limits of the cantonment (other than a source of water-supply under the control of the <sup>1</sup>[Military Engineer] Services or the Public Works Department) from which water is or may be made available for the use of the public in the cantonment to be a source of public water-supply.

Control over sources of public water-supply.

(2) Every such source shall be under the control of the Board.

219. The Board may, by notice in writing, require the owner or any person having the control of any source of public water-supply which is used for drinking purposes—

Power to require maintenance or closing of private source of public drinking water-supply.

(a) to keep the same in good order and to clear it from time to time of silt, refuse and decaying vegetation, or

(b) to protect the same from contamination in such manner as the Board may direct, or

(c) if the water therein is proved to the satisfaction of the Board to be unfit for drinking purposes, to take such measures as may be specified in the notice to prevent the public from having access to or using such water:

Provided that, in the case of a well, such person as aforesaid may, instead of complying with the notice, signify in writing his desire to be relieved of all responsibility for the proper maintenance of the well and his readiness to place it under the control and supervision of the Board for the use of the public, and, if he does so, he shall not be bound to carry out the requisition, and the Board shall undertake the control and supervision of the well.

220. (1) The Board may permit the owner, lessee or occupier of any building or land to connect the building or land with a source of public water-supply by means of communication pipes of such size and description as it may prescribe for the purpose of obtaining water for domestic use.

Supply of water.

(2) The occupier of every building so connected with the water-supply shall be entitled to have for domestic use, in return for the water tax, if any, such quantity of water as the Board may determine.

(3) All water supplied in excess of the quantity to which such supply is limited under sub-section (2) and, in a cantonment in which a water tax is not imposed, all water supplied under this section, shall be paid for at such rate as the Board may fix.

(4) The supply of water for domestic use shall not be deemed to include any supply—



- (a) for animals or for washing vehicles where such animals or vehicles are kept for sale or hire ;
- (b) for any trade, manufacture or business ;
- (c) for fountains, swimming baths or any ornamental or mechanical purpose ;
- (d) for gardens or for purposes of irrigation ;
- (e) for making or watering roads or paths ; or
- (f) for building purposes.

221. If it appears to the Board that any building or land in the cantonment is without a proper supply of pure water, the Board may, by notice in writing, require the owner, lessee or occupier of the building or land and to obtain from a source of public water-supply such quantity of water as is adequate to the requirements of the persons usually occupying or employed upon the building or land, and to provide communication pipes of the prescribed size and description, and to take all necessary steps for the above purposes.

222. (1) The Board may, by agreement, supply, from any source of public water-supply, the owner, lessee or occupier of any building or land in the cantonment with any water for any purpose, other than a domestic purpose, on such terms and conditions, consistent with this Act and the rules and bye-laws made thereunder, as may be agreed upon between the Board and such owner, lessee or occupier.

(2) The Board may withdraw such supply or curtail the quantity thereof at any time if it should appear necessary to do so for the purpose of maintaining sufficient supply of water for domestic use by inhabitants of the cantonment.

223. Notwithstanding any obligation imposed on Boards under this Act, a Board shall not be liable to any forfeiture, penalty or damages for failure to supply water or for curtailing the quantity thereof if the failure or curtailment, as the case may be, arises from accident or from drought or other unavoidable cause unless, in the case of an agreement for the supply of water under section 222, the Board has made express provision for forfeiture, penalty or damages in the event of such failure or curtailment.

224. Notwithstanding anything hereinbefore contained or contained in any agreement under section 222, the supply of water by a Board to any building or land shall be, and shall be deemed to have been, granted subject to the following conditions, namely :—

(a) the owner, lessee or occupier of any building or land in or on which water supplied by the Board is wasted by reason of the pipes, drains or other works being out of repair shall, if he has knowledge thereof, give notice of the same to such officer as the Board may appoint in this behalf ;

(b) the Executive Officer or any other officer or servant of the Board authorized by it in writing in this behalf may enter into or on any premises supplied with water by the Board, for the purpose of examining all pipes, taps, works and fittings connected with the supply of water and of ascertaining whether there is any waste or misuse of such water ;

(c) the Board may, after giving notice in writing, cut off the connection between any source of public water-supply and any building or land to which water is supplied for any purpose therefrom, or turn off such supply if—

(i) the owner or occupier of the building or land neglects to pay the water tax or other charges connected with the water-supply within one month from the date on which such tax or charge falls due for payment ;



(ii) the occupier refuses to admit the Executive Officer or other authorised officer or servant of the Board into the building or land for the purpose of making any examination or inquiry authorised by clause (b) or prevents the making of such examination or inquiry;

(iii) the occupier wilfully or negligently misuses or causes waste of water;

(iv) the occupier wilfully or negligently injures or damages his meter or any pipe or tap conveying water from the water-works;

(v) any pipes, taps, works or fittings connected with the supply of water to the building or land are found, on examination by the Executive Officer, to be out of repair to such an extent as to cause a waste of water;

(d) the expense of cutting off the connection or of turning off the water in any case referred to in clause (c) shall be paid by the owner or occupier of the building or land;

(e) no action taken under or in pursuance of clause (c) shall relieve any person from any penalty or liability which he may otherwise have incurred.

225. A Board may allow any person not residing within the limits of the

Supply to persons outside  
cantonment.

cantonment to take or be supplied with water for any purpose from any source of public water-supply on such terms as it may prescribe, and may at any time

withdraw or curtail such supply.

Penalty.

226. Whoever—

(a) uses for other than domestic purposes any water supplied by a Board for domestic use, or

(b) where water is supplied by agreement with a Board for a specified purpose, uses that water for any other purpose, shall be punishable with fine which may extend to fifty rupees, and the Board shall be entitled to recover from him the price of the water misused.

#### *Water, Drainage and other Connections.*

Power of Board to lay  
wires, connections, etc.

227. A Board may carry any cable, wire, pipe, drain, sewer or channel of any kind,—

(a) for the purpose of carrying out, establishing or maintaining any system of water-supply, lighting, drainage or sewerage, through, across, under or over any road or street, or any place laid out or intended as a road or street, or, after giving reasonable notice in writing to the owner or occupier, into, through, across, under or over any land or building, or up the side of any building, situated within the cantonment, or

(b) for the purpose of supplying water or of the introduction or distribution of outfall of water or for the removal or outfall of sewage, after giving reasonable notice in writing to the owner or occupier, into, through, across, under or over any land or building, or up the side of any building, situated outside the cantonment;

and may at all times do all acts and things which may be necessary or expedient for repairing or maintaining any such cable, wire, pipe, drain, sewer or channel in an effective state for the purpose for which the same may be used or is intended to be used:

Provided that no nuisance shall be caused in excess of what is reasonably necessary for the proper execution of the work:

Provided, further, that compensation shall be payable to the owner or occupier for any damage sustained by him which is directly occasioned by the carrying out of any such operation.

228. In the event of any cable, wire, pipe, drain, sewer or channel being

Wires, etc., laid above  
surface of ground.

laid or carried above the surface of any land or through, over or up the side of any building, such cable, wire, pipe, drain, sewer or channel shall be so laid or



carried as to interfere as little as possible with the rights of the owner or occupier to the due enjoyment of such land or building, and compensation shall be payable by the Board in respect of any substantial interference with the right to any such enjoyment.

229. No person shall, for any purpose whatsoever, without the permission of the Board, at any time make or cause to be made any connection or communication with any cable, wire, pipe, drain, sewer or channel constructed or maintained by, or vested in, a Board.

Connection with main not to be made without permission.

230. A Board may prescribe the size of the ferrules to be used for the supply of gas, if any, and may establish meters or other appliances for the purpose of testing the quantity of any water, or the quantity or quality of any gas, supplied to any premises by the Board.

Power to prescribe ferrules and to establish meters, etc.

231. The ferrules, communication pipes, connections, meters, stand-pipes and all fittings thereon or connected therewith leading from water mains or from pipes, drains, sewers or channels, into any house or land, to which water or gas is supplied by a Board, and the pipes, fittings and works inside any such house or within the limits of any such land, shall in all cases be <sup>1</sup>[installed or] executed subject to the inspection and to the satisfaction of the Board.

Power of inspection.

232. A Board may fix the charges to be made for the establishment by them or through their agency of communications from, and connections with, mains, or pipes for the supply of water, or gas, or for meters or other appliances for testing the quantity or quality thereof supplied, and may levy such charges accordingly.

Power to fix rates and charges.

*Application of this Chapter to Government Water-supplies.*

233. (1) Where in any cantonment there is a water-supply under the control of the [Military Engineer]<sup>2</sup> Services or the Government water-supply. Public Works Department, the officer of the <sup>2</sup>[Military Engineer] Services or of the Public Works Department, as the case may be, in charge of such water-supply (hereinafter in this <sup>3</sup>[Chapter] referred to as the officer) may publish in the cantonment in such manner as he thinks fit a notice declaring that any lake, stream, spring, well, tank, reservoir or other source, whether within or without the limits of the cantonment (other than a source of public water-supply) under the control of the Board is a source of public water-supply and may, for the purpose of keeping any such source in good order or of protecting it from contamination or from use, require the Board to exercise any power conferred upon <sup>4</sup>[it] by section 219.

(2) In the case of any water-supply such as is referred to in sub-section (1), the following provisions of this Chapter, namely, the provisions of sections 220, 222, 223, 224, 226, 227, 228, 229, 230, 231 and 232 shall, as far as may be, be applicable in respect of the supply of water to the cantonment, and for the purpose of such application references to the Board shall be construed as references to the Officer, and references to the Executive Officer or other officer or servant of the Board shall be construed as references to such person as may be authorised in this behalf by the Officer.

234. In any case in which the provisions of section 233 apply <sup>5</sup>[and in which the Board is not receiving a bulk supply of water under S. 234-A], the water-tax, if any, imposed

Recovery of charges.

LEG. REF.

<sup>1</sup> Inserted by Act VIII of 1930.

<sup>2</sup> Substituted by Act VII of 1925.

<sup>3</sup> Substituted for words 'section and in C. C. M.—34

section 234' by Act XXIV of 1936.

<sup>4</sup> Substituted by Act XXXIV of 1939.

<sup>5</sup> Inserted by Act XXIV of 1936.



in the cantonment and all other charges arising out of the supply of water which may be imposed under the provisions of this Chapter as applied by section 233 shall be recovered by the Board, and all monies so recovered, or such proportion thereof as the Central Government may in each case determine, shall be paid by the Board to the Officer.

<sup>1</sup>[234-A. (1) Where in any cantonment there is a water-supply such as is referred to in sub-section (1) of S. 233, the Board may receive from the Military Engineer Services or the Public Works Department, as the case may be, at such point or points as may be agreed upon between the Board and the Officer, a supply of water adequate to the requirements for domestic use of all persons in the cantonment other than entitled consumers.

(2) Any supply of water received under sub-section (1) shall be bulk supply, and the Board shall make such payments to the Officer for all water so received as may be agreed upon between the Board and the Officer, or, in default of such agreement, as may be determined by the Central Government to be reasonable having regard to the actual cost of supplying the water in the cantonment and the rate charged for water in any adjacent municipality:

Provided that, notwithstanding anything contained in this Act, the Board shall not charge for the supply to persons in the cantonment of water received by the Board under this section a rate calculated to produce more than the sum of the payments made to the Officer for water received and the actual cost of the supply thereof by the Board to consumers.

(3) If any dispute arises between the Board and the Officer regarding the amount of water adequate to the requirements of persons in the cantonment other than entitled consumers, the dispute shall be referred to the Central Government whose decision shall be final.]

<sup>1</sup>[234-B. Where under the provisions of sub-section (1) of S. 234-A a bulk supply of water is received by the Board, the Board shall be solely responsible for the supply of water to all persons in the cantonment other than entitled consumers; and the provisions of this Act shall apply as if such bulk supply were a source of public water-supply under the control of the Board and as if the communications from and connections with such bulk supply for the purpose of supplying water to such persons were a system of water-supply established and maintained by the Board.]

## CHAPTER XIV.

### REMOVAL AND EXCLUSION FROM CANTONMENTS AND SUPPRESSION OF SEXUAL IMMORALITY.

235. The <sup>2</sup>[Officer Commanding the station] may, on receiving information that any building in the cantonment is used as a brothel or for purposes of prostitution, by order in writing setting forth the substance of the information received, summon the owner, lessee, tenant or occupier of the building to appear before him either in person or by an authorised agent, and, if the <sup>3</sup>[Officer Commanding the station], is then satisfied as to the truth of the information, he may, by order in writing, direct the owner, lessee, tenant or occupier, as the case may be, to discontinue such use of the building within such period as may be specified in the order.

#### LEG. REF.

<sup>1</sup> Ss. 234-A and 234-B inserted by Act XXIV of 1936.

<sup>2</sup> These words were substituted by S.10 of

the Cantonments (Amendment) Act, 1925, (VII of 1925).

<sup>3</sup> Substituted by S. 14, *ibid.*



236. (1) Whoever in a cantonment loiters for the purpose of prostitution or importunes any person to the commission of sexual immorality, shall be punishable with imprisonment which may extend to one month, or with fine which may extend to two hundred rupees.

Penalty for loitering and importuning for purpose of prostitution.

(2) No prosecution for an offence under this section shall be instituted except on the complaint of the person importuned, or of a military officer in whose presence the offence was committed, or of a member of the Military or Air Force Police, being employed in the cantonment and authorised in this behalf by the <sup>1</sup>[Officer Commanding the station], in whose presence the offence was committed, or of a police officer not below the rank of a sub-inspector <sup>2</sup>[or a sergeant] who is employed in the cantonment and authorised in this behalf by the <sup>1</sup>[Officer Commanding the station] <sup>2</sup>[with the concurrence of the District Magistrate].

237. If the <sup>3</sup>[Officer Commanding the station] is, after such inquiry as he thinks necessary, satisfied that any person residing in or frequenting the cantonment is a prostitute or has been convicted of an offence under section 236, or of the abatement of such an offence, he may cause to be served on such person an order in writing requiring such person to remove from the cantonment within such time as may be specified in the order and prohibiting such person from re-entering it without the permission in writing of the <sup>1</sup>[Officer Commanding the station].

Removal of lewd persons from cantonment.

Removal and exclusion from cantonments of disorderly persons.

238. (1) A Magistrate of the first class, having jurisdiction in a cantonment, on receiving information that any person residing in or frequenting the cantonment—

(a) is a disorderly person who has been convicted more than once of gaming or who keeps or frequents a common gaming house, a disorderly drinking shop or a disorderly house of any other description, or

(b) has been convicted more than once, either within the cantonment or elsewhere, of an offence punishable under Chapter XVII of the Indian Penal Code, or

#### LEG. REF.

<sup>1</sup> These words were substituted by S. 14, of Act VII of 1925.

<sup>2</sup> In sub-S. (2) of S. 236, after the word "sub-inspector" the words "or a sergeant" have been inserted and after the words "officer commanding the station" where they occur the second time, the words "with the concurrence of the District Magistrate" have been added by Act VII of 1931.

<sup>3</sup> Substituted by Act VII of 1925.

#### NOTES.

SEC. 236 (1).—There is nothing in the wording of S. 236 (1) which requires that the person importuning must importune to the commission of sexual immorality with himself or herself. 37 Cr.L.J. 372=1936 A. L.J. 193=1936 All. 129. A Magistrate can convict a male of the offence of loitering for the purpose of prostitution under S. 236(1). 28 Bom.L.R. 298=27 Cr.L.J. 554=1926 Bom. 227.

SEC. 236 (2): PROSECUTION BY EXECUTIVE OFFICER.—LEGALITY OF.—In order that a person can be legally convicted under S. 236, it is necessary that it should be instituted

strictly in accordance with the provisions laid down in sub-S. (2), S.236. An Executive Officer of a Cantonment launched a prosecution under S. 236 against the accused and the accused was convicted under that section. The Executive Officer was not the person importuned, nor did the prosecution allege that the offence was committed in his presence or that he had been authorized in this behalf by the Officer Commanding the station. *Held*, that the prosecution being illegally instituted, the conviction of the accused must be set aside. 1933 Lah. 590=147 I.C. 1200. A complaint under S. 236 was sent in writing by a Regimental Provost Sergeant to a Sub-Inspector of Police who forwarded it in original to the Magistrate. The Magistrate acted upon the complaint. The Regimental Provost Sergeant was a member of the military police and was authorised to make complaints under S. 236. A part of the offence was committed in presence of this officer. *Held*, that a proper complaint was made to the Magistrate in accordance with the provisions of S. 236 (2). 37 Cr.L.J. 372=1936 A. 129 cited *supra*.



(c) has been convicted, either within the cantonment or elsewhere, of any offence punishable under section 156 of the Army Act, or

(d) has been ordered under Chapter VIII of the Code of Criminal Procedure, 1898, either within the cantonment or elsewhere, to execute a bond for his good behaviour,

may record in writing the substance of the information received, and may issue a summons to such person requiring such person to appear and show cause why he should not be required to remove from the cantonment and be prohibited from re-entering it.

(2) Every summons issued under sub-section (1) shall be accompanied by a copy of the record aforesaid, and the copy shall be served along with the summons on the person against whom the summons is issued.

(3) The Magistrate shall, when the person so summoned appears before him, proceed to inquire into the truth of the information received and take such further evidence as he thinks fit, and if, upon such inquiry, it appears to him that such person is a person of any kind described in sub-section (1) and that it is necessary for the maintenance of good order in the cantonment that such person should be required to remove therefrom and be prohibited from re-entering the cantonment, the Magistrate shall report the matter to the <sup>1</sup>[Officer Commanding the station], and, if the <sup>1</sup>[Officer Commanding the station] so directs, shall cause to be served on such person an order in writing requiring him to remove from the cantonment within such time as may be specified in the order and prohibiting him from re-entering it without the permission in writing of the <sup>1</sup>[Officer Commanding the station].

239. (1) If any person in a cantonment causes or attempts to cause or does any act which he knows is likely to cause dis-loyalty, disaffection or breaches of discipline amongst any portion of His Majesty's forces or is a person who, the <sup>1</sup>[Officer Commanding the station] has reason to believe, is likely to do any such act, the <sup>1</sup>[Officer Commanding the station] may make an order in writing setting forth with the reasons for the making of the same and requiring such person to remove from the cantonment within such time as may be specified in the order and prohibiting him from re-entering it without the permission in writing of the <sup>1</sup>[Officer Commanding the station]:

Removal and exclusion from cantonment of seditious persons.

Provided that no order shall be made under this section against any person unless he has had a reasonable opportunity of being informed of the grounds on which it is proposed to make the order and of showing cause why the order should not be made.

(2) Every order made under sub-section (1) shall be sent to the Superintendent of Police of the district, who shall cause a copy thereof to be served on the person concerned.

(3) Upon the making of any order under sub-section (1), the <sup>1</sup>[Officer Commanding the station] shall forthwith send a copy of the same to the Central Government.

(4) The Central Government may, of its own motion, and shall, on application made to it in this behalf within one month of the date of the order by the person against whom the order has been made, call upon the District Magistrate to make, after such inquiry as the Central Government may prescribe, a report regarding the justice of the order and the necessity therefor. At every such inquiry the person against whom the order has been made shall be given an opportunity of being heard in his own defence.

(5) The Central Government may, at any time after the receipt of a copy of an order sent under sub-section (3) or, where a report has been called



for under sub-section (4), on receipt of that report, if it is of opinion that the order should be varied or rescinded, <sup>1</sup>[make] such orders thereon as <sup>2</sup>[it] thinks fit.

(6) Any person who has been excluded from a cantonment by an order made under this section may, at any time after the expiry of one month from the date thereof, apply to the Officer Commanding-in-Chief, the Command, for the rescission of the same and, on such application being made, the said Officer may, after making such inquiry, if any, as he thinks necessary, either reject the application or rescind the order.

Penalty.

240. Whoever—

(a) fails to comply with an order issued under this Chapter within the period specified therein, or, whilst an order prohibiting him from re-entering a cantonment without permission is in force, re-enters the cantonment without such permission, or

(b) knowing that any person has, under this Chapter, been required to remove from the cantonment and has not obtained the requisite permission to re-enter it, harbours or conceals such person in the cantonment, shall be punishable with fine which may extend to two hundred rupees, and, in the case of continuing offence with an additional fine which may extend to twenty rupees for every day after the first during which he has persisted in the offence.

## CHAPTER XV.

### POWERS, PROCEDURE, PENALTIES AND APPEALS.

#### *Entry and Inspection.*

241. It shall be lawful for the President or the Vice-President of a Board, or the Executive Officer, or the Health Officer or Assistant Health Officer or any person specially authorised by the Health Officer or the Assistant Health Officer, or for any other person authorised by general or special order of a Board in this behalf, to enter into or upon any building or land with or without assistants or workmen in order to make any inquiry inspection, measurement, valuation or survey, or to execute any work, which is authorised by or under this Act or which it is necessary to make or execute for any of the purposes or in pursuance of any of the provisions of this Act or of any rule, bye-law or order made thereunder:

Provided that nothing in this section shall be deemed to confer upon any person any power such as is referred to in section 207 or section 215 or to authorise the conferment upon any person of any such power.

242. With the previous sanction of the President, any member of a Board may inspect any work or institution constructed or maintained in whole or part, at the expense of the Board, and any register, book, accounts or other document belonging to, or in the possession of, the Board.

243. (1) A Board may, by general or special order, authorise any person—

(a) to inspect any drain, privy, latrine, urinal, cesspool, pipe, sewer or channel in or on any building or land in the cantonment, and, in his discretion, to cause the ground to be opened for the purpose of preventing or removing any nuisance arising from the drain, privy, latrine, urinal, cesspool, pipe, sewer or channel, as the case may be;

LEG. REF.

<sup>1</sup> Substituted for words "refer the case to the Governor-General in Council, who shall

pass" by A.O., 1937.

<sup>2</sup> Substituted for word 'he' by A.O., 1937.



(b) to examine works under construction in the cantonment, to take levels or to remove, test, examine, replace or read any meter.

(2) If, on such inspection, the opening of the ground is found to be necessary for the prevention or removal of a nuisance, the expenses thereby incurred shall be paid by the owner or occupier of the land or building, but if it is found that no nuisance exists or but for such opening would have arisen, the ground or portion of any building, drain or other work opened, injured or removed for the purpose of such inspection shall be filled in, reinstated, or made good, as the case may be, by the Board.

244. (1) The Executive Officer of a cantonment may, with or without assistants or workmen, enter on any land within fifty yards of any work authorised by or under this Act for the purpose of depositing thereon any soil, gravel, stone or other materials, or of obtaining access to such work, or for any other purpose connected with the carrying on of the same.

Power to enter land adjoining land where work is in progress.

(2) The Executive Officer shall, before entering on any land under subsection (1), give the occupier, or, if there is no occupier, the owner not less than three days' previous notice in writing of his intention to make such entry, and shall state the purpose thereof, and shall, if so required by the occupier or owner, fence off so much of the land as may be required for such purpose.

(3) The Executive Officer shall, in exercising any power conferred by this section, do as little damage as may be, and compensation shall be payable, by the Board to the owner or occupier of such land, or to both for any such damage whether permanent or temporary.

245. It shall be lawful for any person, authorised by or under this Act to make any entry into any place, to open or cause to be opened any door, gate or other barrier—

Breaking into premises.

(a) if he considers the opening thereof necessary for the purpose of such entry; and

(b) if the owner or occupier is absent, or being present refuses to open such door, gate or barrier,

246. Save as otherwise expressly provided in this Act, no entry authorised by or under this Act shall be made except between the hours of sunrise and sunset.

Entry to be made in the day time.

247. Save as otherwise expressly provided in this Act, no building or land shall be entered without the consent of the occupier, or if there is no occupier, of the owner thereof, and no such entry shall be made without giving the said occupier or owner, as the case may be, not less than four hours' written notice of the intention to make such entry:

Owner's consent ordinarily to be obtained.

Provided that no such notice shall be necessary if the place to be inspected is a stable for horses or a shed for cattle, or a latrine, privy or urinal or a work under construction.

248. When any place used as a human dwelling is entered under this Act, due regard shall be paid to the social and religious customs and usages of the occupants of the place entered, and no apartment in the actual occupancy of a female shall be entered or broken open until she has been informed that she is at liberty to withdraw and every reasonable facility has been afforded to her for withdrawing.

Regard to be had to social and religious usages.

#### NOTES.

SEC. 247.—The entry which is contemplated in S. 247 is one without the consent of the occupier or the owner. Where the

entry is with the implied consent of such occupier or owner, no question of written notice arises. 153 I.C. 469=36 Cr.L.J. 356=1935 All. 160.



249. Whoever obstructs or molests any person employed by a Board who is not a public servant within the meaning of section 21 of the Indian Penal Code or any person with whom the Board has lawfully contracted, in the execution of his duty or of anything which he is empowered or required to do by virtue or in consequence of any of the provisions of this Act or of any rule, bye-law or order made thereunder, or in fulfilment of his contract, as the case may be, shall be punishable with fine which may extend to one hundred rupees.

*Powers and Duties of Police Officers.*

250. Any member of the police force employed in a cantonment may, without a warrant, arrest any person committing in his view a breach of any of the provisions of this Act which are specified in Schedule IV:

Provided that—

(a) in the case of the breach of any such provision as is specified in Part B of Schedule IV, no person shall be so arrested who consents to give his name and address, unless there is reasonable ground for doubting the accuracy of the name or address so given, the burden of proof of which shall lie on the arresting officer, and no person so arrested shall be detained after his name and address have been ascertained; and

(b) no person shall be so arrested for an offence under section 236 except—

(i) at the request of the person importuned or of a military officer in whose presence the offence was committed; or

(ii) by or at the request of a member of the Military or Air Force Police, who is employed in the cantonment and authorised in this behalf by the <sup>1</sup>[Officer Commanding the station], and in whose presence the offence was committed or by or at the request of any police officer not below the rank of a Sub-Inspector who is employed in the cantonment and authorised in this behalf by the <sup>1</sup>[Officer Commanding the station].

251. It shall be the duty of all police officers to give immediate information to the Board of the commission of any offence against the provisions of this Act or of any rule or bye-law made thereunder, and to assist all cantonment officers and servants in the exercise of their lawful authority.

*Notices.*

252. Where any notice, order or requisition made under this Act or any rule or bye-law made thereunder requires anything to be done for the doing of which no time is fixed in this Act or in the rule or bye-law, the notice, order or requisition shall specify a reasonable time for doing the same.

Authentication and validity of notices issued by Board.

253. Every notice, order or requisition issued by a Board under this Act or any rule or bye-law made thereunder shall be signed—

(a) <sup>2</sup>[\* \* \*] either by the President of the Board or by the Executive Officer, <sup>3</sup>[\* \* \*]; or

LEG. REF.

<sup>1</sup> Substituted by Act VII<sup>o</sup> of 1925.

<sup>2</sup> Words 'where there is a Board' omitted by Act XXIV of 1936.

<sup>3</sup> Words 'or, where there is no Board, etc.' omitted by *ibid.*

NOTES.

SEC. 249: OBSTRUCTION—REFUSAL TO PAY RENT.—Where a tenant, who is liable to pay

rent to a contractor of the Cantonment Committee who has been duly authorized to collect rent from him, refuses to pay rent either to him or to his servant, the mere refusal to pay rent does not amount to an obstruction within the purview of S. 249. Therefore an action for malicious prosecution lies against the complainant. 188 I.C. 282=1932 All. 386.



(b) by the members of any committee especially authorised by the Board in this behalf.

254. (1) Every notice, order or requisition issued under this Act or any rule or bye-law made thereunder shall, save as otherwise expressly provided, be served or presented—  
 Service of notice, etc.

(a) by giving or tendering the notice, order or requisition, or sending it by post, to the person for whom it is intended; or

(b) if such person cannot be found, by affixing the notice, order or requisition on some conspicuous part of his last known place of abode or business, if within the cantonment, or by giving or tendering the notice, order or requisition to some adult male member or servant of his family, or by causing it to be affixed on some conspicuous part of the building or land, if any, to which it relates.

(2) When any such notice, order or requisition is required or permitted to be served upon an owner, lessee or occupier of any building or land, it shall not be necessary to name the owner, lessee or occupier therein, and the service thereof shall, save as otherwise expressly provided, be effected either—

(a) by giving or tendering the notice, order or requisition, or sending it by post, to the owner, lessee or occupier, or, if there are more owners, lessees or occupiers than one, [on any one of them]<sup>1</sup>, or

(b) if no such owner, lessee or occupier can be found, by giving or tendering the notice, order or requisition to the authorised agent, if any, of any such owner, lessee or occupier or to an adult male member or servant of the family of any such owner, lessee or occupier, or by causing it to be affixed on some conspicuous part of the building or land to which it relates.

(3) When the person on whom a notice, order or requisition is to be served is a minor, service upon his guardian or upon an adult male member or servant of his family shall be deemed to be service upon the minor.

255. Every notice which, by or under this Act, is to be given or served as a public notice or as a notice which is not required to be given to any individual therein specified shall, save as otherwise expressly provided, be deemed to have been sufficiently given or served if a copy thereof is affixed in such conspicuous part of the office of the Board, or in such other public place, during such period or is published in such local newspaper or in such other manner, as the Board may direct.  
 Method of giving notice.

256. In the event of non-compliance with the terms of any notice, order or requisition issued to any person under this Act, or any rule or bye-law made thereunder, requiring such person to execute any work or to do any act, it shall be lawful for the Board whether or not the person in default is liable to punishment for such default or has been prosecuted or sentenced to any punishment therefor, after giving notice in writing to such person, to take such action or such steps as may be necessary for the completion of the act or work required to be done or executed by him and all the expenses incurred on such account shall be recoverable by the Board.  
 Powers of Board in case of non-compliance with notice, etc.

#### *Recovery of Money.*

257. (1) If any such notice as is referred to in section 256 has been given to any person in respect of property of which he is the owner, the Board may require any occupier of such property or of any part thereof to pay to it, instead of to the owner, any rent payable by him in respect of such property, as it falls due, up to the amount recoverable from the owner under section 256:  
 Liability of occupier to pay in default of owner.



Provided that, if the occupier, on application made to him by the Board, refuses truly to disclose the amount of his rent or the name or address of the person to whom it is payable, the Board may recover from the occupier the whole amount recoverable under section 256.

(2) Any amount recovered from an occupier instead of from an owner under sub-section (1) shall, in the absence of any contract between the owner and the occupier to the contrary, be deemed to have been paid to the owner.

258. (1) Where any person, by reason of his receiving the rent of immovable property as an agent or trustee, or of his being as an agent or trustee the person who would receive the rent if the property were let to a tenant, would under this Act be bound to discharge any obligation imposed on the owner of the property for the discharge of which money is required, he shall not be bound to discharge the obligation unless he has, or but for his own improper act or default might have had, funds in his hands belonging to the owner sufficient for the purpose.

(2) The burden of proving any fact entitling an agent or trustee to relief under sub-section (1) shall lie upon him.

(3) Where any agent or trustee has claimed and established his right to relief under this section, the Board may, by notice in writing, require him, to apply to the discharge of such obligation as aforesaid the first monies which may come to his hands on behalf, or for the use, of the owner, and, on failure to comply with the notice, he shall be deemed to be personally liable to discharge the obligation.

<sup>1</sup>[259. (1) Notwithstanding anything elsewhere contained in this Act, arrears of any tax and any other money recoverable by a Board under this Act may be recovered together with the cost of recovery either by suit or, on application to a Magistrate having jurisdiction in the cantonment or in any place where the person from whom such tax or money is recoverable may for the time being be residing, by the distress and sale of any movable property of, or standing timber, growing crops or grass belonging to, such person which is within the limits of such Magistrate's jurisdiction, and shall, if payable by the owner of any property as such, be a charge on the property until paid:

Provided that the tools of artisans shall be exempt from such distress or sale.

(2) An application to a Magistrate under sub-section (1) shall be in writing and shall be signed by the President or Vice-President of the Board or by the Executive Officer, but shall not require to be personally presented].

#### LEG. REF.

<sup>1</sup> S. 259 substituted for old section by Act XXIV of 1936.

#### NOTES.

SEC. 259.—The expression "*recoverable by the Cantonment Authority under the Act*" does not include the case of money due under ordinary contract between that authority and others. It merely applies to such dues as are recoverable by the Cantonment Authority under the express provisions of certain sections of this Act which entitle it to levy fees for permitting certain acts to be done. Where therefore the Cantonment Authority proceeds to recover arrears of rent due from a tenant by distress and sale of his immovable property its action is illegal and makes the Authority liable to pay damages to the tenant for its illegal action. 150 I.C. 682=1933 Lah. 517. A magistrate

C. C. M.—35

acting under S. 259 has jurisdiction to decide whether the conditions under which the Cantonment Authority can resort to him are fulfilled or not. But he is not entitled to go into questions for which a separate remedy exists under the Act to the person from whom recovery is sought. 1938 A.M.L.J. 18. Where there is a revocation of certain remission of tax and the Cantonment Board applies under S. 259 of the Act for recovery of the amounts due, its claim is only for arrears of taxes. The circumstance that the amount was once remitted does not change the nature of the claim. 1938 A.M.L.J. 18. S. 259 is not necessarily confined to arrears of tax due prior to the amendment. The amendment creates no fresh liability to pay, nor does it enlarge the liability. It merely provides a machinery for recovery. 1938 A.M.L.J. 18.



*Committees of Arbitration.*

260. In the event of any disagreement as to the liability of a Board to pay any compensation under this Act, or as to the amount of any compensation so payable, the person claiming such compensation may apply to the Board for the reference of the matter to a Committee of Arbitration, and the Board shall forthwith proceed to convene a Committee of Arbitration to determine the matter in dispute.

261. When a Committee of Arbitration is to be convened, the Board shall cause a public notice to be published stating the matter to be determined, and shall forthwith send copies of the order to the District Magistrate, and to the other party concerned, and shall, as soon as may be, nominate such members of the Committee, as it is entitled to nominate under section 262, and, by notice in writing, call upon the other persons who are entitled to nominate a member or members of the Committee to nominate such member or members in accordance with the provisions of that section.

Constitution of Committee of Arbitration.

262. (1) Every Committee of Arbitration shall consist of five members, namely:—

(a) a Chairman who shall be a person not in the service of the <sup>1</sup>[Crown] or the Board, and who shall be nominated by the <sup>2</sup>[Officer Commanding the station];

(b) two persons nominated by the Board; and

(c) two persons nominated by the other party concerned <sup>3</sup>[\* \* \*].

(2) If the Board or the other party concerned or the <sup>2</sup>[Officer Commanding the station] fails within seven days of the date of issue of the notice referred to in section 261 to make any nomination which it or he is entitled to make or, if any member who has been so nominated neglects or refuses to act and the Board or other person by whom such member was nominated fails to nominate another member in his place within seven days from the date on which it or he may be called upon to do so by the District Magistrate, the District Magistrate shall forthwith appoint a member or members, as the case may be, to fill the vacancy or vacancies.

No person to be nominated who has direct interest or whose services are not immediately available.

263. (1) No person who has a direct interest in the matter under reference, or whose services are not immediately available for the purposes of the Committee, shall be nominated a member of a Committee of Arbitration.

(2) If, in the opinion of the District Magistrate, any person who has been nominated has a direct interest in the matter under reference, or is otherwise disqualified for nomination, or if the services of any such person are not immediately available as aforesaid, and if the Board or other person by whom any such person was nominated fails to nominate another member within seven days from the date on which it or he may be called upon to do so by the District Magistrate, such failure shall be deemed to constitute a failure to make a nomination within the meaning of section 262.

264. (1) When a Committee of Arbitration has been duly constituted, the Board shall, by notice in writing, inform each of the members of the fact, and the Committee shall meet as soon as may be thereafter,

Meetings and powers of Committees of Arbitration.

LEG. REF.

<sup>1</sup> Substituted for 'Government' by A.O. 1937.

<sup>2</sup> Substituted by Act VII of 1925.

<sup>3</sup> Words 'who shall be persons liable to pay taxes in the Cantonment and ordinarily resident therein or in the immediate vicinity thereof' omitted by Act XXIV of 1936.



(2) The Chairman of the Committee shall fix the time and place of meetings, and shall have power to adjourn any meeting from time to time as may be necessary.

(3) The Committee shall receive and record evidence, and shall have power to administer oaths to witnesses, and, on requisition in writing signed by the Chairman of the Committee, the District Magistrate shall issue the necessary processes for the attendance of witnesses and the production of documents required by the Committee, and may enforce the said processes as if they were processes for attendance or production before himself.

265. (1) The decision of every Committee of Arbitration shall be in accordance with the majority of votes taken at a meeting at which the Chairman and at least three of the other members are present.

Decisions of Committees of Arbitration.

(2) If there is not a majority of votes in favour of any proposed decision, the opinion of the Chairman shall prevail.

(3) The decision of a Committee of Arbitration shall be final and shall not be questioned in any Court.

#### *Prosecutions.*

266. <sup>1</sup>[(1)] Save as otherwise expressly provided in this Act, no Court shall proceed to the trial of any offence made punishable by or under this Act, other than an offence specified in Schedule IV, except on the complaint of, or upon information received from, the Board concerned or a person authorised by the Board by a general or special order in this behalf.

<sup>1</sup>[(2) No offence made punishable under this Act shall be tried by any Magistrate or by any Bench, if such Magistrate or any of the Magistrates composing the Bench is a member of the Board.]

267. (1) A Board, or any person authorised by it, by general or special order in this behalf, may, either before or after the institution of the proceedings, compound any offence made punishable by or under this Act other than an offence under Chapter XIV:

Provided that no offence shall be compoundable which is committed by failure to comply with a notice, order or requisition issued by or on behalf of the Board, unless and until the same has been complied with in so far as compliance is possible.

(2) Where an offence has been compounded, the offender, if in custody, shall be discharged and no further proceedings shall be taken against him in respect of the offence so compounded.

#### LEG. REF.

<sup>1</sup> Section 266 renumbered as sub-section (1) of S. 266 and Sub-sec. (2) of S. 266 inserted by Act XXIV of 1936.

#### NOTES.

SEC. 266: INTERPRETATION.—Section 266 only lays down that no Court shall proceed to the trial of any offence under the Act unless moved by the persons mentioned therein and if the persons mentioned therein initiate the proceedings as provided in the section, the Court must follow the procedure laid down in Cr. P. Code. 109 I.C. 607=29 Cr.L.J. 591 (Nag.) Where the prosecution of a person for an offence not specified in Sch. IV of this Act is instituted on a letter which is a personal application by the Executive Officer of the Cantonment Authority for his prosecution, and it is not shown that the Executive Officer is authorised by the

Cantonment Authority by a general or special order to act on its behalf in such a proceeding, the complaint is not made in the manner required by S. 266 of the Act and a conviction thereon is liable to be set aside. 158 I.C. 1010=36 Cr.L.J. 1493=1935 A. 905. A complaint was lodged by the Cantonment Board through a Sub-Overseer, signed by the Executive Officer of the Board. The Executive Officer never appeared before the Magistrate. Sub-Overseer did not hold any power of attorney on behalf of the Board. No power of authority was filed to show that the Executive Officer had any authority to lodge such a complaint. On conviction the accused filed a revision. The Executive Officer filed an affidavit that he had an authority to file the complaint. *Held*, that failure to file the authority is an omission curable under S. 537, Cr. P. Code. 29 Cr.L.J. 822=1928 Lah. 946.



*General Penalty Provisions.*

268. Whoever, in any case in which a penalty is not expressly provided by this Act, fails to comply with any notice, order or requisition issued under any provision thereof, or otherwise contravenes any of the provisions of this Act, shall be punishable with fine which may extend to two hundred rupees, and, in the case of a continuing failure or contravention, with an additional fine which may extend to twenty rupees for every day after the first during which he has persisted in the failure or contravention.

General penalty.

269. Where any person to whom a licence has been granted under this Act or any agent or servant of such person commits a breach of any of the conditions thereof, or of any bye-law made under this Act for the purpose of regulating the manner or circumstances in, or the conditions subject to, which anything permitted by such licence is to be or may be done, the Board may, without prejudice to any other penalty which may have been incurred under this Act, by order in writing, cancel the licence or suspend it for such period as it thinks fit:

Cancellation and suspension of licenses.

Provided that no such order shall be made until an opportunity has been given to the holder of the licence to show cause why it should not be made.

270. Where any person has incurred a penalty by reason of having caused any damage to the property of a Board, he shall be liable to make good such damage, and the amount payable in respect of the damage shall, in case of dispute, be determined by the Magistrate by whom the person incurring such penalty is convicted, and, on non-payment of such amount on demand, the same shall be recovered by distress and sale of the movable property of such person, and the Magistrate shall issue a warrant for its recovery accordingly.

Recovery of amount payable in respect of damage to cantonment property.

*Limitation.*

271. No Court shall try any person for an offence made punishable by or under this Act, after the expiry of six months from the date of the commission of the offence, unless complaint in respect of the offence has been made to a Magistrate within the six months aforesaid.

Limitation for prosecution.

**NOTES.**

SEC. 268.—The Executive Officer of the Cantonment is not a member of the "Cantonment Authority" as defined in S. 2 (v) and a notice issued by him for the removal of an encroachment is invalid. Consequently a person cannot be convicted for disobeying a notice issued by the Executive Officer for removal of encroachment on Government land. Subsequent confirmation of the action of the Executive Officer by the Cantonment Board is of no avail as the notice disobeyed is the notice from the Executive Officer. 35 Cr.L.J. 612=1933 Lah. 545 (1). The Cantonment Authority gave a qualified sanction to A to proceed with the construction of his building at his own risk in that the site on which the construction was being built was claimed by the Government, but there was no "Municipal objection". As soon as A proceeded to build, the Cantonment Authority served him with a notice "to demolish the unauthorised construction". A having failed to comply with this notice, he was prosecuted under S. 187 read with S. 268,

*Held*, that there was no unauthorized construction because A had sanction from the Board to build the room, that it was preposterous to suggest that when A had had the sanction of the Board in writing under S. 181, he did not have the permission in writing of the Cantonment Authority, and that the question between the parties was a purely civil one and as a matter of fact A had not exceeded the authority given him by the Board in sanctioning his application for building. 146 I.C. 2=34 Cr.L.J. 1191=1933 All. 486. A merchant who is selling bamboos, rafters, wooden boards and beams within the limits of the Cantonment without any licence is liable to prosecution under S. 268 for being a dealer in wood within the meaning of S. 210 (1). 1934 All. 987 (1)=36 Cr.L.J. 261. On this section, *see also* 1934 Oudh 29=148 I.C. 420 cited under S. 184. *supra*.

SEC. 271: LIMITATION.—When there is nothing to show that any new building was done by the accused within limitation but what was done in that connexion had been



*Suits.*

272. No suit or prosecution shall be entertained in any Court against any Board<sup>1</sup> [\* \*] or against any <sup>2</sup>[Officer Commanding a station], or against any member of a Board, or against any officer or servant of a Board, for anything in good faith done, or intended to be done, under this Act or any rule or bye-law made thereunder.

273. (1) No suit shall be instituted against any Board or against any member of a Board, or against any officer or servant of a Board, in respect of any act done, or purporting to have been done, in pursuance of this Act or of any rule or bye-law made thereunder, until the expiration of two months after notice in writing has been left at the office of the Board, and, in the case of such member, officer or servant, unless notice in writing has also been delivered to him or left at his office or place of abode, and unless such notice states explicitly the cause of action, the nature of the relief sought, the amount of compensation claimed, and the name and place of abode of the intending plaintiff, and unless the plaint contains a statement that such notice has been so delivered or left.

(2) If the Board, member, officer or servant has, before the suit is instituted, tendered sufficient amends to the plaintiff, the plaintiff shall not recover any sum in excess of the amount so tendered, and shall also pay all costs incurred by the defendant after such tender.

(3) No suit, such as is described in sub-section (1), shall, unless it is an action for the recovery of immovable property or for a declaration of title thereto, be instituted after the expiry of six months from the date on which the cause of action arises.

(4) Nothing in sub-section (1) shall be deemed to apply to a suit in which the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the institution of the suit or proceeding.

*Appeals and Revision.*

274. (1) Any person aggrieved by any order described in the second column of Schedule V may appeal to the authority specified in that behalf in the third column thereof.

(2) No such appeal shall be admitted if it is made after the expiry of the period specified in that behalf in the fourth column of the said Schedule.

(3) The period specified as aforesaid shall be computed in accordance with the provisions of the Indian Limitation Act, 1908, with respect to the computation of periods of limitation thereunder.

275. (1) Every appeal under section 274 shall be made by petition in writing accompanied by a copy of the order appealed against.

(2) Any such petition may be presented to the authority which made the order against which the appeal is made, and that authority shall be bound to forward it to the appellate authority, and may attach thereto any report which it may desire to make by way of explanation.

*LEG. REF.*

<sup>1</sup>Words "or authority appointed under sub-sec. (2) of S. 10" omitted by Act XXIV of 1936.

<sup>2</sup>Substituted by Act VII of 1925.

*NOTES.*

completed more than six months before the date of the complaint, the accused cannot be tried for the offence. 148 I.C. 420=35 Cr.L. J. 666=1934 Oudh 29.

SEC. 273.—S. 273 (1) does not contemplate the class of suits of private contracts for which specific rules of evidence are prescribed by the Limitation Act. It contemplates actions brought against the Board in respect of acts done in pursuance of any rule or bye-law that has the force of law. Hence a suit against the Board for the price of goods supplied is not governed by S. 273 but by Art. 52, Limitation Act. 149 I.C. 49=1934 A.L.J. 805=1934 All. 436.



276. On the admission of an appeal from an order, other than an order contained in a notice issued under clause (a) of section 137, section 140, section 176, or section 238, all proceedings to enforce the order and all prosecutions for any contravention thereof shall be held in abeyance pending the decision of the appeal, and, if the order is set aside on appeal, disobedience thereto shall not be deemed to be an offence.

277. 1[\* \* \* \* \*].

2[(1)] Where an appeal from an order made by the Board has been disposed of by the District Magistrate, <sup>3</sup>[either party to the proceedings] may, within thirty days from the date thereof, apply, through the <sup>4</sup>[Officer Commanding-in-Chief, the Command], to the Central Government, or to such authority as the Central Government may appoint in this behalf, for a revision of the decision.

<sup>5</sup>[(2)] The provisions of this Chapter with respect to appeals shall apply as far as may be, to applications for revision made under this section.

Finality of appellate orders.

278. Save as otherwise provided in section 277, every order of an appellate authority shall be final.

279. No appeal shall be decided under this Chapter unless the appellant has been heard, or has had a reasonable opportunity of being heard in person or through a legal practitioner.

## CHAPTER XVI.

### RULES AND BYE-LAWS.

280. (1) The Central Government may, after previous publication, make rules<sup>6</sup> to carry out the purposes and objects of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(a) the manner in which and the authority to which, application for permission to occupy land belonging to <sup>7</sup>[the Crown] in a cantonment is to be made;

(b) the authority by which such permission may be granted and the conditions to be annexed to the grant of any such permission;

<sup>8</sup>[(bb) the allotment to a Board of a share of the rents and profits accruing from property entrusted to its management under the provisions of section 116-A;]

#### LEG. REF.

<sup>1</sup> The original sub-sec. (1) omitted by Act XXXV of 1926.

<sup>2</sup> Sub-sec. (2) was re-numbered (1) by *ibid.*

<sup>3</sup> Substituted for 'the Cantonment Authority' by Act XXIV of 1936.

<sup>4</sup> These words were substituted by Act XXXV of 1926.

<sup>5</sup> Sub-sec. (3) was re-numbered (2) by *ibid.*

<sup>6</sup> For rules made under this section and called the Cantonment Account Code, 1924 the Cantonment Land Administration Rules, 1925, and the Cantonment Fund Servants Rules, 1925, see *Gen. R. and O.*, Vol. V, pp. 470-611.

<sup>7</sup> Substituted for 'Government' by A.O.,

1937.

<sup>8</sup> Inserted by Act VII of 1925. •

#### NOTES.

SEC. 280.—Extension of Rules outside Cantonment limits, see 2 P.R. 1885 (Cr.); 12 P.R. 1870 (Cr.). Omission to report case of cholera, 9 P.R. 1895 (Cr.). As to appeals against conviction for offence under Cantonment Rules, see 1 P.R. 1897 (Cr.). Rule under the section when *ultra vires*. 40 P.R. 1884 (Cr.); 48 P.R. 1887 (Cr.).

SEC. 280 (a).—See Rat. 505. Sections 64 to 67, Penal Code, do not apply to sentences passed under this Act. Duty of Cantonment Magistrate to inform accused of his right to have the case tried by another Magistrate, see 55 I.C. 1002=21 Cr.L.J. 394. (See also Notes under S. 282, *infra*.)



(c) the appointment, control, supervision, suspension, removal, dismissal and punishment of servants of Boards;

1[(cc) the constitution of a Service of Executive Officers and the appointment, control, supervision, conditions of service, pay and allowances, suspension, removal, dismissal and punishment of the members thereof;]

(d) the circumstances in which security shall be demanded from servants of Boards and the amount and nature of such security;

(e) the grant of leave, absentee or acting allowance to servants of Boards;

(f) the creation and management of Provident Funds, and the circumstances in which, and the conditions subject to which, contributions thereto shall be made from cantonment funds and by servants of Boards;

(g) the keeping of accounts by Boards and the manner in which such accounts shall be audited and published;

(h) the definition of the persons by whom, and the manner in which, money may be paid out of a cantonment fund;

2[(hh) \* \*];

(i) the preparation of estimates of income and expenditure by Boards and the definition of the persons by whom, and the conditions subject to which, such estimates may be sanctioned;

(j) the regulation of the procedure of Committees of Arbitration; and

(k) the prescribing of registers, statements and forms to be used and maintained by any authority for the purposes of this Act.

Supplemental provisions respecting rules. 281. (1) A rule under section 280 may be made either generally for all cantonments or for the whole or any part of any one or more cantonments.

(2) All rules so made shall be published in the Official Gazette and in such other manner, if any, as the Central Government may direct and, on such publication, shall have effect as if enacted in this Act.

282. Subject to the provisions of this Act and of the rules made thereunder, a Board may, in addition to any bye-laws which it is empowered to make by any other provision of this Act, make bye-laws to provide for all or any of the following matters in the cantonment, namely:—

(1) the registration of births, deaths and marriages, and the taking of a census;

(2) the enforcement of compulsory vaccination;

(3) the regulation of the collection and recovery of taxes, tolls and fees under this Act and the refund of taxes;

(4) the regulation or prohibition of any description of traffic in the streets;

(5) the manner in which vehicles standing, driven, led or propelled in the streets between sunset and sunrise shall be lighted;

(6) the seizure and confiscation of ownerless animals straying within the limits of the cantonment;

(7) the prevention and extinction of fire;

(8) the construction of scaffolding for building operations to secure the safety of the general public and of persons working thereon;

#### LEG. REF.

<sup>1</sup> Cl. (cc) of sec. 280 inserted by Act XXIV of 1936.

<sup>2</sup> Cl. (hh) which was inserted by Act XXXV of 1926, was omitted by Act XXIV of 1936.

#### NOTES.

SEC. 282, CLS. (8), (9) AND (10).—See 3 Cr. L.J. 301=23 P.R. 1905 (Cr.) (Repair of wall and removal of building); Rat. 706; 3 Cr. L.J. 78 (keeping common gaming house); Rat. 541 (order for construction of privy); Rat.



(9) the regulation in any manner not specifically provided for in this Act of the construction, alteration, maintenance, preservation cleaning and repairs of drains, ventilation-shafts, pipes, water-closets, privies, latrines, urinals, cesspools and other drainage works.

(10) the regulation or prohibition of the discharge into, or deposit in drains or sewage, polluted water and other offensive or obstructive matter;

(11) the regulation or prohibition of the stabling or herding of animals, or of any class of animals, so as to prevent danger to public health;

(12) the proper disposal of corpses, the regulation and management of burial and burning places and other places for the disposal of corpses, and the fees chargeable for the use of such places where the same are provided or maintained by Government or at the expense of the cantonment fund;

(13) the permission, regulation or prohibition of the use or occupation of any street or place by itinerant vendors or by any person for the sale of articles or the exercise of any calling or the setting up of any booth or stall, and the fees chargeable for such use or occupation;

(14) the regulation and control of encamping grounds, pounds, washings places, serais, hotels, dak-bungalows, lodging-houses, boarding-houses, building-let in tenements, residential clubs, restaurants, eating-houses, cafes, refreshment rooms and places of public recreation, entertainment or resort;

(15) the regulation of the ventilation, lighting, cleansing, drainage and water-supply of the buildings used for the manufacture or sale of aerated or other potable waters and of butter, milk, sweet-meats and other articles of food or drink for human consumption;

(16) the matters regarding which conditions may be imposed by licences granted under section 210;

(17) the control and supervision of places where dangerous or offensive trades are carried on so as to secure cleanliness therein or to minimise any injurious, offensive or dangerous effects arising or likely to arise therefrom;

(18) the regulation of the erection of any enclosure, fence, tent, awning or other temporary structure of whatsoever material or nature on any land situated within the cantonment;

#### NOTES.

636 (neglect to repair house); 19 P.R. 1904 (order for repair of building). *See also* Rat. 875; 7 O.C. 68; 1 P.R. 1906 (Cr.); 13 I.C. 209 = 3 P.R. 1912 (Cr.); 1 S.L.R. 92 (washing clothes in tank); Rat. 54 (plying offensive trade); 8 M. 428; 9 P.R. 1895 (Cr.) (omission to report cholera case); 17 N.L.J. 214 (grazing cattle within cantonment area and preventing them from being impounded).

"Public places" what are and what are not, *see* (1887) A.W.N. 19, 361; 15 P.R. 1906 (Cr.) = 45 P.L.R. 1907; Rat. 471; Rat. 476 (public road); 22 P.L.R. 1907.

Conviction under a wrong section of the Code—Ignorance of law—Effect. *See* 11 I. C. 139 = 12 Cr.L.J. 371. As to registration of prostitutes, *see* 2 P.R. 1895 (Cr.); (1887) A.W.N. 219; Rat. 272; 25 P.R. 1870 (Cr.). As to liability of master for offence committed by servant, *see* 10 Bom.L.R. 1052. Conviction for non-removal of remains of ruined buildings, 23 P.R. 1905 (Cr.). *See also* as to liability for keeping buildings in a ruinous condition. *See* 43 B. 836 = 21 Bom.L.R. 759 = 52 I.C. 288; 43 B. 838 = 21 Bom.L.R. 761 =

52 I.C. 655. As to use of stables without licence *see* Rat. 413. As to giving owner notice of repairs required, *see* 56 P.L.R. 1912. As to when and how and by whom notice is to be given, *see* 3 P.R. 1907 (Cr.) = 5 Cr.L.J. 493. As to ordering imprisonment in default of payment of fine, *see* 40 P.R. 1884 (Cr.). As to effect of breach of rules, *see* (1886) A.W.N. 289; 48 P.R. 1887 (Cr.). Order as to payment of daily fine not proper. 12 Cr.L.J. 371 = 11 I.C. 139. *See also* 7 B.H.C. (Cr.) 87; 19 P.R. 1904 (Cr.); Additional fine when proper. 22 B. 841. Trial of offence beyond cantonment limits—Procedure for trial. 12 P.R. 1870 (Cr.). Liability of Cantonment officer for not proceeding according to the Code and the Rules. *See* 9 C. 341 = 9 I.A. 152 (P.C.).

SECS. 282 AND 283.—A conviction for the offence of grazing cattle on land within the Cantonment area and preventing them from being impounded cannot stand when no connection has been proved between the persons convicted and the cattle in respect of which the conviction is based. 17 N.L.J. 214.



(19) the laying out of streets, and the regulation and prohibition of the erection of buildings without adequate provision being made for the laying out and location of streets;

(20) the regulation of the use of public parks and gardens and other public places, and the protection of avenues, trees, grass and other appurtenances of streets and other public places;

(21) the regulation of the grazing of animals;

(22) the fixing and regulation of the use of public bathing and washing places;

(23) the regulation of the posting of bills and advertisements, and of the position, size, shape or style of name-boards, sign-boards and sign-posts;

(24) the fixation of a method for the sale of articles whether by measure, weight, piece or any other method;

(25) the rendering necessary of licences within the cantonment—

(a) for persons working as job porters for the conveyance of goods;

(b) for animals or vehicles let out on hire;

(c) for the proprietors or drivers of vehicles, boats or other conveyances, or of animals kept or plying for hire; or

(d) for persons impelling or carrying such vehicles or other conveyances;

(26) the prescribing of the fee payable for any licence required under clause (25), and of the conditions subject to which such licences may be granted, revised, suspended or withdrawn;

(27) the regulation of the charges to be made for the services of such job porters and of the hire of such animals, vehicles or other conveyances, and for the remuneration of persons impelling or carrying such vehicles or conveyances as are referred to in clause (25);

(28) the regulation or prohibition, for purposes of sanitation or the prevention of disease or the promotion of public safety or convenience, of any act which occasions or is likely to occasion a nuisance, and for the regulation or prohibition of which no provision is made elsewhere by or under this Act;

(29) the circumstances and the manner in which owners of buildings or land in the cantonment, who are temporarily absent from, or are not resident in the cantonment, may be required to appoint as their agents for all or any of the purposes of this Act or of any rule or bye-law made thereunder, persons residing within or near the cantonment;

(30) the prevention of the spread of infectious or contagious disease within the cantonment;

(31) The segregation in, or the removal and exclusion from the cantonment, or the destruction, of animals suffering or reasonably suspected to be suffering from any infectious or contagious disease;

(32) The supervision, regulation, conservation and protection from injury, contamination or trespass of sources and means of public water-supply, and of appliances for the distribution of water whether within or without the limits of the cantonment;

(33) the manner in which connections with water-works may be constructed or maintained, and the agency which shall or may be employed for such construction and maintenance;

(34) the regulation of all matters and things relating to the supply and use of water including the collection and recovery of charges therefor and the prevention of evasion of the same;

(35) the maintenance of schools, and the furtherance of education generally;

(36) the regulation or prohibition of the cutting or destruction of trees or shrubs, or of the making of excavations, or of the removal of soil or quarry-



ing, where such regulation or prohibition appears to the Board to be necessary for the maintenance of a water-supply, the preservation of the soil, the prevention of landslips or of the formation of ravines or torrents, or the protection of land against erosion, or against the deposit thereon of sand, gravel or stones;

(37) the rendering necessary of licences\* for the use of premises within the cantonment as stables or cowhouses or as accommodation for sheep, goats or fowls;

(38) the control of the use in the cantonment of mechanical whistles, syrens or trumpets; and

(39) generally for the regulation of the administration of the cantonment under this Act.

283. Any bye-law made by a Board under this Act may provide that a contravention thereof shall be punishable—

Penalty for breach of bye-laws.

(a) with fine which may extend to one hundred rupees; or

(b) with fine which may extend to one hundred rupees and, in the case of a continuing contravention, with an additional fine which may extend to twenty rupees for every day during which such contravention continues after conviction for the first such contravention; or

(c) with fine which may extend to ten rupees for every day during which the contravention continues after the receipt of a notice from the Board by the person contravening the bye-law requiring such person to discontinue such contravention.

284. (1) Any power to make bye-laws conferred by this Act is conferred subject to the condition of the bye-laws being made after previous publication and of their not taking effect until they have been approved and confirmed by the Central Government and published in the Official Gazette.

(2) The Central Government in confirming a bye-law may make any change therein which appears to it to be necessary.

(3) The Central Government may, after previous publication of its intention, cancel any bye-law which it has confirmed, and thereupon the bye-law shall cease to have effect.

285. (1) A copy of all rules and bye-laws made under this Act shall be kept at the office of the Board and shall, during office hours, be open free of charge to inspection by any inhabitant of the cantonment.

(2) Copies of all such rules and bye-laws shall be kept at the office of the Board <sup>1</sup>[and shall be sold to the public at cost price singly, or in collections at the option of the purchaser.]

## CHAPTER XVII.

### SUPPLEMENTAL PROVISIONS.

286. The Central Government may, by notification in the Official Gazette, and subject to any conditions as to compensation or otherwise which it thinks fit to impose, extend to any area beyond a cantonment and in the vicinity thereof, with or without restriction or modification, any of the provisions of Chapters IX, X, XI, XII, XIII, XIV and XV or of any rule or bye-law made under this Act for the cantonment which relates to the subject-matter of any of those Chapters, and every



enactment, rule or bye-law so extended shall thereupon apply to that area as if the area were included in the cantonment.

<sup>1</sup>[286-A. The Board may empower any of its members or officers to exercise or perform in the absence of the Executive Officer from the Cantonment all or any of such powers or duties of an Executive Officer under this Act as the Central Government may, by notification in the Official Gazette, specify in this behalf.]

287. (1) Paragraphs 2 and 3 of section 54, and sections 59, 107 and 123 of the Transfer of Property Act, 1882, with respect to the transfer of property by registered instrument, shall, on and from the commencement of this Act, extend to every cantonment.

<sup>2</sup>[(2) The Registrar or Sub-Registrar of the district or sub-district formed for the purposes of the Indian Registration Act, 1908, in which any cantonment is situated, shall <sup>3</sup>[when any document relating to immovable property within the cantonment is registered, send information of the registration] forthwith to the Board or such other authority as the Central Government may prescribe in this behalf.]

288. No notice, order, requisition, licence, permission in writing or other document issued under this Act shall be invalid merely by reason of any defect of form.

289. A copy of any receipt, application, plan, notice, order or other document or of any entry in a register, in the possession of a Board shall, if duly certified by the legal keeper thereof or other person authorised by the Board in this behalf, be admissible in evidence of the existence of the document or entry, and shall be admitted as evidence of the matters and transactions therein recorded in every case where, and to the same extent to which, the original document or entry would, if produced, have been admissible to prove such matters.

290. No officer or servant of a Board shall, in any legal proceeding to which the Board is not a party, be required to produce any register or document the contents of which can be proved under section 289 by a certified copy, or to appear as a witness to prove any matter or transaction recorded therein save by order of the Court made for special cause.

291. For the purposes of the Government Buildings Act, 1899, Cantonments and Boards shall be deemed to be municipalities and municipal authorities respectively.

292. [Repeals]. Repealed by the Repealing Act, 1927 (XII of 1927).

#### LEG. REF.

<sup>1</sup> S. 286-A added by Act VII of 1931.

<sup>2</sup> Sub-section substituted by Act XXXV of 1926.

<sup>3</sup> Substituted by Act X of 1927.

#### NOTES.

SEC. 287.—By virtue of this section, sec. 107 of the T. P. Act is made applicable to cantonments. 134 I.C. 289=1931 Lah. 501. A mortgage by deposit of title-deeds cannot be effected within the limits of a Cantonment to which sec. 59 has been extended. (1933 Lah. 972, Ref.) 1933 Lah. 1001=149 I.C. 1060. A mortgage by deposit of title-deeds is invalid, if effected within a Cantonment area where such transactions are prohibited even though

property is situated in a place where such mortgages are valid. The determining factor in the matter of validity of the mortgage in such cases is not the place where the property alleged to have been mortgaged is situated but the formalities required by the law for the creation of a valid mortgage at the place where the title-deeds are alleged to have been delivered to the creditor. (Case-law discussed.) 1933 Lah. 972=147 I.C. 942; 1927 Cal. 823.

SEC. 288.—Proceedings without notice to accused illegal. 17 A.L.J. 503=50 I.C. 992=20 Cr.L.J. 384; contents of notice as to extent of repairs necessary. 3 P.R. (Cr.) 1912=13 Cr. L.J. 17=13 I.C. 209.



## SCHEDULE I.

## NOTICE OF DEMAND.

(See Section 91.)

To  
residing at

Take notice that the Board demands from the sum  
of due from on account of  
(here describe the property, occupation, circumstance or thing in respect of which the sum  
is payable) leviable under for the period of  
commencing on the day of 19 , and ending on the  
day of 19 , and that if, within thirty days from  
the service of this notice, the said sum is not paid to the Board at

, or sufficient cause for non-payment is not shown to the satisfaction of the Executive  
Officer, a warrant of distress will be issued for the recovery of the same with costs.

Dated this day of 19 .

(Signed)

*Executive Officer,*

*Cantonment.*

## SCHEDULE II.

## FORM OF WARRANT.

(See Section 92.)

(Here insert the name of the officer charged with the execution of the warrant.)

Whereas A.B. of has not paid, and has not shown satisfactory  
cause for the non-payment of, the sum of

\*(Here describe the liability.) due on account of \* for the period of  
ending with the day of 19 , and  
under day of 19 , which sum is leviable

And whereas thirty days have elapsed since the service on him of notice of demand  
for the same;

This is to command you to distrain, subject to the provisions of the Cantonments Act,  
1924, the movable property of the said A.B. to the amount of the said sum of Rs.

; and forthwith to certify to me, together with this warrant, all particulars of the  
property seized by you thereunder.

Dated this day of 19 .

(Signed)

*Executive Officer,*  
*Cantonment*

## SCHEDULE III.

## FORM OF INVENTORY OF PROPERTY DISTRAINED AND NOTICE OF SALE.

(See Section 93.)

To  
residing at.

Take notice that I have this day seized the property specified in the inventory an-

\*(Here describe the liability.) nexed hereto, for the value of due for the liability\*  
mentioned in the margin for the period commencing with  
the day of 19 , and ending with  
the day of 19 , together with Rs. due for

service of notice of demand, and that, unless within seven days from the date of the service  
of this notice you pay to the Board the said amount, together with the costs of recovery,  
the said property will be sold by public auction.

Dated this day of 19 .

:(Signature of officer executing the warrant.)

INVENTORY.

(Here state particulars of property seized.)



## SCHEDULE IV.

CASES IN WHICH POLICE MAY ARREST WITHOUT WARRANT.  
(See Section 250.)

1 Section.	2 Subject.
PART A.	
118 (1) (a) (i) 167	Drunkenness, etc. Making or selling of food, etc., or washing of clothes, by infected person.
PART B.	
118 (1) (a) (ii)	Using threatening or abusive words, etc.
118 (1) (a) (iii)	Indecent exposure of person, etc.
118 (1) (a) (iv)	Begging.
118 (1) (a) (v)	Exposing deformity, etc.
118 (1) (a) (ii)	Gaming.
118 (1) (a) (xii)	Destroying notice, etc.
118 (1) (a) (xiii)	Breaking direction post, etc.
118 (1) (f)	Keeping common gaming-house, etc.
118 (1) (g)	Beating drum, etc.
118 (1) (h)	Singing, etc., so as to disturb public peace or order.
119 (6)	Letting loose, or setting on, ferocious dog.
125	Discharging fire-arms, etc., so as to cause danger.
176 (1)	Remaining in, or re-entering cantonment after notice of expulsion for failure to attend hospital or dispensary.
193 (2)	Destroying, etc., name of street or number affixed to building.
214	Feeding animal on filth, etc.
236	Loitering or importuning for sexual immorality.
240 (a)	Remaining in, or returning to, a cantonment after notice of expulsion.

## SCHEDULE V.

APPEALS FROM ORDERS.  
(See Section 274.)

1 Section.	2 Executive order.	3 Appellate Authority.	4 Time allowed for appeal.
126	Board's notice to <sup>1</sup> [remove] repair, protect or enclose a building, wall or anything affixed thereto or well, tank, reservoir, pool, depression or excavation.	<sup>2</sup> [Officer Commanding-in-Chief, the Command] <sup>3</sup> [or other authority authorized in this behalf by the Central Government].	Thirty days from service of notice.
134	Board's notice to fill up well, tank, etc., or to drain off or remove water.	<sup>2</sup> [Officer Commanding-in-Chief, the Command] <sup>3</sup> [or other authority authorized in this behalf by the Central Government].	Thirty days from service of notice.
140	<sup>4</sup> [* * *] Board's notice requiring a building to be repaired or altered so as to remove sanitary defects.	<sup>2</sup> [Officer Commanding-in-Chief, the Command] <sup>3</sup> [or other authority authorized in this behalf by the Central Government].	Thirty days from service of notice.

## LEG. REF.

<sup>1</sup> Inserted by Act XXXIV of 1939.  
<sup>2</sup> Substituted by Act XXXV of 1926.

<sup>3</sup> Inserted by Act XXIV of 1936.  
<sup>4</sup> Entry relating to section 137 omitted by Act XXXI of 1940.



## APPEALS FROM ORDERS—(Contd).

1 Section.	2 Executive order.	3 Appellate Authority.	4 Time allowed for appeal.
176	Order of <sup>1</sup> [Officer commanding the station] on report of Medical Officer, directing a person to remove from the cantonment and prohibiting him from re-entering it without permission.	<sup>2</sup> [Officer Commanding-in-Chief, the Command] <sup>3</sup> [or other authority authorized in this behalf by the Central Government].	Thirty days from service of notice.
181	Board's refusal to sanction the erection or re-erection of a building.	[Officer Commanding-in-Chief, the Command] <sup>3</sup> [or other authority authorized in this behalf by the Central Government].	Thirty days from the date <sup>4</sup> [on which the refusal shall have been communicated to the person applying for sanction].
185	Board's notice to alter or demolish a building.	<sup>2</sup> [Officer Commanding-in-Chief, the Command] <sup>3</sup> [or other authority authorized in this behalf by the Central Government].	Thirty days from service of notice.
188	Board's notice to pull down or otherwise deal with a building newly erected or re-built without permission over a sewer, drain, culvert, water-course or waterpipe.	<sup>2</sup> [Officer Commanding-in-Chief, the Command] <sup>3</sup> [or other authority authorized in this behalf by the Central Government].	Thirty days from service of notice.
206	Board's notice prohibiting or restricting the use of a slaughter-house.	<sup>2</sup> [Officer Commanding-in-Chief, the Command] <sup>3</sup> [or other authority authorized in this behalf by the Central Government].	Twenty-one days from service of notice.
238	Magistrate's notice directing disorderly person to remove from cantonment and prohibiting him from re-entering it without permission.	District Magistrate.	Thirty days from service of notice.

## SCHEDULE VI.

[Enactments repealed.] Repealed by the Repealing Act, 1927 (XII of 1927).

### THE CANTONMENTS (HOUSE-ACCOMMODATION) ACT (VI OF 1923).

PREFATORY NOTE.—*Necessity for a special law relating to house accommodation in cantonments:—In introducing the first Bill of 1898 in the Council, the Law Member said:—*

Necessity for the Act. "For many years past we have had under consideration the question of house accommodation in cantonments. In the early days of the British dominion in India, the camps, stations and posts of the field army developed into cantonments where troops were stationed in garrison. These cantonments were localities set apart for the troops and were intended for their use only, but, as time went on non-military persons were permitted to reside in cantonments under the regulations of the day; land was occupied, and houses were built for the accommodation of officers and for other purposes, under the rules and conditions prevailing at that time.

"In later years, owing to various circumstances, great difficulties have been experienced in working the regulations applicable to cantonments, and the difficulties of finding suitable accommodation for officers—especially for those obliged to live in a particular part of cantonments—have much increased.

"The whole question has been exhaustively considered by officers specially appointed by committees and by other authorities; it has been discussed in every possible aspect and

## LEG. REF.

<sup>1</sup> Substituted by Act VII of 1925.

<sup>2</sup> Substituted by Act XXXV of 1926.

<sup>3</sup> Inserted by Act XXIV of 1936.

<sup>4</sup> Substituted for 'or refusal' by Act XXIV of 1936.



the investigation has spread over a great many years. The present Bill is the outcome of that discussion the objections raised have been carefully considered, and we have recognised that conditions of ownership and tenancy must be governed by the regulations in force when any particular house was built. But as cantonments are and were intended for occupation of troops, and as the whole of the land belongs, as a general rule, to the state, and houses were built in many cases by persons who had no status in cantonments, not for their own use, but as a source of profit, we consider that it is not inequitable to lay upon house-holders the burden of proving that they hold their grants under special conditions, and ought not to be subjected to the provisions which convenience and military requirements dictate in a locality which has been set apart for military purposes. The necessity for securing house accommodation for the military and civil officers of the Government is essential, but we have endeavoured to safeguard the interests of the house-owners, and to remove any reasons for complaint on the part of the latter.

"It will be observed that in the Bill the cantonment Rules have been indefinitely referred to, inasmuch as that, though prepared and published for criticism sometime ago, they have not yet come into force. It is intended, however, to bring them into operation before the Bill becomes law. These results will provide fully for the matters dealt with in the Bill so far as grants made under them will be concerned. Consequently, I may point out that the operation of the Bill will be practically restricted to past grants only." (*See also Statement of Objects and Reasons and also proceedings in council, Fort St. George Gazette, Supplement, 22nd Nov. 1898.*)

As stated in the preamble to this Bill, various conditions, rules, and regulations and orders in regard to the grant of land and the occupation of land and houses in cantonments have been from time to time made with the object of making accommodation available for officers whose duties require their residence within cantonment limits. These provisions have been collected and published for general information but, notwithstanding their issue in the past, great difficulties have been, and are still being, experienced in the matter.

The necessity for removing these difficulties and of making suitable provision for the housing of officers has long been recognised by the Government and a special Chapter was in 1888 with that object included in the Bill "to amend the law relating to cantonments." The chapter was, however, subjected to criticisms at that time, and as the matter seemed to call for further consideration, while it was thought undesirable to delay the whole measure on that account it was decided to exclude the provisions in question and to proceed with the rest of the Bill, which was eventually passed into law as the Cantonments Act, 1889 (XIII of 1889). The difficulties referred to have, as was expected, steadily increased and the Government of India consider it inexpedient any longer to defer remedial legislation on the subject.

The Bill which it is proposed now to introduce has been framed after careful consideration of the objections previously raised, and, while aiming at securing house accommodation for the military and civil officers of the Government whose presence in cantonments is obviously necessary, it endeavours also to safeguard as far as possible the interests of the house-owners concerned.

This Bill was passed as the Cantonments House Accommodation Act of 1899, which is the first enactment in British India specifically dealing with the accommodation of Houses within cantonment limits. There were certain defects in this Act, and consequently a necessity was felt for amendment and codification. Hence, this Act again came for the consideration of the Government of India in 1901.

The Hon'ble Sir Edmond Ellis in introducing the Cantonments Bill (1901) into the Council made the following statements as to the necessity for amendment and the enactment of a new measure:—

"My lord, I propose to make a statement regarding the course which we intend to pursue in dealing with the Cantonments (House Accommodation) Bill.

"This Bill, the object of which is to grapple with the great and ever increasing difficulty experienced by officers in securing suitable accommodation in houses built within the limits of cantonment was, after the most prolonged consideration dating back to the year 1887, if not earlier, introduced in the Legislative Council by my predecessor Sir Edwin Collen on the 4th November, 1898. The Statement of Objects and Reasons and the Bill were duly published in the Gazette of India and circulated for criticism, and the result was the receipt, during the year 1899, of a larger number of representations official and non-official, regarding the measure. To all of these the most anxious consideration has been given by the Governor-General in Council.

"As was only to be expected, the bill has not been favourably received by the majority of the house owners in cantonments, the objections put forward being most pronounced in the case of the very cantonments in which the want of accommodation for officers has been most acutely felt. On the other hand the measure has met with approval in many quarters, and in some cases even the house owners themselves have admitted, the necessity for such a Bill and the equity of its provisions.



"Now, I desire to make it very plain at the outset that the Government of India are unable to admit that cantonment areas can be regarded in the same light as the other parts of the country. On the contrary, the circumstances in them are altogether special and totally different from the circumstances anywhere else and I have no hesitation in asserting that this fact is well-known and thoroughly felt and appreciated by every resident of any of the permanent military stations, which here in India we call cantonments. The term has for over a century been applied in this country to well-defined areas, always primarily and in some instances almost exclusively set apart for the occupation of troops and their followers. The necessity for maintaining special laws in such places surely goes without saying and this has indeed been recognised in actual practice and throughout all our legislation affecting cantonments. When therefore I find the common law of England cited and vague denunciations directed against the measure on the ground that it encroaches upon private rights which ought to be held sacred and inviolable my answer is that the subject is approached from the wrong standpoint and that I fail to perceive the force of arguments which beg the question and have in fact no application to the case.

"And this brings me at once to the most important part of the bill and of the opposition which it has excited, I allude to clause (3), sub-clause (5) in which it is laid down that all land in a cantonment to which the provisions of the proposed Act are, after due enquiry, applied shall be presumed to be held under a grant from His Majesty, unless and until the person in possession proves to the satisfaction of the Local Government, that he held the land by a lawful title acquired prior to the formation of the cantonment. This provision, of course, shifts the burden of proof from the Government on to the shoulders of the cantonment house owner and it has, perhaps, not unnaturally been objected to as involving a serious interference with the rights of property. It has been urged that the presumption laid down by it is directly opposed to the ordinary legal principle which recognises possession as good *prima facie* evidence of title and that it is unfair to remove the *onus probandi* from the Government on whom it ought to be to the house owner. From what I have already said it will be anticipated that I cannot admit that this objection should be allowed to prevail. Cantonments are military stations in which military considerations always have been and always must be regarded as paramount and can never have been intentionally put on one side. The possession of the Government with regard to them has been clear, for throughout all the various orders which have been issued, the principle has constantly been affirmed that land in cantonments is held subject to the requirements of the military authorities. Proceeding on the presumption which I have alluded to above and which I maintain is a fair presumption all that the bill does is to reproduce and render enforceable conditions the impositions of which on persons permitted to build house in cantonments has been consistently aimed at ever since cantonments were formed in India and has, as I shall endeavour to show, been insisted upon by a series of executive orders issued in Army Regulations for the guidance of cantonment authorities. As the orders in the three presidencies were distinct it will be necessary to notice each separately. 'In Bengal the first order was issued in April, 1801, and by it, the Governor-General in Council directed that if individuals not officers shall purchase they must remove the materials as the ground within the cantonment is to be kept appropriated exclusively to the use of troops; this order was republished on the 28th September, 1807. Again in 1836 regulations were laid down for the occupation of land and the disposal of buildings in cantonments. *Four conditions* were attached—*First*, that the Government should retain the power of resumption on one month's notice; *second*, that the ground being in every case the property of the Government could not be sold by the grantee; *third*, that the buildings erected on the land should not be sold to any civilian without the consent of the officer commanding stations; and *fourth*, that the transfer of any house of over 5,000 Rupees in value to a native of India should be subject to the sanction of the Government. The attention of all officers commanding stations was drawn to these orders by the Commander-in-Chief on the 20th April, 1853 and the General Regulations of the Bengal Army of 1885 practically reproduced them. In 1858 they were incorporated in Code of Regulations for the Public Works Department and they were again and again reproduced in the Regulations issued in 1873, 1880 and 1897. In the Punjab it may be added the Bengal Regulations were followed. In Bombay a general order of January, 1807 pointed out that any permission which officers might receive to erect houses on ground within Military cantonments conferred on them no rights of property in the land as that continued to be the property of the State. Another general order dated the 30th October, 1832, asserted that no private landed property was to be included within the limits of a cantonment in which the whole of the ground belongs to Government. If at the same time provided for the removal from cantonments of any person not being an officer or a soldier, and in such cases permitted the taking away of the materials of any building belonging to any such person. In 1835 another Government order laid down rules for the occupation of land in cantonment and pointed out that "permission" to occupy ground within the limits of a cantonment conferred no proprietary rights on the occupant. This was affirmed by an order which was issued in May, 1838 and included a clause for resumption on one month's notice. In 1851, these orders were affirmed and in 1862 a Government Resolution was issued restating the principles already laid down. The regulations for the Bombay Presidency of 1875 and the Army Regulations (India) of 1887 followed on the same lines.



In Madras the earliest order on the subject appears to have been issued on the 8th May, 1812, and in it the Governor in Council laid down that no officer or person should be permitted to erect any building on ground belonging to the company within the walls of a Fort or within the limits of any cantonment, but on condition of immediate surrender to the Government, and that no grant in perpetuity of any piece of ground within the precincts of a Fort or Cantonment should be accorded to any individual. Leases renewable at the pleasure of the Government were to be given. These orders were republished as a Code of Regulations under the authority of the Governor in Council on the 1st October, 1813. Revised Codes embodying the same conditions were republished on the 12th September, 1820 and again on the 19th December, 1826. Similar orders were issued on the 4th December, 1829; and on the 17th April, 1849, revised rules framed on the same principles were published. These appear again in the Madras Army Regulations of 1869 and 1876 and in the Army Regulations (India) of 1887. From the above it is evident that the Government have consistently and continuously affirmed their rights as regards building sites in cantonments. Moreover in regard to the right of Government to regulate the purchase and letting of houses for the accommodation of Military officers, I would point out that the right was recognised by the Cantonments Acts of 1864 and 1880. By section 19 of Act XXII of 1864 it was provided that rules might be made—

*first*, for regulating any cases in which the land within the limits of a cantonment was the property of the Government but the occupation and use of which by private persons was permissive and for imposing terms on which such occupation and use should be allowed and conditions under which the Government might resume possession on giving compensations;

*secondly*, for maintaining proper Registers of immovable property within cantonment limits and for providing for the registration of transfer of such property; and

*thirdly*, for regulating the manner in which houses within the limits of cantonments should be claimable for purchase or hire for the accommodation, when necessary, of Military officers. These three headings were reproduced in section 27 of Act III of 1880 and it appears to me that if house owners urge that they purchased property in ignorance of the conditions imposed by the Government they have only themselves to blame, for not having made ordinary inquiries as to the circumstances in which land in cantonments has in fact always been and must of necessity always be held. I now come to deal with the present position which appears to be this. In some cases the Government would undoubtedly be able to prove that conditions such as those which I just described were expressly imposed and as expressly accepted. In most cases it could prove that the existence of the orders on the subject above referred to was so much a matter of common knowledge that the imposition and the acceptance of the conditions laid down in them must be implied. But in others it might be able to prove nothing except that the particular cantonment concerned had existed as such for so many years and that some sort of control over the building of houses in it had always been exercised. It may be that the orders laid down by the higher military authorities and the Government have not always been observed and that express and un-conditional grants of building sites, or express agreements permitting the building of houses and imposing no conditions whatsoever have been made. In such cases there is recourse to clause 4 of the Bill, which I shall be prepared to amend in order to make the point perfectly clear that there is no intention to interfere except in certain number of exceptional cases, and it is to meet these that this measure is proposed. Neither the Government nor the house owner, if put to proof, could show either how the land was originally included in the cantonment or under what circumstances the building on it came to be erected. I maintain that in such cases it is but right to give to the Government the benefit of whatever doubt and uncertainty there may be and to presume in the absence of title-deeds on either side that the land is the Government land and must be insisted upon as paramount. The very existence of houses in most cantonments depends primarily on the presence of His Majesty's troops: the value of house property would as a rule be much diminished if the troops were withdrawn; and under these circumstances, it is surely not too much to assume that houses in cantonments were in fact built for the accommodation of Military men; and that appropriation for their use in suitable repair and at reasonable rents is perfectly reasonable, just and proper.

By the earlier part of clause (3) of the Bill the application of the measure is to be left to the Local Governments and is to depend on the result of a careful inquiry regarding the precise circumstances of each cantonment. If the occupant of any building site can show to the satisfaction of the Local Government—judicial proof, be it noticed is not required—that he holds the land by a lawful title acquired prior to the formation of the cantonment, then the land will be excluded from the operation of the proposed Act. And subject to the burden of proof referred to above instead of there being anything to prevent a resort to the Civil Courts by any one aggrieved in the matter, the obnoxious clause under consideration expressly directs that, if pending the inquiry or at any time thereafter any land is proved by the decree of a court of competent jurisdiction to be held under such a lawful title, it shall be excluded from the area of the notification bringing the measure into operation." (See *Fort St. George Gazette*, Part III, 5th Nov., 1901, pp. 28-29).



The present Act is Act of 1923. The Bill which subsequently became Act of 1923 was introduced in the Legislative Council in 1922. The following extracts from the Statement of Objects and Reasons attached to the Bill may most usefully be noticed.

The following is the Statement of Objects and Reasons to the Cantonments House Accommodation Act, 1922.

"A Committee which was appointed in the winter 1920-1921 to enquire into and make recommendations in regard to the administration of cantonments recommended *inter alia* that the Cantonments House Accommodation Act should be revised, so as to remove certain defects which have been brought to light and to carry out more fully the intention of the Act, namely, the better provision of house accommodation for military officers in cantonments. These recommendations have now been examined by the Government of India whose conclusions are embodied in the draft Bill.

A number of the amendments are designed merely to bring the Act up to date by specifying, in place of the authorities by whom the Act is at present administered other authorities recently constituted, *e.g.*, District Commanders in lieu of Divisional Commanders.

The principal changes of substance which the Bill seeks to introduce are—*firstly*, to substitute for the procedure under which houses are liable to be appropriated for use, on a monthly tenancy, by military officers, holding direct from the house owner, a procedure under which Government will take such houses as may be required on a repairing lease for a term of at least 5 years and will allot the houses so leased to officers requiring accommodation. Under this procedure officers will become the tenants of Government, who alone will deal with the house owners. Where a military officer prefers to take a house by private agreement with a house owner, and not from Government, it is considered that there is no justification for interference between the two parties in cases of dispute, which will in future be settled, as they would outside a cantonment, either by agreement between the parties or by recourse to the law Courts. *Thirdly*, the Bill alters the constitution of committees of Arbitration and provides for an appeal to the Court against the decisions of such committees.

## THE CANTONMENTS (HOUSE-ACCOMMODATION) ACT (VI OF 1923).<sup>1</sup>

### Effect of Legislation.

Year.	No.	Short title.	How repealed or affected by Legislation.
1923	IV	The Cantonments (House Accommodation) Act, 1923.	Amendment Act X of 1925. " Act IX of 1930. " Act XXII of 1933. Govt. of India (Adaptation of Indian Laws) Order, 1937. Rep. in pt., Act XII of 1927.

[5th March, 1923.

*An Act further to amend and to consolidate the law relating to the provision of house-accommodation for military officers in cantonments.*

WHEREAS it is expedient further to amend and to consolidate the law relating to the provision of house-accommodation for military officers in cantonments; It is hereby enacted as follows:—

### CHAPTER I.

#### PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE CANTONMENTS (HOUSE-ACCOMMODATION) ACT, 1923.

(2) It extends to the whole of British India (inclusive of British Baluchistan) [ \* \* \* \* ].<sup>2</sup>

#### LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons, see *Gazette of India*, 1922, Pt. V, p. 233; and for Report of Joint Committee, see *ibid.*, 1923,

Pt. V, p. 5.

<sup>2</sup> Words 'except Aden' omitted by A.O., 1937.



(3) It shall come into force on the first day of April, 1923, but it shall not become operative in any cantonment or part of a cantonment until the issue, or otherwise than in pursuance, of a notification as hereinafter provided by section 3:

Provided that any notification made under section 3 of the <sup>1</sup>Cantonments (House-Accommodation) Act, 1902, which is in force at the commencement of this Act, shall be deemed to be a notification made under section 3 of this Act.

Definitions.

2. (1) In this Act, unless there is anything repugnant in the subject or context,—

(a) "Brigade area" means one of the Brigade areas, whether occupied by a brigade or not, into which India is for military purposes for the time being divided, and includes any area which the Central Government may, by notification in the Official Gazette, declare to be a Brigade area for all or any of the purposes of this Act;

<sup>2</sup>[\* \* \* \* \*]  
<sup>3</sup>[(b) "Cantonment Board" means a Cantonment Board constituted under the Cantonments Act, 1924;]

(c) "Command" means one of the Commands into which India is for military purposes for the time being divided, and includes any area which the Central Government may, by notification in the Official Gazette, declare to be a Command for all or any of the purposes of this Act;

(d) <sup>4</sup>["Officer Commanding the station"] means the officer for the time being in command of the forces in a cantonment <sup>5</sup>[or, if that officer is the Officer Commanding the District, the military officer who would be in command of those forces in the absence of the Officer Commanding the District].

(e) "District" means one of the Districts into which India is for military purposes for the time being divided; it includes a Brigade area which does not form part of any such District and any area which the Central Government may, by notification in the Official Gazette, declare to be a District for all or any of the purposes of this Act;

(f) "house" means a house suitable for occupation by a military officer or a military mess, and includes the land and buildings appurtenant to a house;

(g) "military officer" means a commissioned or warrant officer of His Majesty's military or air-forces on military or air-force duty in a cantonment, and includes a Chaplain on duty with troops in a cantonment, <sup>6</sup>[an officer of the Cantonments Department] and any person in Army departmental employment whom the Officer Commanding the District may at any time, by an order in writing, place on the same footing as a military officer for the purposes of this Act;

(h) "owner" includes the person who is receiving, or is entitled to receive, the rent of a house, whether on his own account or on behalf of himself and others or as an agent or trustee, or who would so receive the rent, or be entitled to receive it, if the house were let to a tenant; and

(i) a house is said to be in a state of reasonable repair when—  
 (i) all floors, walls, pillars and arches are sound and all roofs sound and watertight,

(ii) all doors and windows are intact, properly painted or oiled, and provided with proper locks or bolts or other secure fastenings, and

(iii) all rooms, out-houses and other appurtenant buildings are properly colour-washed or white-washed.

#### LEG. REF.

<sup>1</sup> Repealed by section 39 and Schedule of this Act.

<sup>2</sup> Original clause (b) was omitted and cl. (bb) re-lettered as cl. (b) by Act IX of 1930.

<sup>3</sup> Inserted by Act X of 1925, section 2.

<sup>4</sup> Substituted for words "Commanding Officer of the Cantonment" by Act X of 1925.

<sup>5</sup> Added by Act IX of 1930.

<sup>6</sup> Substituted for words "a Cantonment Magistrate" by Act X of 1925, section 2.



(2) If any question arises whether any land or building is appurtenant to a house, it shall be decided by the <sup>1</sup>[Officer Commanding the station] whose decision thereon shall, subject to revision by the <sup>2</sup>[Collector], be final.

## CHAPTER II.

### APPLICATION OF ACT.

3. (1) The <sup>3</sup>[Central Government], <sup>4</sup>[ \* \* \* \* \* ], may, by notification in the Official Gazette, declare this Act to be operative in any cantonment or part of a cantonment <sup>5</sup>[ \* \* \* \* \* ] other than a cantonment situate within the limits of a presidency-town.

Cantonments or parts of cantonments in which Act to be operative.

(2) Before issuing a notification under sub-section (1) in respect of any cantonment or part of a cantonment, the <sup>3</sup>[Central Government] shall cause local inquiry to be made with a view to determining whether it is expedient to issue such notification, and what portion (if any) of the area proposed to be included therein should be excluded therefrom.

<sup>6</sup>[4. Nothing in this Act shall affect the provisions of any written Crown contract unless all the parties to that contract consent in writing to be bound by the terms of this Act.]

Saving of written instruments.

## CHAPTER III.

### APPROPRIATION OF HOUSES.

5. Every house situate in a cantonment or part of a cantonment in respect of which a notification under sub-section (1) of section 3 is for the time being in force shall be liable to appropriation by the <sup>7</sup>[Central] Government on a lease in the manner and subject to the conditions hereinafter provided.

Conditions on which houses may be appropriated.

<sup>8</sup>[6. (1) Where—

(a) a military officer who is stationed in or has been posted to the cantonment, or a President of a military mess in the cantonment, applies in writing to the Officer Commanding the station stating that he is unable to secure suitable accommodation in the cantonment for himself or the mess on reasonable terms by private agreement, and that no suitable house or quarter belonging to <sup>9</sup>[the Crown] is available for his occupation or for the occupation of the mess, and the Officer Commanding the station is satisfied on inquiry of the truth of the facts so stated; or

(b) the Officer Commanding the Station is satisfied on inquiry that there

#### LEG. REF.

<sup>1</sup> Substituted for words "Commanding Officer of the Cantonment" by Act X of 1925.

<sup>2</sup> Substituted for words "District Magistrate" by Act IX of 1930.

<sup>3</sup> Substituted for 'Local Government' by A.O., 1937.

<sup>4</sup> Words "with the previous sanction of the Governor-General in Council" omitted by A.O., 1937.

<sup>5</sup> Words "situate in the Province" omitted by A.O., 1937.

<sup>6</sup> Substituted for old section 4, by *ibid.*

<sup>7</sup> Inserted by *ibid.*

<sup>8</sup> Section 6 is newly substituted for old section 6 by Act IX of 1930. The old section 6 stood as follows:—

6. (1) Where the Officer commanding the station considers that the liability imposed by section 5 should be enforced in respect of any house, he shall serve a notice on the owner of the house requiring him to

permit the house to be inspected, measured and surveyed by such person and on such day, not being less than three days from the service of the notice, and at such time as may be specified in the notice.

(2) On the day and at the time so specified, the owner shall be bound to afford all reasonable facilities to the person specified in the notice for the purpose of the inspection, measurement and survey of the house, and, if he refuses or neglects to do so, the said person may, subject to rules made under this Act, enter on the premises and do all such things as may be reasonably necessary for the said purpose.

<sup>9</sup> Substituted for 'Government' by A.O., 1937.

#### NOTES.

SECS. 6 AND 11.—The Cantonments Act does not contain any prohibition against a transfer by an owner of his right to continue in occupation of the house. All that the Act says is that no notice shall be issued



is not in the cantonment a sufficient and assured supply of houses available at reasonable rates of rent by private agreement to meet the requirements of the military officers and military messes whose accommodation in the cantonment is in his opinion necessary or expedient, the Officer Commanding the station may, with a view to enforcing the liability under section 5, serve a notice on the owner of any house which appears to him to be suitable for occupation by a military officer or a military mess, as the case may be, within the cantonment, or, if this Act is in force in part only of the cantonment, within that part, requiring the owner to permit the house to be inspected, measured and surveyed by such person and on such date not being less than three clear days from the service of the notice, and at such time between sunrise and sunset, as may be specified in the notice.

(2) On the date and at the time so specified the owner shall be bound to afford all reasonable facilities to the person specified in the notice for the purpose of the inspection, measurement and survey of the house and, if he refuses or neglects to do so, such person may, subject to any rules made under this Act, enter on the premises and do all such things as may be reasonably necessary for the said purpose.]

7. (1) If, on the report of such person as aforesaid, the <sup>1</sup>[Officer Commanding the station] is satisfied that the house is suitable for occupation by a military officer or a military mess, he may <sup>2</sup>[\* \* \* \* \*] by notice—

(a) require the owner to execute a lease of the house to the <sup>3</sup>[Central] Government for a specified period which shall not be less than five years;

(b) require the existing occupier, if any, to vacate the house; and

(c) require the owner to execute within such time as may be specified in the notice such repairs as may, in the opinion of the <sup>1</sup>[Officer Commanding the station], be necessary for the purpose of putting the house into a state of reasonable repair.

(2) Every notice issued under sub-section (1) shall state the amount of the annual rent proposed as reasonable for the house, calculated on the assumption that the owner will carry out the required repairs, if any. It shall also contain an estimate of the cost of such repairs.

(3) The following shall be deemed to be conditions of every lease executed under sub-section (1), namely:—

(a) that the house shall, on the expiration of the lease, be redelivered to the owner in a state of reasonable repair, and

(b) that the grounds and the garden, if any, appertaining to the house shall be maintained in the condition in which they are at the time at which the lease is executed:

<sup>4</sup>[Provided that nothing in this sub-section shall be deemed to affect the right of the <sup>3</sup>[Central] Government to avoid the lease in any such event as is specified in clause (e) of section 108 of the Transfer of Property Act, 1882.]

#### LEG. REF.

<sup>1</sup> These words were substituted for the words "Commanding Officer of the Cantonment" by section 6 of the Cantonments (House Accommodation Amendment) Act, 1925 (X of 1925).

<sup>2</sup> In sub-section (1) to section 7, the words "with the previous sanction of the Officer Commanding the District" have been omitted by Act IX of 1930.

<sup>3</sup> Inserted by A.O., 1937.

<sup>4</sup> Proviso to sub-section (3) has been newly added by Act IX of 1930.

#### NOTES.

under section 6 if the house is occupied by

the owner. The owner, therefore, may agree that if the house is required by the military authorities, he would deliver possession thereof to them. The Cantonment Magistrate is not prohibited from entering into any such agreement with an intending purchaser or even an owner in possession. Such an agreement would not defeat the provisions of the Cantonments Act. 25 Bom.L.R. 938=85 I.C. 442=1924 Bom. 258.

SEC. 7.—The best criterion for arriving at a reasonable figure of rent of a house is to find out the rent of bungalows in the locality. 182 I.C. 566=A.I.R. 1939 Pesh. 22.



<sup>18</sup>. [Procedure to be observed before taking a house on lease.] [*Repealed by Act IX of 1930.*]

9. No house in any cantonment or part of a cantonment in which this Act is operative shall, unless it was so occupied at the date of the issue of the notification declaring this Act or the <sup>2</sup>Cantonments (House-Accommodation) Act, 1902, as the case may be, to be operative, be occupied for the purposes of a hospital, school, school hostel, bank, hotel, or shop, or by a railway administration, a company or firm engaged in trade or business or a club, without the previous sanction of the Officer Commanding the District given with the concurrence of the Commissioner or, in a province where there are no Commissioners, of the Collector.

Houses not to be appropriated in certain cases.

10. No notice shall be issued under section 7 if the house—

(a) was, at the date of the issue of the notification declaring this Act or the <sup>2</sup>Cantonments (House Accommodation) Act, 1902, as the case may be, to be operative in the cantonment or part of the cantonment, or is, with such sanction as is required by section 9, occupied as a hospital, school, school hostel, bank, hotel or shop, and has been so occupied continuously during the three years immediately preceding the time when the occasion for issuing the notice arises, or,

(b) was, at the date of such a notification as is referred to in clause (a), or is, with such sanction as aforesaid, occupied by a railway administration or by a company or firm engaged in trade or business or by a club, or

(c) is occupied by the owner, or,

(d) has been appropriated by the Provincial Government with the concurrence of the Officer Commanding the District, or by the Central Government for use as a public office or for any other purpose.

11. (1) If a house is unoccupied, a notice issued under section 7 may require the owner to give possession of the same to the <sup>3</sup>[Officer Commanding the station] within twenty-one days from the service of the notice.

Time to be allowed for giving possession of house.

(2) If a house is occupied, a notice issued under section 7 shall not require its vacation in less than thirty days from the service of the notice.

(3) Where a notice has been issued under section 7 and the house has been vacated in pursuance thereof, the lease shall be deemed to have commenced on the date on which the house was so vacated.

12. If the owner fails to give possession of a house to the <sup>3</sup>[Officer Commanding the station] in pursuance of a notice issued under section 7, or if the existing occupier fails to vacate a house in pursuance of such a notice, the District Magistrate, by himself or by another person generally or specially authorised by him in this behalf, shall enter on the premises and enforce the surrender of the house.

Surrender of house when to be enforced.

#### LEG. REF.

<sup>1</sup> Section 8 was repealed by Act IX of 1930. The repealed section 8 stood as follows:—

8. The Officer Commanding the District shall not sanction the issue of any notice under section 7 unless he is satisfied—

(i) that the house in respect of which it is proposed to issue the notice is suitable for occupation by a military officer or a military mess, and

(ii) that there is not in the cantonment or, if this Act is in force in a part only of the cantonment, then in that part thereof, a

sufficient number of houses already available and suitable for occupation by military officers or military messes whose accommodation in the cantonment or a part thereof, as the case may be, is in his opinion necessary or expedient.

<sup>2</sup> Repealed by section 39 and Schedule of this Act.

<sup>3</sup> These words were substituted for the words "Commanding Officer of the cantonment" by section 6, Act X of 1925.

#### NOTES.

SEC. 11.—See 1934 B. 258, cited under section 6, *supra*.



Option in certain cases for owner on whom notice is issued under section 7 to call upon the Government to purchase.

13. (1) If a house, in respect of which a notice is issued under section 7, is shown to the satisfaction of the <sup>1</sup>[Central Government], or is proved by a decree or order of a Court of competent jurisdiction to have been erected—

(a) under any conditions, rules, regulations or orders which were in force in Bengal prior to the eighth day of December, 1864, and conferred on the owner the option of offering the house for sale to the military officer applying for its appropriation for his occupation or to the East India Company or the Government, or

(b) under any conditions, rules, regulations or orders which were in force in Bombay prior to the first day of June, 1875, and conferred such an option as is described in clause (a), then the owner shall have the option of either complying with the notice or offering the house for sale to the <sup>2</sup>[Central] Government.

(2) If the owner elects to sell the house, and the <sup>2</sup>[Central] Government is willing to purchase it, the question of the amount of the purchase-money to be paid shall, in the event of disagreement, be referred to <sup>3</sup>[a Civil Court, in accordance with the provisions of Chapter IV.]

14. (1) If a house, in respect of which a notice is issued under section 7, is occupied by a tenant holding in good faith and for valuable consideration under a registered lease for any term exceeding one year, the <sup>4</sup>[Central Government] shall, for the term of one year from the date on which the house is vacated in pursuance of the notice, or for the unexpired term of the lease whichever is the shorter, be liable to the owner for the rent fixed by the registered lease instead of for the rent payable under this Act if the rent so fixed exceeds the rent so payable.

(2) If a house, in respect of which a notice is issued under section 7, is occupied by a tenant holding in good faith and for valuable consideration under a registered lease from year to year, the <sup>4</sup>[Central Government] shall be liable as aforesaid for the term of six months from the date on which the house is vacated in pursuance of the notice.

(3) Nothing in this section shall be deemed—

(a) to render the <sup>5</sup>[Central Government] so liable unless an application in writing in this behalf is made by the owner to the <sup>6</sup>[Officer Commanding the station] within fifteen days from the service of the notice; or

(b) to limit or otherwise affect any agreement between the <sup>5</sup>[Crown] and the owner.

15. (1) If the owner considers that the rent stated in a notice issued under section 7 is not reasonable, he may, within a period of <sup>7</sup>[thirty] days from the service of such notice, <sup>7</sup>[refer the matter to a Civil Court in accordance with the provisions of Chapter IV]:

<sup>8</sup>[Provided that where an appeal has been made to the Officer Commanding the District under section 30, the period of thirty days shall be reckoned

#### LEG. REF.

<sup>1</sup> Substituted for 'Local Government' by A.O., 1937.

<sup>2</sup> Inserted by A.O., 1937.

<sup>3</sup> Substituted by Act IX of 1930.

<sup>4</sup> Substituted for "Secretary of State for India in Council" by A.O., 1937.

<sup>5</sup> Substituted for "said Secretary of State in Council" by *ibid.*

<sup>6</sup> Substituted for the words "Command-

ing Officer of the Cantonment" by Act X of 1925.

<sup>7</sup> Substituted by Act IX of 1930.

<sup>8</sup> Proviso added by Act XXII of 1933.

#### NOTES.

SEC. 15.—The Act only refers to an owner. A notice is issued to an owner and if there is any person in occupation, to the occupier, and it is the owner alone who can make a reference to the Civil Court under section 15.



from the date on which the owner received notice of the result of the appeal under sub-section (2) of section 32.]

(2) If the owner does not make such a <sup>1</sup>[reference] within the said period, he shall be deemed to have accepted the rent so offered.

16. (1) If the owner fails to execute any repairs to a house as required by a notice issued to him under section 7, the <sup>2</sup>[Officer Commanding the station] may by notice require the owner to execute the repairs within such period, not being less than <sup>3</sup>[thirty] days, as may be specified in the notice.

(2) If the owner objects to any requisition contained in a notice issued under sub-section (1), he may, within <sup>3</sup>[thirty] days from the service of the notice, <sup>3</sup>[refer the matter to a Civil Court in accordance with the provisions of Chapter IV]:

<sup>4</sup>[Provided that where an appeal has been made to the Officer Commanding the District under section 30, the period of thirty days shall be reckoned from the date on which the owner received notice of the result of the appeal under sub-section (2) of section 32.]

<sup>5</sup>[(3) Every reference under sub-section (2) shall be accompanied by an estimate of the repairs, if any, which the owner considers necessary in order to put the house into a state of reasonable repair.]

<sup>6</sup>[17. If the owner fails to comply with a notice issued under sub-section (1) of section 16, the Military Engineer services or the Public Works Department may, with the previous sanction of the Officer Commanding the Station and notwithstanding any right of reference conferred by that section, cause the repairs specified in the notice to be executed at the expense of the <sup>7</sup>[Central] Government, and the cost thereof, or, where a reference has been made, the amount finally determined by the Civil Court, may be deducted from the rent payable to the owner.]

#### LEG. REF.

<sup>1</sup> Substituted by Act IX of 1930, for 'requisition'.

<sup>2</sup> These words were substituted for the words "Commanding Officer of the Cantonment" by section 6, Act X of 1925.

<sup>3</sup> Substituted by Act IX of 1930.

<sup>4</sup> Proviso added by Act XXII of 1933.

<sup>5</sup> Sub-section (3) of section 16 added by Act IX of 1930.

<sup>6</sup> Section 17 has been substituted by Act IX of 1930 for old section 17 which stood as follows:—

17. Where—

(a) the owner fails to comply with a notice issued under sub-section (1) of section 16 and has not, within fifteen days from the service of such notice, required that the matter be referred to a Committee of Arbitration, or

(b) a Committee of Arbitration decides that repairs are necessary and the extent to which they are necessary, and specifies the period within which they are to be executed, and the owner fails to execute them within such period, and has not within one month from the date of the decision appealed therefrom to the Civil Court as hereinafter provided, or

(c) the owner fails to execute within such period as may be specified by the Civil Court hearing such appeal such repairs as

the Court may decide to be necessary, the Military Engineer Services, or the Public Works Department shall, on the application of the Officer Commanding the station, cause the repairs specified in the notice, or, if the matter has been referred to a Committee of Arbitration in the decision of the Committee or the Civil Court, as the case may be, to be executed at the expense of the Government, and the cost thereof may be deducted from the rent payable to the owner.

<sup>7</sup> Inserted by A.O., 1937.

#### NOTES.

The owner is not bound to make a mortgagee, who is not in possession of the property acquired on lease, a party and his non-joinder will not defeat the suit, although it is advisable that the mortgagee should be added under O. 1, R. 10, C. P. Code. 167 I.C. 158=A.I.R. 1937 Pesh. 17. There should be some provision in the Act that where a house has been taken over and the question of rent is contested by the landlord the amount fixed by the officer commanding should be paid to the landlord without prejudice to his right to fight in Court the question of the enhancement of the rate of rent. 182 I.C. 566=A.I.R. 1939 Pesh. 22.

SECS. 17 AND 18.—See 25 A.L.J. 91=97 I.C. 71=1926 All. 746.



18. Every person on whom devolves, by transfer, by succession or by operation of law, the interest of an owner in any house, or in any part of any house, situate in a cantonment or part of a cantonment in respect of which a notification under sub-section (1) of section 3 is for the time being in force, shall be bound to give notice of the fact to the <sup>1</sup>[Officer Commanding the station] within one month from the date of such devolution, and, if he, without reasonable cause, fails to do so, he shall be punishable with fine which may extend to fifty rupees.

#### <sup>2</sup>CHAPTER IV. PROCEDURE IN REFERENCES.

19. All references under this Act shall be made by application to, and tried by, the Court of the District Judge.

20. References under this Act shall be deemed to be proceedings within the meaning of section 141 of the Code of Civil Procedure, 1908, and in the trial thereof the Court may exercise any of its powers under that Code.

21. The scope of the inquiry in a reference under this Act shall be restricted to a consideration of the matters referred to the Court in accordance with the provisions of this Act.

2\* \* \* \* \*

#### CHAPTER V. APPEALS.

<sup>3</sup>[29. (1) An appeal shall lie to the High Court against the decision of the Court of the District Judge upon a reference tried by it.

(2) No appeal under this section shall be admitted unless it is made within thirty days from the date of the decision against which it is preferred.

(3) An appeal preferred under this section shall be deemed to be an appeal from an order within the meaning of section 108 of the Code of Civil Procedure, 1908].

<sup>4</sup>[30. The owner or any tenant of a house in respect of which a notice has been issued under section 7 may, within a period of <sup>5</sup>[ten days] from the date of the service thereof, appeal to the Officer Commanding the District against the decision of the Officer Commanding the station to appropriate the house.]

31. (1) Every petition of appeal under section 30 shall be in writing and accompanied by a copy of the notice appealed against.

(2) Any such petition may be presented to the <sup>1</sup>[Officer Commanding

#### LEG. REF.

<sup>1</sup> Substituted by Act X of 1925.

<sup>2</sup> Chapter IV has been newly substituted by Act IX of 1930 for the old Chapter IV containing sections 19-28.

<sup>3</sup> Substituted for old section 29 by Act IX of 1930.

<sup>4</sup> Substituted for old section 30 by *ibid.*

<sup>5</sup> Substituted for the words "twenty-one days" by Act XXII of 1933.

#### NOTES.

SEC. 29 (2).—S. 5 of Limitation Act is not applicable to the case of appeals under C.C.M.,—38

the Cantonment (House-Accommodation) Act, as the latter is a special Act. 1941 O.W.N. 453=1941 O.A. (Supp.) 195=1941 A.W.R. (H.C.) 122.

SEC. 30.—A person aggrieved by the issue of a notice against him under section 7 for vacating a house in the Cantonment has only one remedy open to him, namely, to appeal under section 30, whether the notice is legal or not. Civil Courts have no jurisdiction to entertain a suit in respect of such notice. 49 B. 152=27 Bom.L.R. 56=1925 B. 162.



the station], and that officer shall be bound to forward it to the authority empowered by section 30 to hear the appeal, and may attach thereto any report which he may desire to make in explanation of the notice appealed against.

(3) If any such petition is presented direct to the Officer Commanding the District and an immediate order on the petition is not necessary, the Officer Commanding the District may refer the petition to the <sup>1</sup>[Officer Commanding the station] for report.

32. <sup>2</sup>[(1)] The decision on any such appeal of the Officer Commanding the District <sup>3</sup>[\* \* \* \*] shall be final, and shall not be questioned in any Court otherwise than on the ground that the house is situate in a cantonment, or part of a cantonment in which this Act is not operative:

Provided that no appeal shall be decided until the appellant has been heard or has had a reasonable opportunity of being heard in person or through a legal practitioner, <sup>4</sup>[and in giving a decision the Officer Commanding the District shall record briefly the grounds therefor].

<sup>5</sup>[(2) Notice of the result of the appeal shall be given to the appellant as soon as may be, and, where the appellant is a tenant of the house, to the owner of the house also.]

33. Where an appeal has been presented under section 30 within the period prescribed <sup>6</sup>[therein] all action on the notice shall, on the application of the appellant, be held in abeyance pending the decision of the appeal.

## CHAPTER VI.

### SUPPLEMENTAL PROVISIONS.

34. Every notice or requisition prescribed by this Act shall be in writing, signed by the person by whom it is given or made or by his duly appointed agent, and may be served by post on the person to whom it is addressed, or, in the case of an owner who does not reside in or near the cantonment, on his agent appointed <sup>7</sup>[in accordance with a bye-law made under clause (29) of section 282 of the Cantonments Act, 1924].

<sup>8</sup>[34-A. The period prescribed for making any reference or preferring any appeal under this Act shall be computed in accordance with the provisions of the Indian Limitation Act, 1908].

Power for Central Government to make rules. 35. (1) The Central Government may make rules<sup>9</sup> to carry out the purposes and objects of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) <sup>10</sup>[\* \* \* \*]

(b) define the powers of entry, inspection, measurement or survey which may be exercised in carrying out the purposes and objects of this Act or of any rule made hereunder.

### LEG. REF.

<sup>1</sup> Substituted by Act X of 1925.

<sup>2</sup> The original section 32 has been renumbered as sub-section (1) of section 32 by Act XXII of 1933.

<sup>3</sup> Omitted by Act IX of 1930.

<sup>4</sup> Added by Act IX of 1930.

<sup>5</sup> Added by Act XXII of 1933.

<sup>6</sup> Substituted for "by sub-section (2) of

that section" by Act IX of 1930.

<sup>7</sup> Substituted for words "under the Cantonments Act, 1910, or any rule made thereunder" by Act X of 1925.

<sup>8</sup> Inserted by Act IX of 1930.

<sup>9</sup> For such rules, see *Gen. R. and O.*, Vol. V, p. 251.

<sup>10</sup> Omitted by Act IX of 1930.



36. (1) The power to make rules under section 35 shall be subject to the condition of the rules being made after previous publication and of their not taking effect until they have been published in the Official Gazette and in such other manner (if any) as the Central Government may direct.

Further provisions respecting rules.

(2) Any rule under section 35 may be general for all cantonments or parts of cantonments in British India in which this Act is for the time being operative, or may be special for any of such cantonments or parts as the Central Government may direct.

(3) A copy of the rules under section 35 for the time being in force in a cantonment shall be kept open to inspection free of charge at all reasonable times in the office of the Cantonment [Board].<sup>1</sup>

(4) In making any rule under clause (b) of sub-section (2) of section 35, the Central Government may direct that whoever obstructs any person, not being a public servant within the meaning of section 21 of the Indian Penal Code, in making any entry, inspection, measurement or survey, shall be punishable with fine which may extend to fifty rupees, and, in the case of a continuing offence, with fine which, in addition to such fine as aforesaid, may extend to five rupees for every day after the first during which such offence continues.

37. No Judge or Magistrate shall be deemed, within the meaning of section 556 of the Code of Criminal Procedure, 1898, to be a party to, or personally interested in, any prosecution for an offence constituted by or under this Act merely because he is a member of the Cantonment <sup>2</sup>[Board] or has ordered or approved the prosecution.

Inapplicability of section 556 of the Code of Criminal Procedure, 1898, to trials of offences.

38. No suit or other legal proceeding shall lie against any person for anything in good faith done, or intended to be done, under this Act or in pursuance of any lawful notice or order issued under this Act.

Protection to persons acting under Act.

39. [Repeals.] Repealed by section 2 and Sch. of the Repealing Act, 1927 (XII of 1927).

#### [THE SCHEDULE.]

[Enactments repealed.] Repealed by section 2 and Sch. of the Repealing Act, 1927 (XII of 1927).

### THE CARRIAGE BY AIR ACT (XX OF 1934).

[AMENDED BY ACT XXXI OF 1939.]

[19th August, 1934.]

*An Act to give effect in British India to a Convention for the unification of certain rules relating to international carriage by air.*

WHEREAS a Convention for the unification of certain rules relating to international carriage by air (hereinafter referred to as the Convention) was, on the 12th day of October, 1929, signed at Warsaw;

AND WHEREAS it is expedient that British India should accede to the Convention and should make provision for giving effect to the said Convention in British India;

AND WHEREAS it is also expedient to make provision for applying the rules contained in the Convention (subject to exceptions, adaptations and modifications) to carriage by air in British India which is not international carriage within the meaning of the Convention;

It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE CARRIAGE BY AIR ACT, 1934.

LEG. REF.

<sup>1</sup> Substituted by Act XXXII of 1940.

<sup>2</sup> Substituted for word "Committee" by Act X of 1925.



(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on such date as the <sup>1</sup>[Central Government] may, by notification in the <sup>1</sup>[Official Gazette] appoint.

2. (1) The rules contained in the First Schedule, being the provisions of the convention relating to the rights and liabilities of carriers, passengers, consignors, consignees and other persons shall, subject to the provisions of this Act, have the force of law in British India in relation to any carriage by air to which those rules apply, irrespective of the nationality of the aircraft performing the carriage.

(2) The <sup>1</sup>[Central Government] may, by notification in the <sup>1</sup>[Official Gazette] certify who are the High Contracting Parties to the Convention, in respect of what territories they are parties, and to what extent they have availed themselves of the Additional Protocol to the Convention, and any such notification shall be conclusive evidence of the matters certified therein.

(3) Any reference in the First Schedule to the territory of any High Contracting Party to the Convention shall be construed as a reference to all the territories in respect of which he is a party.

<sup>2</sup>[3-a) Any reference in the First Schedule to agents of the carrier shall be construed as including a reference to servants of the carrier.]

(4) Notwithstanding anything contained in the Indian Fatal Accidents Act, 1855, or any other enactment or rule of law in force in any part of British India, the rules contained in the First Schedule shall, in all cases to which those rules apply, determine the liability of a carrier in respect of the death of a passenger, and the rules contained in the Second Schedule shall determine the persons by whom and for whose benefit and the manner in which such liability may be enforced.

(5) Any sum in francs mentioned in rule 22 of the First Schedule shall, for the purpose of any action against a carrier, be converted into rupees at the rate of exchange prevailing on the date on which the amount of damages to be paid by the carrier is ascertained by the Court.

3. (1) Every High Contracting Party to the Convention who has not availed himself of the provisions of the Additional Protocol thereto shall, for the purposes of any suit brought in a Court in British India in accordance with the provisions of rule 28 of the First Schedule to enforce a claim in respect of carriage undertaken by him, be deemed to have submitted to the jurisdiction of that Court and to be a person for the purposes of the Code of Civil Procedure, 1908.

(2) The High Court may make rules of procedure providing for all matters which may be expedient to enable such suits to be instituted and carried on.

(3) Nothing in this section shall authorise any Court to attach or sell any property of a High Contracting Party to the Convention.

4. The <sup>1</sup>[Central Government] may, by notification in the <sup>1</sup>[Official Gazette] apply the rules contained in the first Schedule and any provision of section 2 to such carriage by air, not being international carriage by air as defined in the First Schedule, as may be specified in the notification, subject however to such exceptions, adaptations and modifications, if any, as may be so specified.



## FIRST SCHEDULE.

(See section 2.)

## RULES.

## CHAPTER I.

## SCOPE—DEFINITIONS.

1. (1) These rules apply to all international carriage of persons, luggage or goods performed by aircraft for reward. They apply also to such carriage when performed gratuitously by an air transport undertaking.

(2) In these rules "High Contracting Party" means a High Contracting Party to the Convention.

(3) For the purposes of these rules the expression "international carriage" means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to the Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of these rules.

(4) A carriage to be performed by several successive air carriers is deemed for the purposes of these rules, to be one undivided carriage, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party.

2. (1) These rules apply to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in rule 1.

(2) These rules do not apply to carriage performed under the terms of any international postal Convention.

## CHAPTER II.

## DOCUMENTS OF CARRIAGE.

*Part I.—Passenger ticket.*

3. (1) For the carriage of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:—

- (a) the place and date of issue;
- (b) the place of departure and of destination;
- (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character;
- (d) the name and address of the carrier or carriers;
- (e) a statement that the carriage is subject to the rules relating to liability contained in this Schedule.

(2) The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to these rules. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of the Schedule which exclude or limit his liability.

*Part II.—Luggage ticket.*

4. (1) For the carriage of luggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a luggage ticket.

(2) The luggage ticket shall be made out in duplicate one part for the passenger and the other part for the carrier.

(3) The luggage ticket shall contain the following particulars:—

- (a) the place and date of issue;
- (b) the place of departure and of destination;
- (c) the name and address of the carrier or carriers;
- (d) the number of the passenger ticket;
- (e) a statement that delivery of the luggage will be made to the bearer of the luggage ticket;
- (f) the number and weight of the packages;
- (g) the amount of the value declared in accordance with R. 22 (2);
- (h) a statement that the carriage is subject to the rules relating to liability contained in this Schedule.



(4) The absence, irregularity or loss of the luggage ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to these rules. Nevertheless if the carrier accepts luggage without a luggage ticket having been delivered, or if the luggage ticket does not contain the particulars set out at (d), (f) and (h) of sub-rule (3) the carrier shall not be entitled to avail himself of those provisions of this Schedule which exclude or limit his liability.

*Part III.—Air consignment note.*

5. (1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air consignment," and every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity or loss of this document does not affect the existence or the validity of the contract of carriage which shall be subject to the provisions of R. 9, be none the less governed by these rules.

6. (1) The air consignment note shall be made out by the consignor in three original parts and be handed over with the goods.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

(3) The carrier shall sign an acceptance of the goods.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor; the carrier makes out the air consignment note, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

7. The carrier of goods has the right to require the consignor to make out separate consignment notes when there is more than one package.

8. The air consignment note shall contain the following particulars:—

- (a) the place and date of its execution;
- (b) the place of departure and of destination;
- (c) the agreed stopping places provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character;
- (d) the name and address of the consignor;
- (e) the name and address of the first carrier;
- (f) the name and address of the consignee, if the case so requires;
- (g) the nature of goods;
- (h) the number of the packages, the method of packing and the particular marks or numbers upon them;
- (i) the weight, the quantity and the volume or dimensions of the goods;
- (j) the apparent condition of the goods and of the packing;
- (k) the freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;
- (l) if the goods are sent for payment on delivery, the price of the goods, and if the case so requires, the amount of the expenses incurred;
- (m) the amount of the value declared in accordance with R. 22 (2);
- (n) the number of parts of the air consignment note;
- (o) the document handed to the carrier to accompany the air consignment note;
- (p) the time fixed for the completion of the carriage and a brief note of the route to be followed, if these matters have been agreed upon;
- (q) a statement that the carriage is subject to the rules relating to liability contained in this Schedule.

9. If the carrier accepts goods without an air consignment note having been made out or if the air consignment note does not contain all the particulars set out in R. 8 (a) to (i) inclusive and (q), the carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability.

10. (1) The consignor is responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air consignment note.

(2) The consignor will be liable for all damage suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

11. (1) The air consignment note is *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of carriage.

(2) Statements in the air consignment note relating to the weight dimensions and packing of the goods, as well as those relating to the number of packages are *prima facie* evidence of the facts stated; those relating to the quantity, volume and condition of the



goods do not constitute evidence against the carrier except so far as they both have been, and are stated in the air consignment note to have been, checked by him in the presence of consignor or relate to the apparent condition of the goods.

12. (1) Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the goods by withdrawing them at the aerodrome of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air consignment note, or by requiring them to be returned to the aerodrome of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air consignment note delivered to the latter, he will be liable without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air consignment note.

(4) The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with R. 13. Nevertheless, if the consignee declines to accept the consignment note or the goods or if he cannot be communicated with, the consignor resumes his right of disposition.

13. (1) Except in the circumstances set out in R. 12, the consignee is entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air consignment note and to deliver the goods to him, on payment of the charges due and on complying with the conditions of carriage set out in the air consignment note.

(2) Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the goods arrive.

(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage.

14. The consignor and the consignee can respectively enforce all the rights given them by Rr. 12 and 13 each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by contract.

15. (1) Rules 12, 13 and 14, do not affect either the relations of the consignor or the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

(2) The provisions of Rr. 12, 13 and 14 can only be varied by express provision in the air consignment note.

16. (1) The consignor must furnish such information and attach to the air consignment note such documents as are necessary to meet the formalities of customs, octroi or police before the goods can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

(2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

### CHAPTER III.

#### LIABILITY OF THE CARRIER.

17. The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

18. (1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during carriage by air.

(2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.



19. The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.

20. (1) The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

21. If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may exonerate the carrier wholly or partly from his liability.

22. (1) In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 1,25,000 francs. Where damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 1,25,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value of the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger.

(4) The sums mentioned in this rule shall be deemed to refer to the French franc consisting of 65½ milligrams gold of a millesimal fineness 900.

23. Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in these rules shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract which shall remain subject to the provisions of this Schedule.

24. (1) In the cases covered by Rr. 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Schedule.

(2) In the cases covered by R. 17 the provisions of sub-R. (1) also apply without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

25. (1) The carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability if the damage caused by his wilful misconduct or by such default on his part as is in the opinion of the Court equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.

26. (1) Receipt by the person entitled to delivery of luggage or goods without complaint is *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of carriage.

(2) In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within three days from the date of receipt in the case of luggage and seven days from the date of receipt in the case of goods. In the case of delay the complaint must be made at the latest within fourteen days from the date on which the luggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of carriage or by separate notice in writing despatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

27. In the case of the death of the person liable, an action for damages lies in accordance with these rules against those legally representing his estate.

28. An action for damages must be brought at the option of the plaintiff, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

29. The right of damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

30. (1) In the case of a carriage to be performed by various successive carriers and falling within the definition set out in sub-R. (4) of R. 1, each carrier who accepts passengers, luggage or goods is subjected to the rules set out in this Schedule, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.



(2) In the case of carriage of this nature, the passenger or his representative can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards luggage or goods, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

#### CHAPTER IV.

##### PROVISIONS RELATING TO COMBINED CARRIAGE.

31. (1) In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Schedule apply only to the carriage by air, provided that the carriage by air, falls within the terms of rule 1.

(2) Nothing in this Schedule shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Schedule are observed as regards the carriage by air.

#### CHAPTER V.

##### GENERAL AND FINAL PROVISIONS.

32. Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Schedule, whether by deciding the law to be applied, or by altering the rules as to jurisdiction shall be null and void. Nevertheless for the carriage of goods arbitration clauses are allowed, subject to these rules, if the arbitration is to take place in the territory of one of the High Contracting Parties within one of the jurisdictions referred to in R. 28.

33. Nothing contained in this Schedule shall prevent the carrier either from refusing to enter into any contract of carriage, or from making regulations which do not conflict with the provisions of this Schedule.

34. This Schedule does not apply to international carriage by air performed by way of experimental trial by air navigation undertakings with the view to the establishment of a regular line of air navigation, nor does it apply to carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business.

35. The expression "days" when used in these rules means current days, not working days.

36. When a High Contracting Party has declared at the time of ratification of or of accession to the Convention that the first paragraph of Art. 2 of the Convention shall not apply to international carriage by air performed directly by the State, its colonies, protectorates or mandated territories or by any other territory under its sovereignty, suzerainty or authority, these rules shall not apply to international carriage by air so performed.

### SECOND SCHEDULE

(See section 2.)

#### PROVISIONS AS TO LIABILITY OF CARRIERS IN THE EVENT OF THE DEATH OF A PASSENGER.

1. The liability shall be enforceable for the benefit of such of the members of the passenger's family as sustained damage by reason of his death.

In this rule the expression "member of a family" means wife or husband, parent, step-parent, grand-parent, brother, sister, half-brother, half-sister, child, step-child, grand-child:

Provided that in deducing any such relationship as aforesaid any illegitimate person and any adopted person shall be treated as being, or as having been, the legitimate child of his mother and reputed father or, as the may be, of his adopters.

2. An action to enforce the liability may be brought by the personal representative of the passenger or by any person for whose benefit the liability is under the last preceding rule enforceable, but only one action shall be brought in British India in respect of the death of any one passenger, and every such action by whomsoever brought shall be for the benefit of all such persons so entitled as aforesaid as either are domiciled in British India, or, not being domiciled there express a desire to take the benefit of the action.

3. Subject to the provisions of the next succeeding rule the amount recovered in any such action, after deducting any costs not recovered from the defendant, shall be divided between the persons entitled in such proportions as the Court may direct.



4. The Court before which any such action is brought may at any stage of the proceedings make any such order as appears to the Court to be just and equitable in view of the provisions of the First Schedule to this Act limiting the liability of a carrier and of any proceedings which have been, or are likely to be, commenced outside British India in respect of the death of the passenger in question.

## THE CARRIAGE OF GOODS BY SEA ACT (XXVI OF 1925).<sup>1</sup>

[21st September, 1925]

*An Act to amend the law with respect to the carriage of goods by sea.*

WHEREAS at the International Conference on Maritime Law held at Brussels in October 1922, the delegates at the Conference, including the delegates representing His Majesty agreed unanimously to recommend their respective Governments to adopt as the basis of a convention a draft convention for the unification of certain rules relating to bills of lading;

AND WHEREAS at a meeting held at Brussels in October, 1923, the rules contained in the said draft convention were amended by the Committee appointed by the said Conference;

AND WHEREAS provision has been made by the Carriage of Goods by Sea Act, 1924, that the said rules as so amended and as set out with modifications in the schedule shall, subject to the provisions of that Act, have the force of law with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading;

AND WHEREAS it is expedient that like provision should be made in British India; It is hereby enacted as follows:—

Short title and extent. 1. (1) This Act may be called THE INDIAN CARRIAGE OF GOODS BY SEA ACT, 1925.

(2) It extends to the whole of British India.

Application of rules. 2. Subject to the provisions of this Act, the rules set out in the schedule (hereinafter referred to as "the rules") shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in British India to any other port whether in or outside British India.

Absolute warranty of seaworthiness not to be implied in contracts to which rules apply. 3. There shall not be implied in any contract for the carriage of goods by sea to which the rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

Statement as to application of Rules to be included in bills of lading. 4. Every bill of lading, or similar document of title, issued in British India which contains or is evidence of any contract to which the rules apply, shall contain an express statement that it is to have effect subject to the provisions of the said rules as applied by this Act.

Modification of Article VI of Rules in relation to goods carried in sailing ships and by prescribed routes. 5. Article VI of the Rules shall, in relation to—  
(a) the carriage of goods by sea in sailing ships carrying goods from any port in British India to any other port whether in or outside British India, and

(b) the carriage of goods by sea in ships carrying goods from a port in British India notified<sup>2</sup> in this behalf in the <sup>3</sup>[Official Gazette] by the

### LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons, see *Gazette of India*, 1925, Pt. V, p. 37 and for report of the joint committee, see *ibid.*, p. 205.

<sup>2</sup> For such notification, see *Gazette of*

*India*, 1925, Pt. I, p. 950.

<sup>3</sup> Substituted by Order in Council, 1937.

### NOTES.

SEC. 2. See (1939) 1 M.L.J. 235; 185 I.C. 16.



<sup>1</sup>[Central Government] to a port in Ceylon specified in the said notification, have effect as though the said Article referred to goods of any class instead of to particular goods and as though the proviso to the second paragraph of the said Article were omitted.

6. Where under the custom of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in the rules, the bill of lading shall not be deemed to be *prima facie* evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

7. (1) Nothing in this Act shall affect the operation of sections four hundred and forty-six to four hundred and fifty, both inclusive, five hundred and two, and five hundred and three of the Merchant Shipping Act, 1894, as amended by any subsequent enactment, or the operation of any other enactment for the time being in force limiting the liability of the owners of seagoing vessels.

(2) The rules shall not by virtue of this Act apply to any contract for the carriage of goods by sea before such day,<sup>2</sup> not being earlier than the first day of January, 1926, as the <sup>1</sup>[Central Government] may, by notification in the <sup>1</sup>[Official Gazette], appoint, nor to any bill of lading or similar document of title issued, whether before or after such day as aforesaid, in pursuance of any such contract as aforesaid.

## SCHEDULE.

### RULES RELATING TO BILLS OF LADING.

#### ARTICLE I.

##### DEFINITIONS.

In these rules the following expressions have the meanings hereby assigned to them respectively that is to say—

(a) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper;

(b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid, issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;

(c) "Goods" includes goods, wares, merchandises, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried;

(d) "Ship" means any vessel used for the carriage of goods by sea;

(e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

#### ARTICLE II.

##### RISKS.

Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care

#### LEG. REF.

<sup>1</sup> Substituted by Order in Council, 1937.

<sup>2</sup> For notification appointing such day as the 1st of January, 1926, see *Gazette of India*, 1925, Pt. I, p. 950.

#### NOTES.

ARTS. II AND III.—CASE UNDER BURMA CARRIAGE OF GOODS BY SEA ACT. Where in a contract to carry a cargo of potatoes by sea all the terms and provisions of the Burma Carriage of Goods Act had been

incorporated as applicable to the contract, and there is damage to the cargo owing to the negligence of the servants of the carrier, by virtue of Art. 11 of the Schedule the carrier shall be liable under the contract and not by way of tort in addition to it. A suit in respect of such damage is to be brought within one year after delivery or the date when goods should have been delivered. 1940 Rang.L.R. 552=A.I.R. 1940 Rang. 294.



and discharge of such goods shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

### ARTICLE III.

#### RESPONSIBILITIES AND LIABILITIES.

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

- (a) Make the ship seaworthy;
- (b) Properly man, equip, and supply the ship;
- (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper; issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or covering in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;

(c) The apparent order and condition of the goods:

Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.<sup>1</sup>

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c).

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight; as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.<sup>2</sup>

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

#### LEG. REF.

<sup>1</sup> Clause, "weight" contents and value unknown" in bill of lading—Effect of. 62 M. L.J. 736.

<sup>2</sup> Failure to bring the suit within time extinguishes the right. 1931 Sind 124; 1932 Bom. 330.

#### NOTES.

SCH. I, ART. III, PARA. 6: CONSTRUCTION—PERIOD OF ONE YEAR—IF CAN BE EXTENDED. The period of one year fixed in para. 6, Art. 3, Sch. I is to be construed strictly and is not to be allowed to be extended by vague and indefinite arguments and pleas. Where a ship leaves the port on a particular date she must be deemed to have delivered the cargo to the consignees within the meaning of para. 6, Art. 3, and it is not open to the

consignees to take advantage of a survey, which has been unduly delayed in order to extend the period of time. 1937 Sind 11=168 I.C. 330.

PORT TRUST—IF AGENTS OF SHIP OWNERS.—The Port Trust are not the agents of the ship-owners to hold identified and ascertained consignments indefinitely at the will of the consignees, so as to make the ship-owners liable for the loss caused to the consignments, although in particular cases it may well be that they are agents of the ship-owners for the limited purpose of identifying and delivering the consignments mixed together. 1937 Sind 11.

"REMOVAL"—MEANING.—The word 'removal' in Para. 6, Art. 3, Sch. I, Carriage of Goods by Sea Act, means physical removal. 1937 Sind 11.



In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

7. After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demand be a "shipped" bill of lading, provided that, if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading but at the option of the carrier, such document of title may be noted at the port of shipment by the carrier, master or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this Article be deemed to constitute a "shipped" bill of lading.

8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connexion with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.

#### ARTICLE IV.

##### RIGHTS AND IMMUNITIES.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and supplied and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage had resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

- (a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;
- (b) fire, unless caused by the actual fault or privity of the carrier;
- (c) perils, dangers and accidents of the sea or other navigable waters;
- (d) act of God;
- (e) act of war;
- (f) act of public enemies;
- (g) arrest or restraint of princes, rulers or people, or seizure under legal process;
- (h) quarantine restriction;
- (i) act or omission of the shipper or owner of the goods, his agent, or representative;
- (j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;
- (k) riots and civil commotions;
- (l) saving or attempting to save life or property at sea;
- (m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
- (n) insufficiency of packing;
- (o) insufficiency or inadequacy of marks;
- (p) latent defects not discoverable by due diligence;
- (q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of

#### NOTES.

ART. IV, R. 2 (q).—The rules made under the Carriage of Goods by Sea Act, apply by reason of section 2 of that Act, only to the carriage of goods by sea in ships carrying goods from any port in British India to any other port whether in or outside British India. A lighter transporting goods from the wharf to a steamer lying at anchor in the roads does not come within the purview of section 2 of the Act. Even if the lighter

be held to be a "ship" cl. (q) of rule 2 of Art. IV of the schedule to that Act would make the owners of the lighter liable for the loss caused by the fault of their agent, the tindal. A common carrier is liable for the loss of goods entrusted to him for carriage unless the loss be due to an act of God or of the King's Enemies. 49 L.W. 341 = A.I.R. 1939 Mad. 401 = (1939) 1 M.L.J. 235.



proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules, or of the contract of carriage and the carrier shall not be liable for any loss or damage resulting therefrom.

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100l. per package or unit or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connexion with goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

## ARTICLE V.

### SURRENDER OF RIGHTS AND IMMUNITIES, AND INCREASE OF RESPONSIBILITIES AND LIABILITIES.

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of these rules shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty they shall comply with the terms of these rules. Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

## ARTICLE VI.

### SPECIAL CONDITIONS.

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier, and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect:

Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement.



## ARTICLE VII.

## LIMITATIONS ON THE APPLICATION OF THE RULES.

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition; reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connexion with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

## ARTICLE VIII.

## LIMITATION OF LIABILITY.

The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

## ARTICLE IX.

The monetary units mentioned in these Rules are to be taken to be gold value.

THE CARRIERS ACT (III OF 1865)<sup>1</sup>

## EFFECT OF LEGISLATION

Year.	No.	Short title.	Effect of subsequent legislation.
1865	III	The Carriers Act, 1865	Repealed in part by Act IX of 1890. Section 2 repealed in part by Act X of 1914. Repealed (as to carriers by rail), by Act IV of 1879. Amended by Act X of 1899, S. 2 Amended by Act XIII of 1921.

**PREFATORY NOTE: DEFINITION AND KINDS OF CARRIERS.**—A carrier is one who undertakes the transportation of persons or movable property, and the authorities, both elementary and judicial, recognize two kinds of classes of carriers, *viz.*, 'private carriers' and 'common carriers'. While a common carrier has been defined as one who holds himself out to the public to carry persons or freight for hire, the term did not, at the common law, embrace a carrier of passengers, and is commonly confined to carriers of goods, as distinguished from common carriers of passengers. (See the definition in S. 2). A private carrier is one who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case for hire or reward. A common carrier differs from a private carrier in two important respects: (1) In respect of duty, he being obliged by law to undertake the charge of transportation, which no other person without a special agreement is. (2) In respect of risk, the former being regarded by the law as an insurer, the latter, being liable like ordinary bailees.

**APPLICABILITY OF LAW OF BAILMENTS.**—(1) **TO CARRIAGE OF GOODS.**—The rules of liability applicable to private carriers of goods are those which are in general applicable to ordinary bailees, and the law as to common carriers of goods is a branch of the law covering the subject of bailments. That is, the carrier of goods is a bailee, and, aside from any considerations of public policy which affect the liability of a carrier conducting a public employment his duties and liabilities are in general those of an ordinary bailee; but these considerations of public policy have led to the recognition by the Courts from an early period in the history of the common law, of rules respecting the duty of the common carrier as to serving the public and as to liability for goods entrusted to his care which do not apply to private carriers of goods.

(2) **TO CARRIAGE OF PASSENGERS.**—A carrier of passengers is not, as to the person of the passenger, a bailee, and in this respect the law of carriers of passengers is not a part of the subject of bailments; but inasmuch as those who hold themselves out as prosecuting the business of carrying passengers for hire are regarded as undertaking a public duty, they are properly classed in this respect with public carriers of goods, and it is proper to treat them under the general heading of "Carriers". Moreover public carriers of passengers are deemed common carriers as to the baggage accepted by them for transportation as a part of the business of transporting passengers.

LEF. REF.

<sup>1</sup> For Statement of Objects and Reasons of the Bill which was passed into law as Act III of 1865, see *Gazette of India Extra-*



WHO ARE COMMON CARRIERS OF GOODS.—A common carrier has been defined as "one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place."

RIGHTS AND LIABILITIES OF COMMON CARRIERS.—"A common carrier must carry all goods that are tendered to him for carrying without insisting upon an unreasonable condition, provided they are of the description which he professes to carry, [*Garton v. Bristol and Exeter Railway*, (1861) 1 B. and S. 162; *Great Western Railway v. Sutton*, 1868 L.R. 4 H.L. 226], he has accommodation for the goods [*Jackson v. Rogers*, (1863) 2 Show 327] and reasonable payment of their carriage is offered [*Wyld v. Pickford*, (1841) 8 Mec. and W. 443; 58 R.R. 775], and the sender is ready and willing to pay it (Bullen and Leake, 3rd Ed., p. 277); and also provided that the goods are brought neither too late for the journey by which they are to go [see *Pickford v. Grand Junction Railway*, (1844) 12 Mec. and W. 766]; nor too long a time before the journey is to begin [*Lane v. Cotton*, (1701) 1 Raym. (Ld.); at p. 652; see *Great Western Railway v. Bunch*, (1888) 13 App. Cas. 31]. But the carrier may apparently refuse to take goods which will subject him to exceptional danger [*Edwards v. Sherrat*, (1801) 1 East 604, per Hale, C.J.; *Morse v. Shuc*; (1672) 1 Vent. 238]. Unless otherwise agreed; he must deliver within a reasonable time having regard to the circumstances of the case [*Taylor v. Great Northern Railway*, (1866) L.R. 1 C.P. 385; *Hales v. London and North-Western Railway*, (1863) 4 B. and S. 661] and by the route which he professes to be his route [*Foster v. G.W. Ry.*, (1904) 2 K.B. 306, distinguishing *Mallet v. G.E. Ry.*, (1899) 1 Q.B. 309; see Ency. of Laws of England, Vol. II, p. 580]. A carrier is liable for injury arising from negligence in the execution of his contract to carry, unless he has effectively stipulated that he shall be free from such liability. If the contract is one which deprives the passenger of the benefit of a duty or care which he is *prima facie* entitled to expect that the Railway Company has accepted, the latter must discharge the burden of proving that the passenger assented to the special terms imposed. This he may show to have been done either in person or through the agency of another. Such agency will be held to have been established when he is shown to have authorised antecedently or by way of ratification the making of the contract under circumstances in which he must be taken to have left everything to his agent. In such a case it is sufficient to prove that he has been content to accept the risk of allowing terms to be made without taking the trouble to learn what was being agreed to. In such cases the Railway company may infer his intention from his conduct. Where therefore a passenger who is to be carried upon special conditions at a reduced fare has allowed terms to be made for him by an agent the presumption is that the passenger was content to accept the risk without enquiring what the terms agreed upon by his agent were. 19 C.W.N. 905 (P.C.); see also 54 Cal. 430.

[14th February, 1865.]

*An Act relating to the rights and liabilities of Common Carriers.*

WHEREAS it is expedient not only to enable common carriers to limit their liability for loss of or damage to property delivered to them to be carried but also to declare their liability for loss of or damage to such property occasioned by the negligence or criminal acts of themselves, their servants or agents; It is enacted as follows:—

#### LEG. REF.

ordinary, dated 1st August, 1864, and for Proceedings relating to the Bill, see *ibid.*, Supplement, p. 497, and *ibid.*, 1865, pp. 51, 64 and 65.

The Act has been declared to be in force in the whole of British India, except as regards the Scheduled Districts, by the Laws Loans Extent Act (XV of 1874), S. 3.

It has been applied to Upper Burma generally (except the Shan States) by the Burma Laws Act (XIII of 1898), Bur. Code, Vol. I, but its application to hill-tribes in a hill tract is barred by the Kachin Hill Tribes Regulation (I of 1895), Bur. Code, Vol. I; and to Chins in the Chin Hills by the Chin Hills Regulation (V of 1896), Bur. Code, Vol. I. It has been applied to the Santhal Parganas, by the Santhal Parganas Settlement Regulation (III of 1872), S. 31, as

amended by the Santhal Parganas Justice and Laws Regulation (III of 1899), B. and O. Code, Vol. I.

It has been declared, by notification under section 3 (a) of the Scheduled Districts Act (XIV of 1874), to be in force in the following Scheduled Districts, namely:—

Sindh. See *Gazette of India*, 1880, Pt. I, p. 672.

West Jalpaiguri, the Western Hills of Darjiling, the Darjiling Tarai and the Damson Sub-division of the Darjiling District. See *Gazette of India* 1881, Pt. I, p. 74.

The Districts of Halaribagh, Lohardaga (now the Ranchi District, see *Calcutta Gazette*, 1899, Pt. I, p. 44); and Manbhum; and Pargana Dhalbhum and the Kolhan in the District of Singbhum. See *Gazette of India*, 1881, Pt. I, p. 504.



Short title.

1. This Act may be cited as THE CARRIERS ACT, 1865.

## LEG. REF.

The Porahat Estate in the District of Singbhum. See *Gazette of India*, 1897, Pt. I, p. 1059.

Kumaon and Garhwal. See *Gazette of India*, 1876, Pt. I, p. 605.

The Scheduled portion of the Mirzapur District. See *Gazette of India*, 1878, Pt. I, p. 383.

Jaunsar Bawar. See *Gazette of India*, 1878, Pt. I, p. 382.

The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan and Dera Ghazi Khan. [*Portions of the Districts of Hazara, Bannu, Dera Ismail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat now form the North-West Frontier Province*, see *Gazette of India*, 1901, Pt. I, p. 857; and *ibid.*, 1902, Pt. I, p. 575; but its application to that part of the Hazara District known as Upper Tanawal is barred by the Hazara (Upper Tanawal) Regulation (II of 1900), *Punj. and N.-W. Code.*] See *Gazette of India*, 1886, Pt. I, p. 48.

The Scheduled Districts of the Central Provinces. See *Gazette of India*, 1879, Pt. I, p. 771.

The Scheduled Districts in Ganjam and Vizagapatam. See *Gazette of India*, 1898; Pt. I, p. 870.

The District of Sylhet. See *Gazette of India*, 1879, Pt. I, p. 631.

The rest of Assam (except the North Lushai Hills). See *Gazette of India*, 1897, Pt. I, p. 299.

It has been declared, by notification under section 3 (b) of the last-mentioned Act, not to be in force in the Scheduled District of Lahaul—see *Gazette of India*, 1886, Pt. I, p. 301.

It has been extended, by notification under section 5 of the same Act, to the following Scheduled Districts, namely:—

The Tarai of the Province of Agra. See *Gazette of India*, 1876, Pt. I, p. 505.

Ajmer and Merwara. See *Gazette of India*, 1877, Pt. I, p. 605.

It has been repealed as to carriers by rail by the Indian Railways Act (IV of 1879). For the Indian Railways Act now in force, see the Indian Railways Act (IX of 1890).

## NOTES.

SEC. 1: ACT IS NOT EXHAUSTIVE—THE LIABILITY OF THE COMMON CARRIERS IS GOVERNED BY THE ENGLISH COMMON LAW AS MODIFIED BY THE CARRIERS ACT.—A common carrier is subject to two distinct classes of liability, the one as insurer, in which the element of default is absent, the other for losses, as he is under an obligation to carry safely, in which that element is present. The Carriers Act modifies this by providing that the liability as insurer for goods not mentioned in the schedule may be limited by

C. C. M.—40

special contract where the loss is due to negligence. 38 C. 28=15 C.W.N. 226.

ACT NOT AFFECTED BY CONTRACT ACT.—3 B. 109; 18 C. 620 (P.C.); 20 I.C. 546=38 M. 941=25 M.L.J. 162.

WHO ARE COMMON CARRIERS.—Owners of sea-going merchant ships (26 C. 562); owners of steamships plying periodically (3 M. 107); carrier by water generally (38 M. 941). See also 28 M. 400. The proprietor of a motor bus service, which is essentially intended for the carrying of passengers and their luggage or goods, if any, cannot be regarded as a common carrier so far as transport of goods is concerned. If the conductor of a bus belonging to such a service on his own responsibility, accepts a consignment of goods from a person other than a passenger undertaking to deliver it to a person who would call for the same at a specified place, and takes payment for such transport, issuing a ticket to the consignor in the same way as to a passenger who has luggage, and the consignment miscarries, the proprietor cannot be treated as a common carrier so as to make him liable for the act of the conductor in his employ. The matter is one between the consignor and the conductor, and the proprietor is not responsible on any such contract to which he is not a party. 17 Mys.L.J. 284.

As to duties of common carriers under the Act, see 51 I.A. 28=51 C. 304 (P.C.).

LIABILITY OF COMMON CARRIER.—A common carrier does not cease to fill that character if he enters into a special contract limiting his liability both under the Carriers Act and under the Indian Railways Act. 31 I.C. 474=11 N.L.R. 174. Carrier is ordinarily the agent of the buyer not only to take delivery but also to assent to appropriation. 12 I.C. 662. A common carrier in India is liable as an insurer. He is responsible for safety of goods entrusted to him except when loss or injury arises from act of God or King's enemies. But this liability may be varied by contract. 29 I.C. 260=21 C. L.J. 565. In India carriers by sea do not get the benefit of the Act. 40 B. 529=33 I.C. 536. Carriers by sea for hire are common carriers though the Carriers Act of 1865 does not apply to them. 38 M. 941. The duties and liabilities of a common carrier are governed in India by the principles of the *English Common Law* on the subject except where they have been departed from the Carriers Act, or by the Railways Act (*Ibid.*) Where the bill of lading contained the clause "At shipper's risk with option of carrying on deck," and the goods (betel leaves) went bad for want of ventilation, held, that the carrier was not liable in damages, being exempted by the special clause. 30 I.C. 939 (1). Stipulations exempting the carrier from liability will be held to limit his liability as insurer and not his liability



Interpretation clause.

2. In this Act, unless there be something repugnant in the subject or context—

“common carrier” denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately:

“Person”.

<sup>1</sup>“person” includes any association or body of persons, whether incorporated or not.

<sup>2</sup>[\* \* \* \* \*]

3. No common carrier shall be liable for the loss of or damage to property delivered to him to be carried exceeding in value one hundred rupees and of the description contained in the schedule to this Act, unless the person delivering such property to be carried, or some person duly authorized in that behalf, shall have expressly declared to such carrier or his agent the value and description thereof.<sup>3</sup>

Carriers not to be liable for loss of certain goods above one hundred rupees in value, unless delivered as such.

For carrying such property, payment may be required at rates fixed by carrier.

4. Every such carrier may require payment for the risk undertaken in carrying property exceeding in value one hundred rupees and of the description aforesaid, at such rate of charge as he may fix:

Provided that, to entitle such carrier to payment at a rate higher than his ordinary rate of charge, he shall have caused to be exhibited in the place where he carries on the business of receiving property to be carried, notice of the higher rate of charge required, printed or written in English and in the vernacular language of the country wherein he carries on such business.

#### LEG. REF.

<sup>1</sup> Cf. definition in section 3 (39) of the General Clauses Act (X of 1897).

<sup>2</sup> Repealed by Act X of 1914.

<sup>3</sup> The earlier sections extend to India the principle embodied in the Carriers Act, 1830 (11 Geo. IV and I Wm. IV, c. 68). See Statement of Objects and Reasons quoted *supra*.

#### NOTES.

for negligence unless negligence is expressly included. 17 I.C. 37=6 S.L.R. 103 (32 M. 9, Foll.). The burden of proving absence of negligence is on the common carrier, loss or damage being deemed *prima facie* proof of negligence. 29 I.C. 260=21 C.L.J. 565. In a contract to carry a load from one place to another where no fixed route is settled upon, the more convenient route may be followed though it is a longer one and carriage cost should be calculated on the same. 11 I.C. 43 (Cal.). The definition of a “common carrier” in section 2 is framed without reference to the extent of his liability. 31 I.C. 474=11 N.L.R. 174. A carrier in its general sense means a person or company which undertakes to transport the goods of another person from one place to another for hire. 34 M.L.J. 553. Where goods have to be carried with the aid of different agencies to arrive at the destination, the carrier with whom the contract is made at one end is, in the absence of a contract limi-

ting his liability to his own transport system, liable for loss or destruction of the goods beyond his own system or in consequence of act done by or default of persons other than his own servant. (*Ibid.*) See also 54 Cal. 430=1927 Cal. 394.

SEC. 2.—A licensee of a ferry is a common carrier. 50 I.C. 562. As to the position of State owned Railways, see (1937) 2 Cal. 614. “Indiscriminately,” meaning of. See 51 Cal. 304=51 I.A. 28 (P.C.).

SECS. 3 and 4.—The liability for loss or damage is not defeated by the fact that the goods delivered as luggage are in fact merchandise. 41 Cal. 80. Liability for loss of goods in case of through booking by steamer and rail. See 11 C.W.N. 1076. On this section, see also 44 C. 419; 13 P.R. 1866. Early Anglo-Indian Legislation extended to India the principle embodied in the Carriers Act (1830) (11 Geo. IV and I Wm. IV c. 68). See Statement of Objects and Reasons. See also 38 C. 28; 10 C. 166 (F.B.); 13 C.L.R. 342; 40 C. 716; 17 B. 417; 17 C. 39; 19 C. 538; 18 C. 620 (P.C.). Where a passenger in a public lorry who was entitled under the rules printed on his ticket, to transport himself and also to a transport of certain luggage without extra charges, loses his luggage (in this case a hold all). Held, that the owners of the lorry were common carriers, and so were liable for loss of goods entrusted. 1937 A.M.L.J. 56.



5. In case of the loss or damage to property exceeding in value one hundred rupees and of the description aforesaid, delivered to such carrier to be carried, when the value and description thereof shall have been declared and payment shall have been required in manner provided for by this Act, the person entitled to recover in respect of such loss or damage shall

The person entitled to recover in respect of property lost or damaged may also recover money paid for its carriage.

also be entitled to recover any money actually paid to such carrier in consideration of such risk as aforesaid.

6. The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any public notice; but any such carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act XXII of 1863<sup>1</sup> (*to provide for taking land for works of public utility to be constructed by private persons or companies, and for regulating the construction and use of works on land so taken*) may, by special contract, signed by the owner of such property so delivered as last aforesaid or by some person duly authorized in that behalf by such owner, limit his liability in respect of the same.

In respect of what property liability of carrier not limited or affected by public notice. Carriers, with certain exceptions, may limit liability by special contract.

#### LEG. REF.

<sup>1</sup> See now the Land Acquisition Act (I of 1894), section 2.

#### NOTES.

SECS. 6 TO 8.—A carrier is liable for injury arising from *negligence* in the execution of his contract to carry unless he has effectively stipulated that he shall be free from such liability. 19 C.W.N. 905=31 I.C. 684 (P.C.). Nature of negligence for which owner of railroad or tramroad liable. See 11 M.L.J. 156. Unless there is a contract to the contrary the consignor cannot hold the company with whom he did not contract, liable for the loss, when all that is complained of, is *non-feasance*. 34 M.L.J. 553=45 I.C. 485. Where there is an agreement between two companies constituting one as the agent of the other and both are working for joint benefit, either company may be sued. (*Ibid.*) Goods consigned to a Railway Company for carriage were, during transmission, destroyed by a severe cyclone. Held, in a suit for value of the goods that the company was not liable. 38 I.C. 702=25 C.L.J. 37. When an extraordinary cause co-operating with the negligence of a person produces injury to some other person, the negligent person is not liable. (*Ibid.*) Liability of railway in case of loss of goods by fire caused by erroneous description of goods. See 3 B. 120; 3 B. 109; 5 B. 371; 13 P.R. 1866; 28 M. 400; 17 M. 445; 11 C.W.N. 1076. Burden of proof as to negligence. 24 C. 786; 1 C.W.N. 200; 26 C. 398; 24 C. 786. A contract of carriage by a shipping company is at an end when it delivers the goods to the Port Commissioners. 41 Cal. 703=25 I.C. 885. Whether the goods are to be delivered to the consignee at his house or at the termination of the journey depends on agreement and on the usual course of business. 44 I.C. 401

=20 Bom.L.R. 591. It is the duty of the consignee to ascertain when the goods will arrive and to be ready to take delivery. 41 Cal. 703. At the time of delivery, a Railway Company is not bound to give after re-weighing a certificate of shortage. Refusal on the part of the consignee to take delivery in consequence of the refusal to give a certificate is sufficient to throw the loss arising from deterioration of the goods on the consignee. 45 I.C. 933=22 C.W.N. 902. The act of the company in sending out notice of arrival and issuing a delivery order to a person, whom they *bona fide* believed to be the person entitled to the goods was not an act for which they could be made liable. 41 Cal. 703. Notice of suit and liability for loss, before suit: see 8 C.L.J. 192; 41 I.C. 919. Waiver of notice. 38 C. 50. Where freight is paid in advance for the carriage of goods by sea to a shipowner, he gets it absolutely and the shipper of goods cannot recover it. 44 Mad. 145=40 M.L.J. 57. A clause in a contract of carriage agreeing to hold the carriers indemnified from and against all claims which may be insured against them nevertheless is governed by S. 8 and does not relieve the carriers of liability arising from the negligence of their servants. It is not a separate contract of indemnity but part of the contract of carriage. 38 Cal. 28. Where by a special contract, a Steamer Company common carriers, were exempted from liability for any loss or damage, unless it arose from their negligence or criminal act of their servants or agents, the loss of goods is *prima facie* evidence of negligence and burden is on them to prove that loss must have been occasioned otherwise than by the negligence or criminal act of themselves, their servants or agents. 40 Cal. 716=19 I.C. 245=17 C.W.N. 633. Where, by an arrangement with Railway Company, goods



17. The liability of the owner of any railroad or tramroad constructed under the provisions of the said Act XXII of 1863, for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any special contract; but the owner of such railroad or tramroad shall be liable for the loss of or damage to property delivered to him to be carried only when such loss or damage shall have been caused by negligence or a criminal act on his part or on that of his agents or servants.

Liability of owner of railroad or tramroad constructed under Act XXII of 1863, not limited by special contract. In what case owner of railroad or tramroad answerable for loss or damage.

shall have been caused by negligence or a criminal act on his part or on that of his agents or servants.

8. Notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from the <sup>2</sup>[\* \*] criminal act of the carrier or any of his agents or servants <sup>2</sup>[and shall also be liable to the owner for loss or damage to any such property other than property to which the provisions of section 3 apply and in respect of which the declaration required by that section has not been made, where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants].

Common carrier liable for loss or damage caused by neglect or fraud of himself or his agent.

to the owner for loss or damage to any such property other than property to which the provisions of section 3 apply and in respect of which the declaration required by that section has not been made, where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants].

9. In any suit brought against a common carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents.

Plaintiffs, in suits for loss, damage, or non-delivery, not required to prove negligence or criminal act.

10. No suit shall be instituted against a common carrier for the loss of, or

#### LEG. REF.

<sup>1</sup> Section 7 (so far as it relates to railways) has been repealed by the Indian Railways Act (IX of 1890), Ch. VII, S. 72.

<sup>2</sup> The words "negligence or" were omitted and the words within brackets at the end of the section were added by Act XIII of 1921, section 2 (1).

<sup>3</sup> Section 10 was added by the Indian Carriers Act (X of 1899), S. 2. The original section was repealed by the Indian Railways Act (IX of 1890). That section ran as follows:—

"Nothing in this Act shall affect the provision contained in the ninth, tenth, and eleventh sections of Act XVIII of 1854 (relating to Railways in India)."

#### NOTES.

delivered to it were to be transported by a Steamship Company and the goods were destroyed on board a steamer, *held* that, although there was no contract between it and the plaintiff, the Steamship Company was nevertheless liable as a common carrier for the loss. 47 Cal. 6=23 C.W.N. 998.

BILL OF LADING.—Special clause against liability—Shipper cannot sue. 62 I.C. 709=30 M.L.T. 18 (H.C.).

SECS. 8 AND 9.—The Act makes a common carrier liable to the owner of the goods as such though not as insurer. 47 Cal. 6. But *see* 60 Cal. 879. The loss or damage to the goods is *prima facie* proof of negligence

and under S. 9 the burden of proof as to the absence of negligence is thrown upon the common carrier. 41 Cal. 80. The onus of proving negligence of the carrier is not upon the plaintiff. (*Ibid.*) Contract exonerating carrier from liability for negligence of servants invalid. 59 C. 472=1932 C. 344.

CARRIER'S LIABILITY.—The licence granted to a lighterman required him to give the benefit of his services to all persons who may require them, subject to his having reasonable ground for refusal. He entered into contracts for the carriage of goods with a steamship and gave an indemnity for safe carriage, but he was not prevented from entering into other contracts. *Held*, that the licensee was a common carrier and, where he does not carry safely, he is liable for the loss on the footing that he is an insurer of the goods. The owner of the goods can sue him and it is no answer to say that there is no privity of contract between him and the carrier. 60 Cal. 879=37 C.W.N. 559=1933 Cal. 735. Injuries to goods—Through booking of goods—Negligence—Onus of proof—Non-feasance and misfeasance. 47 Cal. 6. Goods delivered to Steamship Co.—Carriage by Railway Companies—Loss during transit in railway—Liability of Steamship Co.—Burden of proof. 54 Cal. 430=31 C.W.N. 358.

SEC. 10.—In order to maintain a suit for damages for short delivery against a com-



Notice of loss or injury to be given within six months. injury to, goods entrusted to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff.

<sup>1</sup>11. The Provincial Government may, by notification in the Official Gazette, add to the list of articles contained in the Schedule to this Act, and the Schedule shall, on the issue of any such notification, be deemed to have been amended accordingly.

### SCHEDULE

Gold and silver coin.  
Gold and silver in a manufactured or un-manufactured state.  
Precious stones and pearls.  
Jewellery.  
Time-pieces of any description.  
Trinkets.  
Bills and hundies.  
Currency notes of the Central Government or notes of any Banks, or securities for payment of money, English or Foreign.  
Stamps and stamped paper.  
Maps, prints, and works of art.  
Writings.  
Title-deeds.  
Gold or silver plate or plated articles.  
Glass.  
China.  
Silk in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials.  
Shawls and lace.

Cloths and tissues embroidered with the precious metals or of which such metals form part.  
Articles of ivory, ebony or sandalwood.  
<sup>2</sup>[Art pottery and all articles made of marble.  
Furs.  
Government securities.  
Opium.  
Coral.  
Musk, *Itr*, Sandal wood oil and other essential oils used in the preparation of *itr* or other perfumes.  
Musical and scientific instruments.  
Feathers.  
Narcotic preparations of hemp.  
Crude India-rubber.  
Jade, jade-stone and amber.  
Gooroochand or Gooroochandani.  
Cinematograph films and apparatus.  
Zahir Mohra Khatai.]

### THE CASTE DISABILITIES REMOVAL ACT (XXI OF 1850).

EFFECT OF SUBSEQUENT LEGISLATION.—Short title given by Act XIV of 1827. Declared in force—throughout British India except as regards the Scheduled Districts, Act XV of 1874, section 3; in the Sonthal Parganas, Reg. III of 1872, section 3, as amended by Reg. III of 1899, section 3.

#### LEG. REF.

<sup>1</sup> Section 11 was added by Act XIII of 1921, S. 3.

<sup>2</sup> Added by Notification No. 5299 dated 14th October, 1922. See *Gazette of India*, 1922, Pt. I, p. 1235.

#### NOTES.

mon carrier, a notice of claim under S. 10 must be given, even though the carrier came to know of the claim *aliunde* within six months' time and had no difficulty in tracing the goods. 41 I.C. 919=27 C.L.J. 294; 38 C. 50. The essential of a good notice under S. 10 is that it should reach the person who is liable to make good the loss. 54 Cal. 430 =31 C.W.N. 358=1927 C. 394.

PLEADING NOTICE.—In a suit against persons alleged to be common carriers within the meaning of the Carriers Act for the loss or injury to goods entrusted to them for carriage, it is not necessary for the plaintiff, as in the case of S. 80, C.P. Code, to expressly state in the plaint that he has issued

a notice under S. 10, Carriers Act. Such an averment is implied under O. 6, R. 6, C.P. Code, and it is for the defendants to deny in their written statement according to O. 8, R. 2, that they are common carriers or to raise the plea of the absence of notice. Where they fail to do so, the onus is on them to prove and to show that they took good care in the carriage of the plaintiff's goods. Per *Dunkley, J.*—An averment in plaint that demands were made for the amount of damage claimed but to no avail, which is not denied by the defendants, is a sufficient compliance with the provisions of S. 10. Moreover failure to raise in the written statement the plea of the absence of notice amounts to waiver on the part of the defendants of the proof of notice. The notice under S. 10 is not a part of cause of action of the suit but is merely a condition which has to be performed before the suit could be brought and differs in that respect from a notice under S. 80, C.P. Code. A.I.R. 1938 Rang. 437.



**PREFATORY NOTE.**—"When Warren Hastings became the Governor of Bengal, one of his first acts was to lay down a plan for the administration of civil justice in the interior of Bengal. With respect to civil rights, Warren Hastings' plan of 1772 directed by his twenty-third rule, that "in all suits regarding marriage, inheritance and caste and other religious usage and institutions, the laws of the Koran with respect to Mahomedans, and those of Shaster with respect to Gentus (Hindus) shall be invariably adhered to". Moulvies or Brahmins were directed to attend the Courts for the purpose of expounding the law and giving assistance in framing the decrees. The principle laid down by the above rule of Warren Hastings was recognised and confirmed by the code of regulations issued by the Government of Bengal in 1780, as also by the British Parliament in 1881 by the provision contained in section 18 of 21 Geo. III, c. 70. Enactments to the same effect have been introduced into numerous subsequent English and Indian enactments. A Bengal Regulation of 1832 (VII of 1832), whilst re-enacting the rules of Warren Hastings which had been embodied in previous regulations qualified their application by a provision which attracted little attention at that time, but afterwards became the subject of considerable discussion. It declared that these rules are intended and shall be held to apply to such person as *bona fide* professes those religions at the time of the application of the law to the case, and were designed for the protection of the rights of such persons, not for the deprivation of the rights of others. Where, therefore, in any civil suit the parties to such suits may be of different persuasion, where one party shall be of the Hindu and the other of the Mahomedan persuasion, or where one or more of the parties to such suit shall not be either of the Mahomedan or Hindu persuasion the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws they would have been entitled. In all such cases the decision shall be governed by the principles of justice and equity, and this provision shall not be considered as justifying the introduction of the English or any foreign law or the application to such cases of any rules not sanctioned by those principles. In the year 1850 the Government of India passed the law (XXI of 1850) of which the object was to extend the principle of this regulation throughout the territories subject to the Government of the East India Company. This Act, which was at the time of its passing, known as the *Lex Loci Act*, excited considerable opposition among orthodox Hindus as unduly favouring converts and has been criticised from the Hindu point of view with respect to its operation on the guardianship of children in a case where one of two parents had been converted from Hinduism to Mahomedanism. It will have been observed that Warren Hastings' rule and the enactment based upon it apply to Hindus and Mahomedans. There are, of course, many natives of India who are neither Hindus nor Mahomedans, such as the Portuguese and Armenian Christians, the Parsis, the Sikhs, the Jains, the Buddhists of Burma and elsewhere and the Jews. The tendency of the Courts or the legislature has been to apply to these classes the spirit of Warren Hastings' rule and to leave them in the enjoyment of family law, except so far as they have shown a disposition to place themselves under English Law." (*See Ilbert's Government of India*, 2nd Ed., 1907, pp. 323, 329.) This Act was originally known as the *Lex Loci Act*, and is even now generally cited under the same designation. The title is, however, a misnomer. It was properly applied to the other provisions which were subsequently dropped. (*See the evidence of Mr. Cameron before the Select Committee of the House of Lords in 1852; Ilbert's Government of India*, 2nd Ed., 1907, p. 328 Note.)

### THE CASTE DISABILITIES REMOVAL ACT (XXI OF 1850).<sup>1</sup>

[11th April, 1850.

*An Act for extending the principle of section 9, Regulation VII, 1832, of the Bengal Code throughout the Territories subject to the Government of the East India Company.*

WHEREAS it is enacted by section 9, Regulation VII, 1832, of the Bengal

#### LEG. REF.

<sup>1</sup> Short title, "The Caste Disabilities Removal Act, 1850." *See the Indian Short Titles Act, 1897 (XIV of 1897).*

This Act has been declared to be in force in the whole of British India, except as regards the Scheduled Districts, by the Laws Local Extent Act, 1874 (XV of 1874), section 3.

It has been declared in force in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation (III of 1872), section 3, as amended by the Sonthal Parganas Laws and Justice Regulation, 1899 (III of 1899), B. & O. Code, Vol. I.

It has been declared, by notification under section 3 (a) of the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in the following Scheduled Districts, namely:—  
Sindh, see *Gazette of India* (1880) Pt. I, p. 672.

West Jalpaiguri, see *Gazette of India*, 1881, Pt. I, p. 74.

The Districts of Hazaribagh, Lohardaga (now the Ranchi District, see *Calcutta Gazette*, 1899, Pt. I, p. 44); and Manbhum; and Pargana Dhalbhum and the Kolhan in District of Singbhum, see *Gazette of India*, 1881, Pt. I, p. 504.



## Preamble.

Code<sup>1</sup> that "whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion, or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled; and whereas it will be

## LEG. REF.

The Scheduled portion of the Mirzapur District, see *Gazette of India*, 1879, Pt. I, p. 383.

Jaunsar Bawar, see *Gazette of India*, 1897, Pt. I, p. 382.

The Districts of Peshawar, Hazara, Kohat, Banu, Dera Ismail Khan and Dera Ghazi Khan. (*Portions of the Districts of Hazara, Banu, Dera Ismail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat, now form the North-West Frontier Province*, see *Gazette of India*, 1901, Pt. I, p. 857, and *ibid.*, 1902, Pt. I, p. 575; but its application has been barred in that part of the Hazara District known as Upper Tanawal, by the Hazara (Upper Tanawal) Regulation (II of 1900), S. 3, Punjab and N.-W. Code), see *Gazette of India*, 1886, Pt. I, p. 48.

The District of Lahaul, see *Gazette of India*, 1886, Pt. I, p. 301.

The Scheduled Districts of the Central Provinces, see *Gazette of India*, 1879, Pt. I, p. 771.

The Scheduled Districts in Ganjam and Vizagapatam, see *Gazette of India*, 1898, Pt. I, p. 870.

Coorg, see *Gazette of India*, 1879, Pt. I, p. 747.

The District of Sylhet, see *Gazette of India*, 1879, Pt. I, p. 631.

The rest of Assam (except the North Lushai Hills), see *Gazette of India*, 1897, Pt. I, p. 299.

The Porahat Estate in the Singbhum District, see *Gazette of India*, 1897, Pt. I, p. 1059.

It has been extended, by notification under section 5 of the last-mentioned Act, to the following Scheduled Districts, namely:—

Upper Burma generally (except the Shan States), see *Gazette of India*, 1898, Pt. I, p. 89 and 1899, Pt. I, p. 98.

Kumaon and Garhwal, see *Gazette of India*, 1876, Pt. I, p. 606.

The Tarai and the Province of Agra, see *Gazette of India*, 1876, Pt. I, p. 505.

<sup>1</sup> Bengal Regulation Act VII of 1832 was repealed by the Bengal Civil Courts Act (VI of 1871) which was repealed by Act XII of 1887.

## NOTES.

This Act is not retrospective. 4 A.L.J. 365. As to effect of conversion before this Act on rights of inheritance, see 21 M.L.J. 645=15 C.W.N. 545=35 A. 356 (P.C.).

SCOPE OF ACT.—See 23 M. 171; 1 Bom. 559; 32 Cal. 871; 46 L.W. 772. Regulation VII of 1832 or Act XXI of 1850 held to be appli-

cable to the Province of Oudh from the date of annexation at the earliest, that is the year 1856. 4 O.W.N. 1243=1928 Oudh 138.

OBJECT OF THE ACT.—19 W.R. 367 (406); construction of this Act (*ibid.*); conflict to be avoided in construing Act. 77 P.R. 1907; 11 A. 100.

APPLICATION OF ACT.—Act applies to all cases of ex-communication from caste—Cause of ex-communication being immaterial. 2 N.W.P. 446; ex-communication of Hindu widow for unchastity causes no forfeiture of rights. 1 B. 559; 32 C. 871; 19 W.R. 367 (379). Application of Act to heirs of convert. See 21 P.L.R. 1903; 32 C. 871; 11 A. 100; 57 I.A. 313=60 M.L.J. 275 (P.C.); 1935 Oudh 301. Change of religion—Effect on guardianship of minor children—Inapplicability of rule in Jammu and Kashmir. See 41 P.L.R. J. & K. 33.

Act applies only for the benefit of the person who changes his religion. In other words, when once a person has changed his religion and changed his personal law, that law will govern the rights of succession of his children. 160 I.C. 48=1936 A.L.J. 488=1936 A.W.R. 198=1936 All. 202.

EFFECT OF THE ACT.—Act XXI of 1850 secures after apostasy the same rights to individuals in property as they enjoyed before apostasy. 31 I.C. 476=98 P.R. 1915. Section 1 merely removes the personal disability of the person who has changed his religion from enforcing his rights which he possessed prior to the change. It does not lay down that if any ancestor of the *propositus* in any degree of ascent has changed his religion the Act would apply in determining the status of an heir to such a *propositus*. The removal of the penalty which the preamble bears out is clearly intended for the benefit of the party who has incurred the penalty and not for others. The Act has no application to a case where the claimant of rights either of one class or of the other has neither renounced nor has been excluded from the communion of any religion or been deprived of caste. 4 O.W.N. 1243=1928 O. 138. Degradation by apostasy does not dissolve marriage among Hindus. 9 M. 466 (470); 18 C. 264; 17 M. 235; 23 M. 171; 25 B. 644; 49 P.R. 1907; 4 B. 330; 4 M. 243; 8 M. 169; 2 N.W.P. 300; as to restitution of conjugal rights, see 8 A. 78. Hindu widow re-marrying after conversion—Effect on her rights of inheritance. 23 M.L.J. 81; 19 C. 289; 35 A. 466. Act does not affect usage of Hindu temple or other religious institution. 13 M. 293; 13 I.A. 105; 11 M.I.A. 405. Loss of caste does not involve loss



beneficial to extend the principle of that enactment throughout the territories subject to the Government of the East India Company; It is enacted as follows:—

1. So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.

### THE INDIAN CENSUS ACT (XXIV OF 1939).

[26th September, 1939.

*An Act to provide for certain matters in connection with the taking of the census.*

WHEREAS it has been determined to take a census of British India during the year 1941, and whereas it is expedient to provide for certain matters in connection with the taking of such census;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN CENSUS ACT, 1939.

#### NOTES.

of right of guardianship. 167 P.L.R. 1901; 1 A. 549; 14 M.L.A. 309; 28 A. 233; or right to give Hindu son in adoption. 25 B. 551.

SEC. 1.—A convert or outcaste from Hindu religion retains his right of inheritance whether the right accrues before or after the conversion to another religion or exclusion from caste. 3 Pat. 152. Courts in India should refuse to interfere with the autonomy of caste, i.e., with the decisions of caste panchayats provided they are not opposed to natural justice. 23 I.C. 301=12 A.L.J. 552. Caste panchayats deal with families as units. 23 I.C. 301=12 A.L.J. 552. The effect of section 9 of the Bengal Regulation (VII of 1832) and of Act XXI of 1850 which extended the principles of the Regulation to the whole of British India is virtually to set aside the provisions of Hindu Law which penalise the renunciation of religion or exclusion from caste by enforcing forfeiture of the property of the converts. 33 A. 356=38 I.A. 87=15 C.W.N. 545=21 M.L.J. 845 (P.C.). A Hindu who was joint in estate with his son became a convert to Mahomedanism in 1845 and died in 1851, his son having predeceased him. *Held*, that the convert's son who remained Hindu did not acquire any enforceable right to his father's share in the joint family property which he could either assert in himself or transmit to his heirs for enforcement in a British Court of Justice. (*Ibid.*) Conversion by a Hindu wife to Mahomedanism—Right of succession. See 21 L.W. 415 at 431. A Hindu son is entitled to inherit

the property of his father who was converted to Mahomedanism. See 27 I.C. 357=8 S.L.R. 155 (11 A. 100, Foll.); 38 I.A. 87; 23 M. 171; 21 C. 697, Ref.; 1927 M. 72. Conversion of one member of Hindu family—Coparcenary right of—Survivorship put an end to. 26 L.W. 361=1927 M. 883=105 I.C. 206. As to burden of proof, see 27 I.C. 357.

The Caste Disabilities Removal Act has abrogated the rule of Mahomedan Law by which a non-Muslim is excluded from succession to a Muslim. 1 Lah. 376. When a convert to Christianity leaves descendants behind him, they cannot, as reversioners claim the estate of a deceased Hindu, as the provision for removal of disabilities under the above Act applies only to the apostate and does not extend to his descendants. 40 M. 1118 (11 A. 100, diss. from). See also 98 I.C. 867=24 L.W. 675=1926 M.W.N. 952. A convert's son must be put in the position in which he would have been, if his father had not changed his religion. 27 I.C. 357=8 S.L.R. 155. The fact of the vendees being Christians did not deprive them of their rights of succession to the vendors who being Christians were converted to Islam. 1 Lah. 376. Apostasy from Hinduism does not entitle a member of a Malabar tarwad to claim partition of the property and delivery to him of his share, under the Removal of Caste Disabilities Act. The effect is not to enlarge the convert's interest in any property or to get rid of any condition or restriction to which it was originally subject. 44 M. 891=41 M.L.J. 243 (F.B.).



(2) It extends to the whole of British India.

2. (1) The Central Government may appoint a Census Commissioner to supervise the taking of the census throughout British India, and Superintendents of Census Operations to supervise the taking of the census within the several Provinces.

(2) The Provincial Government may appoint persons as census-officers to take, or aid in, or supervise the taking of, the census within any specified local area.

(3) A declaration in writing, signed by any authority authorised by the Provincial Government in this behalf, that any person has been duly appointed a census-officer for any local area shall be conclusive proof of such appointment.

(4) The Provincial Government may delegate to such authority as it thinks fit the power of appointing census-officers conferred by sub-section (2).

3. The Census Commissioner, all Superintendents of Census Operations and all census-officers shall be deemed to be public servants within the meaning of the Indian Penal Code.

4. (1) (a) Every officer in command of any body of men belonging to His Majesty's naval, military or air forces or of any vessel of war,

(b) every person (except a pilot or harbour-master) having charge or control of a vessel,

(c) every person in charge of a lunatic asylum, hospital, workhouse, prison, reformatory or lock-up or of any public, charitable, religious or educational institution,

(d) every keeper, secretary or manager of any *sarai*, hotel, boarding-house, lodging-house, emigration depot or club,

(e) every manager or officer of a railway or any commercial or industrial establishment, and

(f) every occupant of immovable property wherein at the time of the taking of the census persons are living,—

shall, if so required by the District Magistrate or by such authority as the Provincial Government may appoint in this behalf, perform such of the duties of a census-officer in relation to the persons who at the time of the taking of the census are under his command or charge, or are inmates of his house, or are present on or in such immovable property, or are employed under him, as such Magistrate or authority may, by written order, direct.

(2) All the provisions of this Act relating to census-officers shall apply, so far as may be, to all persons while performing such duties under this section, and any person refusing or neglecting to perform any duty which under this section he is directed to perform shall be deemed to have committed an offence under section 187 of the Indian Penal Code.

5. The District Magistrate, or such authority as the Provincial Government may appoint in this behalf for any local area, may, by written order which shall have effect throughout the extent of his district or of such local area, as the case may be, call upon—

(a) all owners and occupiers of land, tenure-holders, and farmers and assignees of land-revenue, or their agents, and

(b) all members of district, municipal, *panchayat* and other local authorities and officers and servants of such authorities,



to give such assistance as shall be specified in the order towards the taking of a census of the persons who are, at the time of the taking of the census, on the lands of such owners, occupiers, tenure-holders, farmers and assignees, or within the areas for which such local authorities are established, as the case may be, and the persons to whom an order under this section is directed shall be bound to obey it and shall, while acting in pursuance of such order, be deemed to be public servants within the meaning of the Indian Penal Code.

6. (1) A census-officer may ask all such questions of all persons within the limits of the local area for which he is appointed as, by instructions issued in this behalf by the Provincial Government and published in the official Gazette, he may be directed to ask.

*Asking of questions and obligation to answer.*

(2) Every person of whom any question is asked under sub-section (1) shall be legally bound to answer such question to the best of his knowledge or belief :

Provided that no person shall be bound to state the name of any female member of his household, and no woman shall be bound to state the name of her husband or deceased husband or of any other person whose name she is forbidden by custom to mention.

7. Every person occupying any house, enclosure, vessel or other place shall allow census-officers such access thereto as they may require for the purposes of the census and as, having regard to the customs of the country, may be reasonable, and shall allow them to paint on, or affix to, the place such letters, marks, or numbers as may be necessary for the purposes of the census.

*Occupier to permit access and affixing of numbers.*

8. (1) Subject to such orders as the Provincial Government may issue in this behalf, a census-officer may, within the local area for which he is appointed, leave or cause to be left a schedule at any dwelling-house or with the manager or any officer of any commercial or industrial establishment, for the purpose of its being filled up by the occupier of such house or of any specified part thereof or by such manager or officer with such particulars as the Provincial Government may direct regarding the inmates of such house or part thereof, or the persons employed under such manager or officer, as the case may be, at the time of the taking of the census.

*Occupier or manager to fill up schedule.*

(2) When such schedule has been so left, the said occupier, manager or officer, as the case may be, shall fill it up or cause it to be filled up to the best of his knowledge or belief so far as regards the inmates of such house or part thereof or the persons employed under him, as the case may be, at the time aforesaid, and shall sign his name thereto and, when so required, shall deliver the schedule so filled up and signed to the census-officer or to such person as the census-officer may direct.

9. (a) Any census-officer or any person lawfully required to give assistance towards the taking of a census who refuses or neglects to use reasonable diligence in performing any duty imposed upon him or in obeying any order issued to him in accordance with this Act or any rule made thereunder, or any person who hinders or obstructs another person in performing any such duty or in obeying any such order, or

*Penalties.*

(b) any census-officer who intentionally puts any offensive or improper question or knowingly makes any false return or, without the previous sanction of the Central Government or the Provincial Government, discloses any information which he has received by means of, or for the purposes of, a census return, or



(c) any person who intentionally gives a false answer to, or refuses to answer to the best of his knowledge or belief, any question asked of him by a census-officer which he is legally bound by section 6 to answer, or

(d) any person occupying any house, enclosure, vessel or other place who refuses to allow a census-officer such reasonable access thereto as he is required by section 7 to allow, or

(e) any person who removes, obliterates, alters or damages before the 31st day of March, 1941, any letters, marks or numbers which have been painted or affixed for the purposes of the census, or

(f) any person who, having been required under section 8 to fill up a schedule, knowingly and without sufficient cause fails to comply with the provisions of that section, or makes any false return thereunder,—

shall be punishable with fine which may extend to two hundred rupees.

10. No prosecution under this Act shall be instituted except with the previous sanction of the Provincial Government or of an authority authorised in this behalf by the Provincial Government.

11. Nothing in this Act shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence under this Act:

Provided that no such prosecution shall be instituted except with the previous sanction referred to in section 10.

12. No Court inferior to that of a Presidency Magistrate or a Magistrate of the second class shall try, whether under this Act or under any other law, anything which constitutes an offence under this Act.

13. No person shall have a right to inspect any book, register or record made by a census-officer in the discharge of his duty as such, or any schedule delivered under section 8, and notwithstanding anything to the contrary in the Indian Evidence Act, 1872, no entry in any such book, register, record or schedule shall be admissible as evidence in any civil proceeding whatsoever or in any criminal proceeding other than a prosecution under this Act or any other law for any act or omission which constitutes an offence under this Act.

14. Notwithstanding anything in any enactment or rule with respect to the mode in which a census is to be taken in any municipality, the municipal authority, in consultation with the Superintendent of Census Operations or with such other authority as the Provincial Government may authorise in this behalf, shall, at the time appointed for the taking of the census of British India during the year 1941, cause the census of the municipality to be taken wholly or in part by any method authorised by or under this Act.

15. Notwithstanding anything in any enactment or rule in regard to municipal, local, union or village funds, the Provincial Government may direct that the whole or any part of any expenses incurred for anything

#### NOTES.

SEC. 10.—Having regard to the proviso to section 11 of the Census Act (1929), a prosecution cannot be instituted under sections 193 and 417, I. P. Code, for giving a false

answer to a question put by a census officer except with the previous sanction of the Provincial Government or of an authority authorised by them. 45 C.W.N. 902.



done in accordance with this Act or the rules made thereunder may be charged to any municipal, local, union or village fund constituted for, and on behalf of, the area within which such expenses were incurred.

16. The Census Commissioner for British India or any Superintendent of Census Operations or such person as the Provincial Government may authorise in this behalf may, if he so thinks fit, at the request and cost (to be determined by him) of any local authority or person, cause abstracts to be prepared and supplied containing any such statistical information as can be derived from the census returns for British India or the Province, as the case may be, being information which is not contained in any published report and which in his opinion it is reasonable for that authority or person to require.

Grant of statistical abstracts.

Power to make rules.

17. (1) The Central Government may make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, the Central Government may make rules providing—

(a) for the appointment of census-officers and of persons to perform any of the duties of census-officers or to give assistance towards the taking of a census, and for the general instructions to be issued to such officers and persons;

(b) for the enumeration of persons employed on railways and their families and of other classes of the population for which it may be necessary or expedient to make special provision.

## THE CENTRAL BOARD OF REVENUE ACT (IV OF 1924).<sup>1</sup>

### EFFECT OF LEGISLATION.

Year.	No.	Short title.	How repealed or otherwise affected by legislation.
1924	IV	The Central Board of Revenue Act, 1924.	Rep in part by Act XII of 1927, Act XXXIV of 1939.

[13th March, 1924.]

*An Act to provide for the constitution of a Central Board of Revenue and to amend certain enactments for the purpose of conferring powers and imposing duties on the said Board.*

WHEREAS it is expedient to provide for the constitution of a Central Board of Revenue and to amend certain enactments for the purpose of conferring powers and imposing duties on the said Board; it is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE CENTRAL BOARD OF REVENUE ACT, 1924.

(2) It shall come into force on the first day of April, 1924.

2. As soon as may be after the commencement of this Act, the Central Government shall constitute a Central Board of Revenue,<sup>2</sup> consisting of one or more persons appointed by it, which shall be subject to the

Constitution of Central Board of Revenue.

### LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons, see *Gazette of India*, 1924, Pt. V, p. 30; and for Report of the Select Committee, see *ibid.*, p. 37.

<sup>2</sup> For notification constituting the Central Board of Revenue, see General Rules and Orders, Vol. V. p. 612.

### NOTES.

SEC. 2.—The Board of Revenue is not a Court of first instance but a Court of appeal and revision. Consequently, it should be approached only when it is desired to have an order passed by the Court of first instance set aside either in appeal or in revision. 1941 O.A. (Supp.) 610=1941 R.D. 677.



control of the Central Government in the exercise of such powers and the performance of such duties as may be entrusted to it by the Central Government or by or under any law.

3. The Central Government may make rules<sup>1</sup> for the purpose of regulating the transaction of business by the Central Board of Revenue, and every order made or act done in accordance with such rules shall be deemed to be the order or act, as the case may be, of the Central Board of Revenue.

4. [*Amendments of enactments.*] Repealed by Act XXXIV of 1939.

#### THE SCHEDULE.

##### ENACTMENTS AMENDED.

[*Repealed by Act XXXIV of 1939.*]

### THE CHARITABLE ENDOWMENTS ACT (VI OF 1890).<sup>2</sup>

#### EFFECT OF LEGISLATION.

Year.	No.	Short title	How repealed or otherwise affected by legislation.
1890	VI	The Charitable Endowments Act, 1890.	Repealed in part (as to Burma) by Act XIII of 1898. Ss. 3 (1), 4 (3) (c), 11, 13 amended by Act XXXVIII of 1920 and A.O. 1937.

[7th March, 1890.]

*An Act to provide for the Vesting and Administration of Property held in trust for charitable purposes.*

WHEREAS it is expedient to provide for the vesting and administration of property held in trust for charitable purposes; it is hereby enacted as follows:—

Title, extent and commencement.

1. (1) This Act may be called THE CHARITABLE ENDOWMENTS ACT, 1890.

(2) It extends to the whole of British India, inclusive of <sup>3</sup>[\* \* \*] British Baluchistan; and

(3) It shall come into force on the first day of October, 1890.

2. In this Act “charitable purpose” includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship.

#### LEG. REF.

<sup>1</sup> For such Rules see General Rules and Orders, Vol. V, p. 612.

<sup>2</sup> For Statement of Objects and Reasons, see *Gazette of India*, 1889, Pt. V, p. 137; for Report of the Select Committee, see *ibid.*, 1890, p. 65; and for Proceedings in Council, see *ibid.*, 1889, Pt. VI, pp. 117 and 190, and *ibid.*, 1890, Pt. VI, p. 37.

The Act has been declared in force in Upper Burma (except the Shan States) by

the Burma Laws Act (XIII of 1892), Burma Code.

The Act has been declared in force in the Sonthal Parganas under section 3 of the Sonthal Parganas Settlement Regulation (III of 1872) as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), Bengal Code, Vol. I.

<sup>3</sup> The words “Upper Burma, and” were repealed by the Fifth Schedule of the Burma Laws Act (XIII of 1898), Burma Code.



3. <sup>1</sup>[(1) The Central Government may appoint an officer of the Government by the name of his office to be treasurer of charitable endowments for India, and the Government of any Province may appoint an officer of the Government by the name of his office to be treasurer of charitable endowments for the Province.]

Appointment and incorporation of Treasurer of charitable endowments.

(2) Such Treasurer shall, for the purposes of taking, holding and transferring movable or immovable property under the authority of this Act, be a corporation sole by the name of the Treasurer of Charitable Endowments for <sup>1</sup>[India or, as the case may be, the Province] and, as such Treasurer, shall have perpetual succession and a corporate seal, and may sue and be sued in his corporate name.

<sup>2</sup>[3-A. In the subsequent provisions of this Act "the appropriate Government" means, as respects a charitable endowment, the objects of which do not extend beyond a single Province and are not objects to which the executive authority of the Central Government extends, the Government of the Province, and as respects any other charitable endowment the Central Government.]

Definition of "appropriate Government", etc.

4. (1) Where any property is held or is to be applied in trust for a charitable purpose, the <sup>1</sup>[appropriate Government], if it thinks fit, may, on application made as hereinafter mentioned, and subject to the other provisions of this section, order, by notification<sup>3</sup> in the official Gazette, that the property be vested in the Treasurer of Charitable Endowments on such terms as to the application of the property or the income thereof as may be agreed on between the <sup>1</sup>[appropriate Government] and the person or persons making the application, and the property shall thereupon so vest accordingly.

Orders vesting property in Treasurer.

(2) When any property has vested under this section in a Treasurer of Charitable Endowments, he is entitled to all documents of title relating thereto.

(3) [\* \* \*]

(4) An order under this section vesting property in a Treasurer of Charitable Endowments shall not require or be deemed to require him to administer the property, or impose or be deemed to impose upon him the duty of a trustee with respect to the administration thereof.

5. (1) On application made as hereinafter mentioned, and with the concurrence of the person or persons making the application, the <sup>1</sup>[appropriate Government] if it thinks fit, may settle a scheme for the administration of any property which has been or is to be vested in the Treasurer of Charitable Endowments, and may in such scheme appoint, by name or office, a person or persons, not being or including such Treasurer, to administer the property.

Schemes for administration of property vested in the Treasurer.

(2) On application made as hereinafter mentioned, and with the concurrence of the person or persons making the application, the <sup>1</sup>[appropriate Government] may, if it thinks fit, modify any scheme settled under this section or substitute another scheme in its stead.

#### LEG. REF.

<sup>1</sup> Substituted by Order in Council, 1937.

<sup>2</sup> Section 3-A inserted by Order in Council, 1937.

<sup>3</sup> For notifications issued under this section in conjunction with section 5 for—

(1) Bengal, *see* Beng. Stat. R. & O., Vol. II. (2) Bombay, *see* Bom. R. & O.,

Vol. I. (3) Madras, *see* Mad. R. & O., Vol. I. (4) Punjab, *see* Punj. List of Local R. & O. (5) The United Provinces of Agra and Oudh, *see* U. P. List of Local R. & O., Vol. I, Pt. I. *See also* note under section 7 (1).

<sup>4</sup> Omitted by Order in Council, 1937.



(3) A scheme settled, modified or substituted under this section shall, subject to the other provisions of this section, come into operation on a day to be appointed by the <sup>1</sup>[appropriate Government] in this behalf, and shall remain in force so long as the property to which it relates continues to be vested in the Treasurer of Charitable Endowments or until it has been modified or another such scheme has been substituted in its stead.

(4) Such a scheme, when it comes into operation, shall supersede any decree or direction relating to the subject-matter thereof in so far as such decree or direction is in any way repugnant thereto, and its validity shall not be questioned in any Court, nor shall any Court give, in contravention of the provisions of the scheme or in any way contrary or in addition thereto, a decree or direction regarding the administration of the property to which the scheme relates:

<sup>2</sup>[Provided that nothing in this sub-section shall be construed as precluding a Court from inquiring whether the Government by which a scheme was made was the appropriate Government.]

(5) In the settlement of such a scheme effect shall be given to the wishes of the author of the trust so far as they can be ascertained, and, in the opinion of the <sup>1</sup>[appropriate Government], effect can reasonably be given to them.

(6) Where a scheme has been settled under this section for the administration of property not already vested in the Treasurer of Charitable Endowments, it shall not come into operation until the property has become so vested.

- Mode of applying for vesting orders and schemes.

6. (1) The application referred to in the two last foregoing sections must be made,—

(a) if the property is already held in trust for a charitable purpose, then by the person acting in the administration of the trust, or, where there are more persons than one so acting, then by those persons or a majority of them; and

(b) if the property is to be applied in trust for such a purpose, then by the person or persons proposing so to apply it.

(2) For the purposes of this section the executor or administrator of a deceased trustee of property held in trust for a charitable purpose shall be deemed to be a person acting in the administration of the trust.

7. [*Exercise by Governor-General in Council of powers of Local Government.*] Repealed by A.O., 1937.

8. (1) Subject to the provisions of this Act, a Treasurer of Charitable Endowments shall not, as such Treasurer, act in the administration of any trust whereof any of the property is for the time being vested in him under this Act.

(2) Such Treasurer shall keep a separate account of each property for the time being so vested in so far as the property consists of securities for money, and shall apply the property or the income thereof in accordance with the provision made in that behalf in the vesting order under section 4 or in the scheme, if any, under section 5, or in both those documents.

(3) In the case of any property so vested other than securities for money, such treasurer shall, subject to any special order which he may receive from the authority by whose order the property became vested in him, permit the persons acting in the administration of the trust to have the possession, management and control of the property, and the application of the income thereof, as if the property had been vested in them.



9. A Treasurer of Charitable Endowments shall cause to be published annually in the Official Gazette, at such time as the <sup>1</sup>[appropriate Government] may direct, a list of all properties for the time being vested in him under this Act and an abstract of all accounts kept by him under sub-section (2) of the last foregoing section.

10. (1) A Treasurer of Charitable Endowments shall always be a sole trustee and shall not, as such Treasurer, take or hold any property otherwise than under the provisions of this Act, or subject to those provisions, transfer any property vested in him except in obedience to a decree divesting him of the property, or in compliance with a direction in that behalf issuing from the authority by whose order the property became vested in him.

(2) Such a direction may require the Treasurer to sell or otherwise dispose of any property vested in him, and, with the sanction of the authority issuing the direction, to invest the proceeds of the sale or other disposal of the property in any such security for money as is <sup>1</sup>[specified in the direction] or in the purchase of immovable property.

(3) When a Treasurer of Charitable Endowments is divested, by a direction of the <sup>1</sup>[appropriate Government] under this section, of any property, it shall vest in the person or persons acting in the administration thereof and be held by him or them on the same trusts as those on which it was held by such Treasurer.

11. If the office held by an officer of the Government who has been appointed to be a Treasurer of Charitable Endowments is abolished or its name is changed, the <sup>1</sup>[appropriate Government] may appoint the same or another officer of the Government by the name of his office to be such Treasurer, and thereupon the holder of the later office shall be deemed for the purposes of this Act to be the successor in office of the holder of the former office.

<sup>1</sup>[12. If by reason of any alteration of areas or by reason of the appointment of a treasurer of charitable endowments for India or for any Province for which such a treasurer has not previously been appointed or for any other reason it appears to the Central Government that and property vested in a treasurer of Charitable Endowments should be vested in another such treasurer, that Government may direct that the property shall be so vested and thereupon it shall vest in that other treasurer and his successors as fully and effectually for the purposes of this Act as if it had been originally vested in him under this Act.]

<sup>2</sup>[13. (1) <sup>3</sup>[\* \* \*]

(2) The <sup>1</sup>[appropriate Government] may make rules consistent with this Act for—

#### LEG. REF.

<sup>1</sup> Substituted by Order in Council, 1957.

<sup>2</sup> Substituted by Act XXXVIII of 1920.

<sup>3</sup> Omitted by A.O.

#### NOTES.

SECS. 10 AND 11.—Under section 10 the defendant has the option either to deposit money or to furnish security. The Court can order him to do one of these two things but cannot specify which he is to do. 69

I.C. 658. The security furnished under section 10 however relates to the expenditure actually incurred or likely to be incurred by the plaintiff which is quite a different matter from the costs of the suit. The Court cannot direct payment of this expenditure otherwise than in accordance with that section, and when security has been furnished the Court is incompetent to order execution against the surety. (*Ibid.*)



(a) prescribing the fees to be paid to the Government in respect of any property vested under this Act in a Treasurer of Charitable Endowments;

(b) regulating the cases and the mode in which schemes or any modification thereof are to be published before they are settled or made under section 5;

(c) prescribing the forms in which accounts are to be kept by Treasurers of Charitable Endowments, and the mode in which such accounts are to be audited; and

(d) generally, carrying into effect the purposes of this Act.]

14. No suit shall be instituted against the <sup>1</sup>[Crown] in respect of anything done or purporting to be done under this Act, or in respect of any alleged neglect or omission to perform any duty devolving on the Government under this Act, or in respect of the exercise of, or the failure to exercise, any power conferred by this Act on the Government, nor shall any suit be instituted against a Treasurer of Charitable Endowments except for divesting him of property on the ground of its not being subject to a trust for a charitable purpose, or for making him chargeable with or accountable for the loss or misapplication of any property vested in him, or the income thereof, where the loss or misapplication has been occasioned by or through his wilful neglect or default.

15. Nothing in this Act shall be construed to impair the operation of section 111 of the <sup>2</sup>Statute 53, George III, Chapter 155, or of any other enactment for the time being in force, respecting the authority of an Advocate-General at a presidency to act with respect to any charity, or of sections 8, 9, 10 and 11 of the Act<sup>3</sup> No. XVII of 1864 (*an Act to constitute an Office of Official Trustee*) respecting the vesting of property in trust for a charitable purpose in an Official Trustee.

16. [General Controlling authority of the Governor-General in Council.]  
Repealed by Act XXXVIII of 1920, section 2 and Sch. I.

## THE CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV OF 1920). EFFECT OF LEGISLATION.

Year.	No.	Short title.	How repealed or otherwise affected by legislation.
1920	XIV	The Charitable and Religious Trusts Act, 1920	Section 2 amended by Act XLI of 1923, Sec. 2., A. O. 1937.

[20th March, 1920.]

*An Act to provide more effectual control over the administration of Charitable and Religious Trusts.*

WHEREAS it is expedient to provide facilities for the obtaining of information regarding trusts created for public purposes of a charitable or religious nature, and to enable the trustees of such trusts to obtain the directions of a Court on certain matters, and to make special provision for the payment of the

### LEG. REF.

<sup>1</sup> Substituted by A.O., 1937 for "Government".

<sup>2</sup> The East India Company Act, 1813 (*Coll. Stats. Ind.*, Vol. I).

<sup>3</sup> The Official Trustees Act, 1864 (which has been repealed by Act (II of 1913).

### NOTES.

SEC. 14.—The administration of the property of a hospital was vested in the Treas.

suror of Charitable Endowments under S. 3 of the Charitable Endowments Act. Hence a suit could not be filed against the Secretary alone as representing the Committee. See 26 O.C. 333=1924 Oudh 128. Suit for property vested in the Treasurer for Charitable Endowments. Settlor alleged to have only life interest—Suit based on a title paramount to the settlors—Maintainability. See 1926 Oudh 431.



expenditure incurred in certain suits against the trustees of such trusts; It is hereby enacted as follows:—

Short title and extent. 1. (1) This Act may be called THE CHARITABLE AND RELIGIOUS TRUSTS ACT, 1920.

(2) It extends to the whole of British India:

Provided that the <sup>1</sup>[Government of any Province] may, by notification in the <sup>1</sup>[Official Gazette], direct that this Act, or any specified part thereof, shall not extend to <sup>1</sup>[that Province or any specified area therein] or to any specified trust or class of trusts.

2. In this Act, unless there is anything repugnant in the subject or context, “the Court” means the Court of the District Judge <sup>2</sup>[or any other Court empowered in that behalf by the <sup>1</sup>[Provincial Government]] and includes the High Court in the exercise of its ordinary original civil jurisdiction.

3. Save as hereinafter provided in this Act, any person having an interest in any express or constructive trust created or existing for a public purpose of a charitable or religious nature may apply by petition to the Court within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate to obtain an order embodying all or any of the following directions, namely:—

#### LEG. REF.

<sup>1</sup> Substituted by Order in Council, 1937.

<sup>2</sup> These words were added after the words “District Judge” by Act XLI of 1923, section 2.

#### NOTES.

SECS. 1 AND 3.—The Act does not cease to apply to a case where the trustee has parted with the entire trust property. 78 I.C. 174. Persons who claim adversely to the trust and who are not liable under section 3 are not proper parties to an application for directing the trustee to produce the accounts. 78 I.C. 174. As to applicability of the Act to property on condition of holding so long as temple lasted—No direction as to appropriation of income—Public trust, if constituted. See 3 Luck. 392=1928 O. 241=5 O.W.N. 50. The Madras Hindu Religious Endowments Act (II of 1927) has not taken away the jurisdiction of the District Judge under section 5 of the Charitable and Religious Trusts Act. To a certain extent both the Acts cover the same ground. When the District Judge passes an order under section 5 of Act XIV of 1920, because the Madras Hindu Religious Endowment Board showed no inclination to exercise its powers under the Madras Act, it is a good reason for exercising his discretion; and the order cannot be revised by the High Court under section 115, C.P.Code. 152 I.C. 1052=1935 Mad. 56 (1)=68 M. L.J. 55.

SEC. 2.—Under this Act the District Court is a Court subordinate to the High Court. 27 A.L.J. 911=1929 All. 581=121 I.C. 267.

SEC. 3.—The Charitable and Religious Trusts Act of 1920 applies only to those

cases where the entire benefit under the wakf or trust is allotted for public purposes. Also where a trust is of public nature any person having an interest in the said trust is entitled to make the application contemplated by section 3 of the Act of 1920 but he is not so entitled if the purpose of the trust is partly public and partly private. In the latter case his remedy is to make an application under section 4 of the Wakf Act of 1923. 4 Luck. 429=1929 Oudh 225 (F.B.). Section 3 applies to a mixed trust partly for a public and charitable purpose and partly for private purpose. 163 I.C. 234=1936 A.L.J. 546=1936 A. 411. See also 11 O.W.N. 1435=Oudh 96. Act XIV of 1920 is not inapplicable to a trust merely because a small sum is reserved for purposes which may not be strictly public purposes. Where under the same deed or will either a specified part of the property, for example, a defined share in the property, or a specified part of the income has been definitely set apart for public purposes, then the mere fact that any other part of the property or any other specified part of the income is for private purposes would not take the case out of the provisions of the Act. 1937 A.L.J. 1183=I.L.R. (1938) All. 1=1937 All. 786 See also 173 I.C. 453=1937 Cal. 313. Section 3 of the Act sets out what must be established in order to bring the matter within the purview of the Act. Put shortly there must be a trust. It must be either express or constructive. It must have been either created or it must be existing for a public purpose. And that public purpose must be of a charitable or a religious nature. Though the trust which arises in the case



(1) directing the trustee to furnish the petitioner through the Court with particulars as to the nature and objects of the trust, and of the value, condition, management and application of the subject-matter of the trust, and of the income belonging thereto, or as to any of these matters, and

(2) directing that the accounts of the trust shall be examined and audited:

Provided that no person shall apply for any such direction in respect of accounts relating to a period more than three years prior to the date of the petition.

Contents and verification of petition. 4. (1) The petition shall show in what way the petitioner claims to be interested in the trust, and shall specify, as far as may be, the particulars and the audit which he seeks to obtain.

(2) The petition shall be in writing and shall be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying plaints.

#### NOTES.

of a dedication to an idol is not the exact kind of trust which the English law contemplates, nevertheless they are trusts, though of a special and particular kind and they are the sort which the Charitable and Religious Trusts Act is intended to cover. 1941 N.L.J. 396. The words "having an interest in a trust" must in each case depend on the nature of the trust. 50 A. 880 = 26 A.L.J. 1379 = 111 I.C. 129. See also 119 I.C. 365. A person who is a worshipper at Gurdwara is a person interested in a public trust for this Act. 36 P.L.R. 162 = 1934 Lah. 949. As to what is a public trust, see 11 O.W.N. 1435. Where the rules of an alleged trust provide for the carrying on a sort of banking business whereby loans are to be made at interest either on security or guarantee, the object of the trust is hardly consistent with its being of a religious or charitable nature. 62 I.A. 146 = 57 A. 330 = 39 C.W.N. 865 = 1935 P.C. 97 = 69 M.L.J. 1 (P.C.). There can be no doubt that on the wording of the statute that the Charitable and Religious Trusts Act applies only to those cases where the entire benefit under the wakf in trust is allotted to public purposes and not where the purpose of the trust is partly public and partly private. In every case, the real substance of the trust and the primary intention of the creator of the trust have to be looked at. If the intention of the creator was the creation of a trust for a public purpose, the dedication in favour of the poor relations of creator who are classed with the helpless widows in the neighbourhood will not destroy the public nature of the trust. 173 I.C. 453 = A.I.R. 1937 Cal. 313. See also 1937 All. 786.

"PUBLIC TRUST"—MOSQUE BUILT BY PUBLIC SUBSCRIPTION.—Where a mosque was built with public subscriptions and used by the Mahomedan public for offering prayers and further was admitted by the respondent to be a religious trust in a prior suit, held,

that such a mosque was a public trust and that an application under section 3 calling upon the respondent to furnish certain information should be decided on merits. 17 Lah. 768 = 165 I.C. 664 (1) = 1936 Lah. 695. To constitute, a trust "created or existing for a public purpose of a charitable or religious nature" the author or authors of the trust must be ascertained and the intention to create a trust must be indicated by words or acts with reasonable certainty. Moreover the purpose of the trust, the trust property, and the beneficiaries must be indicated so as to enable the Court to administer the trust if required. (57 A. 330 = 62 I.A. 446, Rel. on). 65 I.A. 252 = 42 C.W.N. 1013 = I.L.R. (1938) Lah. 453 = A.I.R. 1938 P.C. 195 = (1938) 2 M.L.J. 228 (P.C.).

SEC. 3 (2).—Under cl. 2 to section 3, the Court is enabled to direct the examination and audit of the accounts in whosoever's hands the funds or the properties of the trust may be, quite apart from whether he is a trustee or not. 175 I.C. 636 = 19 Pat. L.T. 639 = A.I.R. 1938 Pat. 280.

REVISION.—The provisions of section 115, C.P.Code, and section 44, Punjab Courts Act, are very wide and an order of the District Judge under section 3, is revisable. 17 Lah. 768 = 165 I.C. 664 = 1936 Lah. 695. Where a Judge passes an order under section 3 of the Act directing a mutawalli to file accounts within a certain time, it cannot be said that in law no revision would lie from such order. 1938 O.W.N. 1054 = 1938 Oudh 262.

SECS. 3 AND 5: SCOPE OF.—The Act is intended to provide more effectual control over the administration of charitable and religious trust and provision is made therein for obtaining an order calling on the trustee to give particulars of the object of the trust and if the trust is denied to file a suit. No such provision is made in the Mussalman Wakf Act of 1923. 1927 Pat. 189. See also 1936 Lah. 695. Applica-



5. (1) If the Court on receipt of a petition under section 3, after taking such evidence and making such inquiry, if any, as it may consider necessary, is of opinion that the trust to which the petition relates is a trust to which this Act applies, and that the petitioner has an interest therein, it shall fix a date for the hearing of the petition, and shall cause a copy thereof together with notice of the date so fixed, to be served on the trustee and upon any other person to whom in its opinion notice of the petition should be given.

#### NOTES.

tion under—No notice to all the trustees—Notice served on three trustees only—Legality of order. 1924 M.W.N. 515=32 I.C. 733=1925 M. 135. An application under section 3 of the Charitable and Religious Trusts Act does not cease to be maintainable simply because the opponents raise a question of title. Though under section 5 (6) of the Act, the Court has no jurisdiction to decide any question of title between the petitioner and any one claiming title adversely to the trust, it does not mean that the moment a claim adverse to the trust is advanced, the jurisdiction of the Court is ousted. When such a claim is put forward, it in effect amounts to a denial of the existence of the trust. It is open to the claimant to take advantage of section 5 (3) and to get the question determined in a regular suit. If he does not avail himself of this course, the Court must decide whether a trust exists. The opposing party has still his remedy by way of suit. 58 Bom. 623=36 Bom.L.R. 687=1934 Bom. 343.

SEC. 5.—In proceedings for examination of accounts of trust property under the Charitable and Religious Trusts Act (1920), the District Judge did not refer to the original grant at all, but based his order on certain statements which were wholly irrelevant and inadmissible for the purpose of construing the terms of the original grant. *Held*, the order was illegal and was vitiated by material irregularity and could be set aside in revision. The fact that the petitioner had the remedy of suit open to him is no bar to the order being set aside in revision. 58 Bom. 623=36 Bom.L.R. 687=1934 Bom. 343. On this section, see also 152 I.C. 1052=1935 Mad. 56=68 M.L.J. 55, cited under section 1. The District Judge has no jurisdiction under the Act to decide questions of title. The Act does not bar the questions of title being agitated and decided in a regular suit by a Court exercising ordinary original civil jurisdiction. The mere fact that the Act provides a summary remedy does not create a bar to the filing of a regular suit by the unsuccessful party. The party who seeks to oust the jurisdiction of the Civil Court must establish his contention. 152 I.C. 861=11 O.W.N. 1435=1935 Oudh 96.

SEC. 5 (3) AND (4).—Section 5 (4) in terms gives the Court of the District Judge

jurisdiction to decide, under certain circumstances, the question whether a trust is one to which the Act applies. When either its existence or its being a trust to which the Act applies, is denied, and no undertaking as contemplated by sub-r. (3) is given, the District Judge is exercising a jurisdiction vested in him, if he decides as to the nature of the trust. 178 I.C. 167=1938 O.W.N. 1054=A.I.R. 1938 Oudh 262.

SECS. 5 AND 6.—On an application under the charitable and Religious Trusts Act praying that the respondents be directed to file accounts of their management of the property alleging that it is a religious endowment, the District Judge is no doubt authorised to decide the question whether the property is or is not devoted to public, religious or charitable purposes. But the proceedings of the District Judge are of a summary nature and do not fall within the definition of a suit and his decision cannot operate as *res judicata*. 36 P.L.R. 13=1934 Lah. 771. The decision of the District Judge under the Act—a decision from which by section 12 of the Act there is no appeal—is a decision in a summary proceeding which is not a suit nor of the same character as a suit which has not been made final by any provision of the Act, and in respect of which the doctrine of *res judicata* does not apply so as to bar a regular suit even in the case of a person who was a party to the proceedings under the Act. The terms of section 6 of the Act are intended to define the consequences of the failure to comply with any order that may be passed under section 5 (5) of the Act, but the words “if a trustee without reasonable excuse fails to comply” in the section cannot be read to exclude a contention in a regular suit that the plaintiff is not a trustee or to prevent a similar contention being raised by a defendant, to a suit under section 92, C.P.Code. 67 I.A. 1=I.L.R. (1940) Kar. (P.C.) 25=15 Luck. 1=A.I.R. 1940 P.C. 7= (1940) 1 M.L.J. 1 (P.C.). Per Niamatulla, J. The order of the District Judge under section 5 of Act XIV of 1920 is only an order passed in summary proceedings and it has not the force of a decree and has the effect merely of withdrawing certain restrictions imposed on the persons desirous of instituting suits under section 92, C.P.Code. The decision under section 5 on an application for examination of accounts of the alleged



(2) On the date fixed for hearing of the petition, or on any subsequent date to which the hearing may be adjourned, the Court shall proceed to hear the petitioner and the trustee, if he appears, and any other person who has appeared in consequence of the notice, or who it considers ought to be heard, and shall make such further inquiries, if any, as it thinks fit. The trustee may, and, if so required by the Court, shall at the time of the first hearing or within such time as the Court may permit present a written statement of his case. If he does present a written statement, the statement shall be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying pleadings.

(3) If any person appears at the hearing of the petition and either denies the existence of the trust or denies that it is a trust to which this Act applies, and undertakes to institute within three months a suit for a declaration to that effect and for any other appropriate relief, the Court shall order a stay of the proceedings and, if such suit is so instituted, shall continue the stay until the suit is finally decided.

(4) If no such undertaking is given, or if after the expiry of the three months no such suit has been instituted, the Court shall itself decide the question.

(5) On completion of the inquiry provided for in sub-section (2), the Court shall either dismiss the petition or pass thereon such other order as it thinks fit:

Provided that, where a suit has been instituted in accordance with the provisions of sub-section (3), no order shall be passed by the Court which conflicts with the final decision therein.

(6) Save as provided in this section, the Court shall not try or determine any question of title between the petitioner and any person claiming title adversely to the trust.

6. If a trustee without reasonable excuse fails to comply with an order made under sub-section (5) of section 5, such trustee shall, without prejudice to any other penalty or liability which he may incur under any law for the time being in force, be deemed to have committed a breach of trust affording ground for a suit under the provisions of section 92 of the Code of Civil Procedure, 1908; and any such suit may, so far as it is based on such failure, be instituted without the previous consent of the Advocate-General.

#### NOTES.

trust property does not bar a suit for declaration that the property does not belong to the trust but is in the absolute ownership of the alleged trustee. 1929 All. 506. The maintenance of a suit so as to nullify the effect of section 6 of the Act is not permissible. 27 A.L.J. 653=118 I.C. 513=1929 A. 506.

Section 5 of the Charitable and Religious Trusts Act does not by itself contemplate the intervention of other persons for compelling the mutawalli to file his accounts except possibly as a mere reminder to the Judge that the accounts have not been filed with a view to induce the Judge to take proceedings under section 10. 118 I.C. 717.

Sec. 6.—Section 6 says that once a breach of trust has been committed, by the trustee by his refusal to produce the accounts, a suit so far as it is based on such

failure may be instituted without the previous sanction of the Advocate-General. It nowhere says by whom such a suit should be instituted. Once an order has been passed under section 6 of the Act, a suit under section 92 of the C.P. Code may be continued by other persons, even though the original plaintiff who applied under sections 3 and 4 and secured the order from the District Court under section 6 of the Act has dropped out of the suit. 1933 Mad. 854=65 M.L.J. 690. A suit contemplated by section 6 of the Act does not become incompetent on the ground that one of the reliefs claimed therein cannot be said to be "based on such failure", i.e., the failure of the trustee to render accounts. The Court can entertain the suit so far as the other reliefs are concerned. 1933 M. 854=65 M.L.J. 690; see also 28 A.L.J. 1291.



7. (1) Save as hereinafter provided in this Act, any trustee of an express or constructive trust created or existing for public purpose of a charitable or religious nature may apply by petition to the Court, within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate, for the opinion, advice or direction of the Court on any question affecting the management or administration of the trust property, and the Court shall give its opinion, advice or direction, as the case may be, thereon:

Powers of trustee to apply for directions.

Provided that the Court shall not be bound to give such opinion, advice or direction on any question which it considers to be a question not proper for summary disposal.

(2) The Court, on a petition under sub-section (1), may either give its opinion, advice or direction thereon forthwith, or fix a date for the hearing of the petition, and may direct a copy thereof, together with notice of the date so fixed, to be served on such of the persons interested in the trust, or to be published for information in such manner, as it thinks fit.

(3) On any date fixed under sub-section (2) or on any subsequent date to which the hearing may be adjourned, the Court, before giving any opinion, advice or direction, shall afford a reasonable opportunity of being heard to all persons appearing in connection with the petition.

(4) A trustee stating in good faith the facts of any matter relating to the trust in a petition under sub-section (1), and acting upon the opinion, advice or direction of the Court given thereon, shall be deemed, as far as his own responsibility is concerned, to have discharged his duty as such trustee in the matter in respect of which the petition was made.

8. The costs, charges and expenses of and incidental to any petition, and all proceedings in connection therewith, under the foregoing provisions of this Act shall be in the discretion of the Court, which may direct the whole or any part of any such costs, charges and expenses to be met from the property or income of the trust in respect of which the petition is made, or to be borne and paid in such manner and by such persons as it thinks fit:

Costs of petition under this Act.

Provided that no such order shall be made against any person (other than the petitioner) who has not received notice of the petition and had a reasonable opportunity of being heard thereon.

9. No petition under the foregoing provisions of this Act in relation to any trust shall be entertained in any of the following circumstances, namely:

Savings.

(a) if a suit instituted in accordance with the provisions of section 92 of the Code of Civil Procedure, 1908, is pending in respect of the trust in question;

(b) if the trust property is vested in the Treasurer of Charitable Endowments, the Administrator-General, the Official Trustee or any society registered under the Societies Registration Act, 1860; or

(c) if a scheme for the administration of the trust property has been settled or approved by any Court of competent jurisdiction or by any other authority acting under the provisions of any enactment.

#### NOTES.

SEC. 7.—When a trustee makes an application to the District Judge to obtain his opinion or advice a case is presented before the District Judge for decision. 1929 All. 581=27 A.L.J. 911 following 48 I.A. 280=44 M. 656 (P.C.).

Powers of District Judge under section 7—Extent of—Wakf property—Dispute between mutawallis—District Judge appointing defendant to collect rents—Suit against him by mutawallis—Notice under section 80, C.P. Code, not necessary. 165 I.C. 681=1936 A.L.J. 1112=1936 A. 801.



10. (1) In any suit instituted under section 14 of the Religious Endowments Act, 1863, or under section 92 of the Code of Civil Procedure, 1908, the Court trying such suit may, if, on application of the plaintiff and after hearing the defendant and making such inquiry as it thinks fit, it is satisfied that such an order is necessary in the public interest, direct the defendant either to furnish security for any expenditure incurred or likely to be incurred by the plaintiff in instituting and maintaining such suit, or to deposit from any money in his hands as trustee of the trust to which the suit relates such sum as such Court considers sufficient to meet such expenditure in whole or in part.

Power of Courts as to costs in certain suits against trustees of charitable and religious trusts.

(2) When any money has been deposited in accordance with an order made under sub-section (1), the Court may make over to the plaintiff the whole or any part of such sum for the conduct of the suit. Before making over any sum to the plaintiff, the Court shall take security from the plaintiff for the refund of the same in the event of such refund being subsequently ordered by the Court.

Provisions of the Code of Civil Procedure to apply.

11. (1) The provisions of the Code of Civil Procedure, 1908, relating to—

- (a) the proof of facts by affidavit,
- (b) the enforcing of the attendance of any person and his examination on oath,
- (c) the enforcing of the production of documents, and
- (d) the issuing of commissions,

shall apply to all proceedings under this Act and the provisions relating to the service of summonses shall apply to the service of notices thereunder.

(2) The provisions of the said Code relating to the execution of decrees shall apply to all proceedings under this Act, and the provisions relating to Act.

Barring of appeals.

12. No appeal shall lie from any order passed or against any opinion, advice or direction given under this Act.

## THE CHILD MARRIAGE RESTRAINT ACT (XIX OF 1929). EFFECT OF LEGISLATION.

Year.	No.	Short title.	How repealed or otherwise affected by Legislation.
1929	XIX	The Child Marriage Restraint Act, 1929.	Amended by Act VIII of 1930. " Act VII of 1938. " Act XIX of 1938.

PREFATORY NOTE.—It is now recognized in all civilized countries that the regulation by legislative enactment of the marriageable age of girls and boys is not only within the competence but is also one of the chief duties of the state Legislature. Such a provi-

### NOTES.

SEC. 10.—Under section 10 of the Charitable and Religious Trusts Act, the District Judge has the power to punish a mutawalli if, without any reasonable cause, the burden of proving which shall lie upon him, he fails to furnish statement of particulars of documents, of statement of accounts. This is purely a penal proceeding in the course of which the Judge may enquire as to whe-

ther a wakf is one to which the Act is applicable. But, till that stage arises, the Judge cannot hold any such enquiry and compel a mutawalli who is not admitting the applicability of the Act, to file accounts. 118 I.C. 717=1930 A. 81=52 A. 167.

SEC. 12.—See 67 I.A. 1=(1940) 1 M. L.J. 1 (P.C.).



sion is necessary to secure the health and happiness of the coming generations. In England, in several of her colonies, in most of the continental states of Europe and in the United States of America, statutes exist fixing the minimum age before which the marriages of boys and girls may not be lawfully solemnized. Even after the passing of this age, while the parties are minors, the consent of the parents is made a necessary condition for the validity of the marriage. In no other part of the world is the need for such a measure greater than in India, where custom and social sentiment, if not legal provisions, are strongly opposed to marriages of even virgin and child widows. One would think that it is an anomaly not easily understandable by strangers that a child who has not completed its first birthday should become a fixed widow for life. Such cases are not only possible but they actually exist in a fairly large number in this ancient land.

The necessity for the passing of this Act and the evils it was intended to remedy were explained as follows in the original Statement of Objects and Reasons:—

"The object of the Bill is twofold. The main object, by declaring invalid the marriages of girls below 12 (now made 14) years of age, is to put a stop to such girls becoming widows. The second object, by laying down the minimum marriageable ages of boys and girls, is to prevent, so far as may be, their physical and moral deterioration by removing a principal obstacle to their physical and mental development.

"According to the Census Report of 1921 A.D., there were in that year 612 Hindu widows who were less than one year old, 2,024 who were under 5 years, 97,857 who were under 10 years, and 3,32,024 who were under 15 years of age. The deplorable feature of the situation, however, is that the majority of these child widows are prevented by Hindu custom and usage from re-marrying. Such a lamentable state of affairs exists in no country, civilized or uncivilized, in the world. And it is high time, that the law came to the assistance of these helpless victims of social customs, which, whatever their origin or justification in olden days, are admittedly out of date and are the source of untold misery and harm at the present time.

"According to the Brahmanas, the most ancient and the most authoritative book containing the laws of the Hindus, the minimum marriageable age of a man is 24 and a woman 16. And if the welfare of the girl were the only consideration in fixing the age, the law should fix 16 as the minimum age for the valid marriage of a girl. But amongst the Hindus, there are people who hold the belief that a girl should not remain unmarried after she attains puberty. And as in this country, some girls attain puberty at an age as early as 12, the Bill fixes 12 (now made 14) as the minimum age for the valid marriage of a Hindu girl.

"In order, however, to make the Bill acceptable to the most conservative Hindu opinion, provision is made in the Bill that, for conscientious reasons, the marriage of a Hindu girl would be permissible even when she is 11 years old. No Hindu Sastra enjoins marriage of a girl before she attains puberty, and the time has arrived and public opinion sufficiently developed, when the first step towards the accomplishment of the social reform, so necessary for the removal of a great injustice to its helpless victims and so essential to the vital interests of a large part of humanity, should be taken, by enacting a law declaring invalid the marriages of girls below 11 years of age.

"With regard to boys, the Sastras do not enjoin marriage at a particular age. Thoughtful public opinion amongst the Hindus would fix 18 as the minimum marriageable age for a boy. But as some classes of the Hindus would regard such legislation as too drastic, the Bill takes the line of least resistance by providing 15 years (now made 18) as the age below which the marriage of a Hindu boy shall be invalid. Even in England, where child marriages are unknown and early marriages are exceptions, it has been found necessary to fix the ages below which boys and girls may not marry."

The Bill as originally introduced aimed at preventing child marriages among the *Hindus* only; and the mode by which it was attempted to be effected was by prescribing a minimum age of 12 years for a girl and of 15 years for a boy, and by declaring marriages within those ages invalid. There was no proposal to render the performance of such marriages penal, but only to create a civil disability. But the Bill, as it emerged from the Select Committee and discussion in the Council, increased the marriageable age of the girl to 14 years and that of the boy to 18 years. The Act was also made applicable to all persons and not only to Hindus. It further provided that marriages celebrated in contravention of the Act were not invalid but only punishable with fine or imprisonment or both.

The Act now applies to all persons, Hindus, Mahomedans, etc., and marriages celebrated in contravention of the Act are not visited with any civil disability but only with a particular punishment.

The Act did not receive any favourable reception from a large section of Hindu Sanathanists and Mahomedans, who have been always contending that the provisions of the Act were interfering with their religious injunctions; and various methods were resorted to for the purpose of evading the provisions of the Act.

One of the easiest methods by which it was found possible to evade the provisions of the Act was to have child marriages celebrated outside British India, for instance, in the French Territory or in a Native State, where such marriages were till recently not deemed to be offences.



The question was raised in several cases, whether marriages so performed outside British India were punishable under this Act; and different High Courts have given conflicting decisions. [*Vide* (1937) 1 M.L.J. 388=45 L.W. 210; 59 B. 745.]

The passing of the Act did not give satisfaction to either party. The progressive section has always contended that during the progress of the Bill in the Assembly, too much concession had been shown to the orthodox opposition and that, in several respects, it was very easy to evade its provisions with impunity; and the opposition, on the other hand, had uniformly and persistently contended that the Act had gone too far. Amending Bills had been proposed from time to time—both by the progressive party as well as by the members of the orthodox party.

But, as one may read from the tendency of the times, there is not the slightest chance of any Assembly going back on the principle of the Act. Bills to exempt one community or other from the operation of this enactment, and Bills to make the provisions of the Act less stringent have, no doubt, been introduced in the Assembly from time to time.

On the other hand, two important Acts have recently been passed which have to a large extent made the evasion of the Act almost impossible.

AMENDING ACT VII OF 1938.—A Bill was introduced in the Legislative Assembly in 1936 (Bill No. 21 of 1936) to prevent the evasion of the law by having recourse to the celebration of marriages of infants at places outside British India. The reasons for the introduction of the amending Act and the mischief it was intended to remedy were thus explained in the Statement of Objects and Reasons:

"There is no law making British subjects amenable to the provisions of the Child Marriage Restraint Act if they commit offences under the Act in the territories of any Native Prince or Chief in India. In practice it has been observed that the provisions of the Sarda Act are being evaded and abused by the British subjects by their hopping over the borders of the British territory and committing offences under this Act by performing child marriages in contravention of the Act in Native States and returning to British India to enjoy immunity from the punishment provided by the Act. If a provision such as that proposed by this Bill is not enacted, the provisions of the Child Marriage Restraint Act will be infructuous. Cases of such an abuse are not rare and it is high time that they should be provided against. Sections 3 and 4 of the Penal Code do not cover offences when committed under this Act out of British India, to be made punishable in British India.

"Section 4 applies the provisions of the Penal Code only to the offences committed by any Native Indian subject of His Majesty in any place without and beyond British India and there is no law passed by the Governor-General of India in Council, as required by section 3 of the Penal Code, for trying in British India an offence under the Child Marriage Restraint Act when committed beyond the limits of the British territories.

"Thus it is expedient and necessary to amend this Act as proposed by this Bill."

ACT XIX OF 1938.—Another Bill (No. 38 of 1935) was introduced in the Legislative Assembly on the 26th of September, 1935. The object of the Bill was thus explained in the Statement of Objects and Reasons:

"The object of this Bill is to amend the Act by two provisions aimed at facilitating the more effective enforcement of the Act:—

"First by putting it beyond question that the Courts empowered to take proceedings under the Act may at their discretion issue an injunction prohibiting a marriage arranged in contravention of the Act.

"Already Civil Courts in the Bombay Presidency are known in several cases to have issued injunction orders against marriages known to have been arranged in contravention of the Act. It is not known whether similar action has been taken in any other province. But since doubts have been thrown upon the legality or practicability of this method, it seems desirable to remove such doubts by providing for it directly through the proposed amendment. The draft Bill proposes to impose a higher maximum penalty for the breach of such an injunction than the penalty provided in the Act in the case of prosecution after the marriage has already taken place, on the ground that breach of a Court injunction involves contempt of Court.

"Secondly, by permitting the Court to take proceedings under the Act upon its own motion, without requiring the execution of a bond and to incur also the risk of losing the sum mentioned in the bond. The proposed amendment would enable the Court to proceed upon information obtained privately after taking such steps as it might think necessary to satisfy itself of the correctness of the information."

## THE CHILD MARRIAGE RESTRAINT ACT (XIX OF 1929).

### CONTENTS.

#### SECTIONS.

#### INTRODUCTION.

1. Short title, extent and commencement.
2. Definitions.

C. C. M.—43

#### SECTIONS.

3. Punishment for male adult below twenty-one years of age marrying a child.
4. Punishment for male adult above



## SECTIONS.

twenty-one years of age marrying a child.

5. Punishment for solemnizing a child marriage.

6. Punishment for parent or guardian concerned in a child marriage.

7. Imprisonment not to be awarded for offences under section 3.

8. Jurisdiction under this Act.

## SECTIONS.

9. Mode of taking cognizance of offences.  
10. Preliminary inquiries into offences under this Act.

11. Power to take security from complainant.

12. Power to issue injunction prohibiting marriage in contravention of this Act.

## INDEX.

[1st October, 1929.

*An Act to restrain the solemnisation of child marriages.*

WHEREAS it is expedient to restrain the solemnisation of child marriages; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE CHILD MARRIAGE RESTRAINT ACT, 1929.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas,

<sup>1</sup>[and applies also to—

## LEG. REF.

<sup>1</sup> Added by Act VII of 1938.

## NOTES.

SEC. 1: OBJECT OF THE AMENDMENT.—There was a conflict of decisions as to whether the Act, as it originally stood, was applicable to child marriages celebrated in places outside British India, *e.g.*, in any place within the French territory or a Native State where such marriages were not declared offences. [*Vide* (1937) 1 M.L.J. 388=1937 M. 203; 59 B. 745; 175 I.C. 615=1938 Nag. 205.] But this amendment makes this Act applicable to all British subjects and servants of the Crown in any part of India and to all British subjects who are domiciled in any part of India wherever they may be. Thus, at present, this Act can pursue every British subject, although he may celebrate the marriage outside British India, and the Legislature by this amendment has adopted the view of the Madras High Court; so the decision in 59 B. 745 would no longer be correct under the Act as amended. In an administration suit an application was made for liberty to spend out of the estate certain sum to meet the marriage expenses of the plaintiff who was a minor and had not reached the age of 16. Both the bridegroom and the bride were domiciled in Bikanir and the marriage ceremony was to be performed in Bikanir. The source of income was however in Calcutta. *Held*, that the application could not be granted as the Court should not facilitate conduct which the legislature in British India had made penal even if such marriage was not punishable according to law of Bikanir. A.I.R. 1941 Cal. 244.

OBJECT OF ACT NOT TO DECLARE MARRIAGE INVALID, BUT TO INFLICT PUNISHMENT.—Although a marriage may have been celebrated in contravention of the provisions of this Act, the Act does not declare it to be an invalid marriage. The Act merely imposes certain penalties on the persons bringing about such marriages. 1936 A. 852=1936 A. L.J. 1097. The Child Marriage Restraint

Act aims at the restraint of solemnization of child marriages. It does not affect the validity of the marriages after they have been performed. There may no doubt be cases where the Court in the exercise of its discretion, may refuse to give a declaration in the case of a marriage performed in contravention of the Act. 182 I.C. 568=1939 A. L.J. 173=A.I.R. 1939 All. 340.

ACT, IF ULTRA VIRES.—The Act is not *ultra vires* at least so far as Hindus are concerned. It was contended that the previous sanction of the Governor-General in Council required by sec. 67 (2) (b) of the Government of India Act (5 & 6 Geo. V, ch. 61 and 9 & 10 Geo. V, ch. 101) was not given to the introduction of the measure which became Act XIX of 1929. The argument was that the original Bill, which was introduced and for which sanction was given, was so altered and shaped by the Select Committee, that the Bill as it came out of the Select Committee bore no resemblance at all to the original Bill, and that therefore a fresh sanction should have been obtained for this. It was held that so far as Hindus are concerned, the changes introduced in the Select Committee did not affect the object and purpose of the Bill; and that the difference introduced was only with reference to the methods of achieving the purpose, *viz.*, that the Bill provided for achieving it by creating civil disability whereas the Act provides for achieving it by inflicting punishments, and that the changes were not such as to render inadequate the "previous sanction" accorded, and that the Act, therefore, was valid and not *ultra vires*. 14 Pat.L.T. 438=33 Cr.L.J. 20=1933 Pat. 471.

APPLICABILITY OF ACT—JURISDICTION OF COURTS.—The Act is a penal statute, and, under it whoever offends against its provisions commits a crime. It is applicable to all such crimes committed in British India, even though the persons accused are foreigners, *i.e.*, subjects of a Native State. 39 C.W.N. 656. In the case of these persons,



- (a) all British subjects and servants of the Crown in any part of India; and
- (b) all British subjects who are domiciled in any part of India wherever they may be].
- (3) It shall come into force on the 1st day of April, 1930.

## NOTES.

if the marriage takes place outside British India, it would not constitute an offence under this Act.

With reference to the question whether the celebration of child marriages by native British subjects outside British India can be punished under this Act, there was a conflict of opinion between the Bombay and Madras High Courts.

The Madras High Court held that this Act makes it an offence to celebrate a child marriage, and that the penal law, applies not only to the celebration of such marriages within British India by any one, but also to the celebration of such marriage even outside British India by native Indian subjects. (*Vide* sec. 3, I. P. C. and secs. 186 and 188, Criminal Procedure Code.) This Act is extra-territorial to this extent, viz., that if native Indian subjects commit offences punishable under this Act even outside British India, they are liable to be tried and punished when found in British India. The Act can pursue them even when they have broken it after going outside British India. (1937) 1 M.L.J. 388=1937 M. 273; *see also* 175 I.C. 615=A.I.R. 1938 Nag. 235. In this case the marriage was in Frenchpet, about which there was dispute at the time whether it was in British India or whether it formed a part of the French Territory. But the Court held that this circumstance was immaterial for the case as the jurisdiction of the Court did not depend on that question. (*Ibid.*) But the Bombay High Court has taken a different view, and has held that this Act is limited in its operation to British India and it only strikes at marriages contracted in British India. 59 B. 745=1935 B. 437. The accused in this case were charged under section 6 of this Act in that they permitted or failed to prevent the marriage of their son, who was under the age of 18 years. The marriage took place at Goa, outside British India, and the accused were tried by the District Magistrate of Kanara where the accused were residing at the time of the charge. It was held that marriage contracted outside British India was not an offence under the Act. *See* arguments of Counsel reported in 59 B. 745.

But now the amending Act VII of 1938 has set at rest this question. Under it the Act is made applicable to all British subjects wherever they may be in India. So now, the view of the Madras High Court would be the correct law on the point.

Court should not do anything in frustration of object of this Act, even in proceedings unconnected with this Act. The preamble to the Act states that it is "expedient to restrain the solemnization of child marriages", and therefore no Court would do anything

which is calculated to facilitate the performance of any such act. So, where the Court was asked to sanction an amount for the marriage of a girl out of the funds in the hands of a Receiver appointed by the Court, the Court refused to do so, as the girl was below 14 years and as the legislature has expressed disapproval of such a marriage. It also repelled the suggestion that the marriage could be celebrated without any offence in a place outside British India and that the parties were domiciled in a Native State. 63 C. 1153. A charge in respect of an offence under the Child Marriage Restraint Act alleged to have been committed in French territory cannot be inquired into in British India except on the certificate of the Political Agent or the sanction of the Local Government, as required by the proviso to section 188, Cr. P. Code. There is nothing to the contrary in the Child Marriage Restraint Act. 1939 M.W.N. 742=49 L.W. 656=A.I.R. 1939 Mad. 577. *See also* 1940 N.L.J. 304 cited under section 9 *infra*; also 1939 A.M.L.J. 130.

In an administration suit an application was made for liberty to spend out of the estate certain sum to meet the marriage expenses of the plaintiff who was a minor and had not reached the age of 16. Both the bridegroom and the bride were domiciled in Bikanir and the marriage ceremony was to be performed in Bikanir. The source of income was however in Calcutta. Held, that the application could not be granted as the Court should not facilitate conduct which the legislature in British India had made penal even if such marriage was not punishable according to law of Bikanir. A.I.R. 1941 Cal. 244=194 I.C. 730.

The Child Marriage Restraint Act is intended to prohibit marriage of a Hindu male during his minority and it overrides to that extent the Hindu Law. Such a marriage prohibited by law, though not declared void, cannot be regarded as a necessary purpose. The first marriage of a Hindu is no doubt enjoined by the shastra but when the bridegroom is a minor whose marriage is restrained by statute, the Hindu Law cannot prevail. Hence such a marriage does not constitute a necessity to justify the mortgage of joint family property. 1941 N.L.J. 282.

INTENTION TO GIVE CHILD IN MARRIAGE—UNLAWFUL PURPOSE WITHIN EXCEPTION TO SEC. 361, I.P.C.—An intention to give a child in marriage in contravention of this Act is an "unlawful purpose" within the exception to section 361, I. P. Code, on the ground that, if the purpose is carried out, the person giving the child in marriage is liable to conviction and punishment. 11 R. 213=34 Cr.L.J. 696=1933 R. 98 (F.B.).

TRIAL UNDER ACT MAY BE SUMMARY.—A



## Definitions.

2. In this Act, unless there is anything repugnant in the subject or context—

(a) "child" means a person who, if a male, is under eighteen years of age, and if a female, is under fourteen years of age;

(b) "child marriage" means a marriage to which either of the contracting parties is a child;

## NOTES.

trial under this Act may be summary, as it is permitted by section 260 (1) (a), Criminal Procedure Code, as the offences under the Act come under the heading "offences not punishable with imprisonment for a term exceeding 6 months". Section 4 (1) (o), Criminal Procedure Code, states that "offence" means any act or omission made punishable by any law for the time being in force. Therefore, an offence against a law such as this Act will come under the provisions of section 260 (1) (a) of the Criminal Procedure Code. 35 Cr.L.J. 677=148 I.C. 351=1934 A. 331. *Transfer of case* under this Act by District Magistrate to sub-divisional Magistrate for disposal without making any enquiry (under section 202, Cr. P. Code) is not legal. 48 L.W. 774=1939 M. 294=(1939) 1 M.L.J. 111.

SETTING ASIDE OF ACQUITTAL IN REVISION—PRACTICE OF HIGH COURT.—It was held in 12 Pat.L.T. 629 that, though the acquittal of an accused would be set aside only in very exceptional cases, it would not be proper to apply that strict rule in cases under this Act, on the grounds that the Police can take no action and the legislature has made the members of the public litigants. But now the Act has been amended and the Police also can take action.

SENTENCE UNDER ACT TO BE DETERRENT.—The Courts are not at liberty to treat this enactment as a legislative imposture and manifestly, if it is to be effective, the sentence upon the priest and other celebrants, without whose aid ordinarily no infringement of the Act is possible, should be such as to deter other avaricious members of his caste from following his example. 14 Pat.L.T. 438=33 Cr.L.J. 20=1933 Pat. 471.

SEC. 2: EVIDENCE OF AGE.—Register of Births and Deaths is a relevant document under Sec. 35 of the Evidence Act, and further evidence may not be necessary to establish the date of birth. 16 Pat.L.T. 629. But opinion evidence from mere appearance is not sufficient to establish the age. I.L.R. (1937) Mad. 854=1937 M. 490; nor certificate from any incompetent medical officer when more competent officer is available. 35 Cr.L.J. 677=148 I.C. 351=1934 A. 331.

SEC. 2 (b): MARRIAGE.—The word 'marriage' has not been defined in this Act. "The meaning of the word differs in different countries. In Christendom, it means a monogamous marriage, being the voluntary union for life of one man and one woman to the exclusion of all others. In India a marriage has a different meaning, in that, in the case of Hindus, it need not be voluntary and

it may be polygamous, and if custom permits polyandrous; while in the case of the Mahomedans there is a marriage called *Mulah* which need not be for life at all." (Gour's Hindu Law, 3rd Ed., p. 271.)

However, marriage may be defined as an alliance between a man and a woman recognised by law. Such alliance may be formed in a number of ways which vary from the most complicated form prescribed in the Hindus Sastras to the free love which under the name of *Sambandam* is taken for a marriage in Malabar. The question of legal recognition is all in all.

SOLEMNIZATION OF MARRIAGE AMONG HINDUS—ESSENTIALS.—Hindu lawyers prescribed various ceremonies for the solemnization of a marriage. But these ceremonies in their entirety are seldom, if ever, performed. According to them the Vivaha Homa and Saptapadi are essential. But it is notorious that marriages are performed in many castes without them, and it is now settled that, if by caste usage any other form is considered as constituting a marriage, then the adoption of that form under the conditions prescribed by the caste, with the intention of thereby completing the marriage union, is sufficient. It is consequently clear that the essential and binding part of the marriage ceremony must necessarily vary in different localities. 33 M. 342=5 I.C. 42.

TILAK CEREMONY, IF CONSTITUTES MARRIAGE.—*Tilak* ceremony may be regarded as a necessary preliminary to the marriage ceremony; but the actual marriage is a ceremony quite different and distinct from it. Nor can a marriage be properly called a 'consequence' of the *tilak* ceremony. 1934 A.L.J. 681=35 Cr.L.J. 1175=1934 A. 829.

MARRIAGE BETWEEN PARTIES OF SAME GOTRA IF NOT WITHIN THE ACT.—The Act aims at and deals with the restraint of the performance of the marriage, and it has nothing to do with the validity or invalidity of the marriage; so even when the parties to the marriage belonged to the same *gotra*, it will nonetheless be marriage for the purposes of this Act. 58 A. 402=36 Cr.L.J. 1483=1936 A. 11.

MARRIAGE WHEN COMPLETE—GAUNA CEREMONY IF NECESSARY.—The marriage becomes complete as soon as the marriage ceremony which depends on the law and religion of the parties is performed. The fact that the *Gauna* ceremony has not been performed as yet does not affect the performance of the marriage. Consummation is not a part of the marriage ceremony. 58 A. 402=36 Cr.L.J. 1483=1936 A. 11.



(c) ("contracting party" to a marriage means either of the parties whose marriage is <sup>1</sup>[or is about to be] thereby solemnised; and

(d) "minor" means a person of either sex who is under eighteen years of age.

Punishment for male adult below twenty-one years of age marrying a child.

3. Whoever, being a male above eighteen years of age and below twenty-one, contracts a child marriage shall be punishable with fine which may extend to one thousand rupees.

4. Whoever, being a male above twenty-one years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

Punishment for male adult above twenty-one years of age marrying a child.

#### LEG. REF.

<sup>1</sup> Inserted by Act XIX of 1938.

#### NOTES.

SEC. 2 (c): CONTRACTING PARTY.—These words in this Act are defined to mean the parties whose marriage is or is about to be thereby celebrated. Generally in this country, child marriages are brought about by the parents or guardians of the children, and but for this definition, these words would naturally refer to the parents or guardians.

SEC. 2 (d): MINOR.—This Act fixes the age of minority at 18 years for the purposes of this Act. According to the Indian Majority Act, it is extended to 21 years when there is a certificated guardian appointed or declared by the Court under the Guardians and Wards Act, 1893.

SEC. 3: SCOPE OF.—This section fixes the penalty of a maximum fine of Rs. 1,000 on a male between the ages of 18 and 21, who contracts a child marriage. Note that no imprisonment can be awarded under this section. Imprisonment cannot be awarded under the provisions of section 25, General Clauses Act, 1897, or section 64 of the I. P. Code even in case of default in payment of the fine inflicted (*see* section 7, *infra*.)

CONTRACTUAL CAPACITY FOR MARRIAGE UNDER ENGLISH LAW—EFFECT OF CHILD MARRIAGE.—Under the English law, a binding marriage can be contracted by an infant of either sex at the age of 16 years. [*Vide* age of Marriage Act (1929), 19 & 20 Geo. V, ch. 36, section 1], and a marriage between persons either of whom is under that age is void. (*Halsbury*, 2nd Ed., Vol. XVII, p. 597.)

SECS. 3 AND 4: SCOPE OF.—Sections 3 and 4 prescribe penalties for the male who contracts a child marriage for himself and these differ according to his age. If he is below the age of 18 years, he is not at all punishable. If he is between the ages of 18 and 21, the punishment prescribed under section 3 is only a maximum fine of Rs. 1,000. According to section 7 of the Act, the Court is not competent to award imprisonment for default in payment of fine inflicted. If the male is above 21 years of age, it is open to the Court under section 4 not only to inflict a similar fine of Rs. 1,000 but also to award a month's simple imprisonment in addition, or in the alternative. Also, in this latter

case it is open to the Court under section 25 of the General Clauses Act, 1897, or section 64 of the I. P. Code to award additional imprisonment on default of payment of the fine.

SEC. 3 OR 4 AND SEC. 12: DISTINCT OFFENCES.—A person may commit distinct offences both under section 3 or section 4 and section 12. Where a male has been restrained by means of an injunction order of the Court issued under section 12 from contracting a child marriage, and he has the same solemnized, then, he would be committing two offences, (i) the offence of contracting the child marriage under section 3 or section 4 as the case may be, and (ii) the offence of contempt of Court for disobeying the injunction, and would render himself liable to two sentences and punishments.

It is to be noted that section 7 disables the Court from awarding punishment of imprisonment for default of payment of the fine inflicted, only in respect of a sentence under section 3. Therefore, where the male between the ages of 18 and 21 contracts a child marriage in disobedience to an injunction order issued by the Court against it, and he is fined under section 12, it is open to the Court to award imprisonment as an alternative punishment on default of payment of the fine inflicted on him.

SEC. 4.—*See* notes under section 3 *supra*.

SECS. 4 AND 5: VALUE OF CERTIFICATE AS TO AGE OF BRIDE FROM INCOMPETENT MEDICAL OFFICER.—In a case under this Act against the bridegroom under section 4 and the priest who officiated at the marriage under section 5, it was contended by them that they were misled by a certificate granted by the woman medical officer in charge of a hospital to the effect that the girl was not less than 14 years of age. But according to the Civil Surgeon the girl was only about 12 years of age, and no evidence was produced to contradict the Civil Surgeon. It was held that they should have gone to the Civil Surgeon in order to obtain a certificate and that the fact of their having secured a certificate from the woman medical officer, was not sufficient. 35 Cr.L.J. 677=148 I.C. 351=1934 A. 331. But the production of the medical certificate may be taken into account in the matter of awarding punishment. (*Ibid.*)



5. Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both, unless he proves that he had reason to believe that the marriage was not a child marriage.

#### NOTES.

JUSTIFICATION CAN BE PLEADED ONLY IF ACT DONE IN GOOD FAITH.—A party pleading justification and claiming exemption from punishment for any offence should have under section 79 of the Indian Penal Code, acted in good faith involving due care and caution. 35 Cr.L.J. 677=148 I.C. 351=1934 A. 331.

SEC. 5: 'PERFORMS, CONDUCTS OR DIRECTS'.—The words 'performing, conducting' etc., refer to the actual marriage ceremony itself, and not of any negotiation, preparation or any other preliminary acts; and these are not covered by the section. 175 I.C. 615=1938 Nag. 235. See also 42 Bom.L.R. 857=1940 Bom. 363. These words would include the Priests or Purohits who officiate at the marriage ceremony. See 14 Pat.L.T. 438=146 I.C. 298=1933 Pat. 471. Do these words include also persons such as those who accommodate the offending parties by giving them premises, etc., for the celebration of the marriage, and the servants and dependants of the parties who do several acts in connection with and in furtherance of the marriage? It has been held that merely applying to the Municipal Board for permission to hold nautch, music, and fireworks on the occasion of marriage does not amount to an offence under this section. 1936 O.W. N. 480. But it has been held, in 16 Pat.L.T. 639, that, though a person may not be directly guilty of an offence under this Act, the provisions of the Indian Penal Code regarding the *abetment* of offences may be applied to him, and he may be convicted and sentenced for abetment of offences under this Act. So, according to this section, it would be a question of fact in each case whether the acts alleged against any such person constitute an abetment of the offence under this Act read with the provisions of the Indian Penal Code. Section 5 of the Act is intended to punish the *solemnizing a child marriage*. The words "*perform, conduct or direct*" in section 5 bear the same import and mean working towards the end, that is completing the union, and are used to indicate solemnization of the marriage. They do not suggest the arranging of marriage merely or attending a marriage ceremony with view to assisting in the solemnization of the marriage. The words are used in relation to the ceremony. The performance of a marriage among Hindus means the solemnization thereof by conducting such ceremonies as would complete and validate the marriage that is, the performance of the sacramental or religious and not the secular ceremony. Mere participation in the latter ceremony would not offend against section 5. Section 5 is not intended to punish parents who arrange or assist in the performance of the marriage ceremony. The parents

of a grown up bride who take part in the kanyadan ceremony cannot be made liable under section 5. I.L.R. (1940) Bom. 709=42 Bom.L.R. 857=1940 Bom. 363.

MARRIAGE.—[See also notes under section 2 (b) *supra*.] For the purposes of this section, it is only the marriage ceremony that has to be considered, and it is quite immaterial where and when or by whom the *Tilak* ceremony was performed. 1934 A.L.J. 681=35 Cr.L.J. 1175=1934 A. 829. Where the accused are not charged with the commission of an offence by reason of having performed the *Tilak* ceremony, but are charged for the offence of performing, conducting or directing the child marriage under section 5 of this Act, sections 179 and 182, Criminal Procedure Code, could not apply, as the marriage cannot be properly called a 'consequence' of the *Tilak* ceremony, and the case is, therefore, not triable in the place where the *Tilak* ceremony took place. 1934 A.L.J. 681=35 Cr.L.J. 1175=1934 A. 829. See also 175 I.C. 615=1938 Nag. 235.

'REASON TO BELIEVE'.—These words imply that there has been a *bona fide* inquiry and test as regards the age of the child concerned. It is a well-known fact in medical jurisprudence that the age of a person between the ages of 12 and 16 could not be ascertained satisfactorily by a mere personal inspection. So in a case where the husband and priest who were accused under this Act pleaded that they were satisfied by a personal inspection of the minor girl that she was above the age of 14 years while as a matter of fact she was below that age, it was held that the defence would not avail them. I.L.R. (1937) Mad. 854=45 L.W. 437. Further, mere production of a medical certificate as to the age would not be sufficient. It must have been issued by a competent medical officer. Where, therefore, a certificate as to the age of a girl was obtained from a subordinate woman medical officer while there was available in the station the District Civil Surgeon, and while the uncontradicted evidence of the Civil Surgeon showed that the girl was below the age of 14 years, it was held that the parties were guilty. 35 Cr.L.J. 677=148 I.C. 351=1934 A. 331. Production of the birth certificate of the boy or girl may be satisfactory evidence.

SECS. 5 AND 6: SCOPE OF—CONFLICT OF RULINGS.—As to the question whether the parents are liable under section 5 or under section 6, or under both these sections, there is a difference of opinion among the High Courts. It was held by the Allahabad High Court that sections 5 and 6 deal with different offences, section 5 deals with the persons who perform, conduct or direct any child marriage. Section 6 provides for the offence in cases where a minor himself conducts a child marriage. It is only in the case where



6. (1) Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, shall be punishable with simple imprisonment which may

Punishment for parent or guardian concerned in a child marriage.

#### NOTES.

a minor contracts a child marriage that any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised shall be punishable. Section 5 deals with cases in which the marriage is not contracted by the minor. It is not the intention of the legislature to punish a person both under sections 5 and 6 at the same time. 58 A. 402=36 Cr.L.J. 1483=A.I.R. 1936 A. 11.

The Madras High Court, on the other hand, holds that section 5 applies only to the solemnization of marriage by others than parents and that section 6 alone applies to parents who promote a child marriage or permit it or negligently fail to prevent it. I.L.R. (1937) Mad. 854=45 L.W. 437. The Nagpur Court also holds the same view as that of Madras. 1932 N. 174. In cases of complaints of offences under sections 5 and 6 and it is essential that trying Magistrate should find definitely that either or both of the contracting parties to the marriage were infants within the meaning of the Act, that is to say, that the bridegroom was under the age of 18 or that the bride was under the age of 14. 181 I.C. 916=40 Cr.L.J. 605=A.I.R. 1939 Cal. 288. Where it is alleged that the accused lived in British India and arranged for a marriage in contravention of the provisions of the Act, to take place out of British India, the offence is committed inside British India and hence no certificate under section 188, Cr. P. Code, is necessary. 1939 A.M. L.J. 130. See also 49 L.W. 656=A.I.R. 1939 M. 577.

SEC. 6: SCOPE AND OBJECT OF SECTION.—Unlike section 5 which constitutes only positive acts as an offence, this section constitutes not only certain acts but also certain omissions as offences under the Act. Further this section lays down a rule of presumption contrary to the ordinary rule of presumption under the criminal law, and throws on the accused the burden of proving that he did not negligently fail to prevent the child marriage. On this section, see 175 I.C. 615=A.I.R. 1938 Nag. 235.

PARENTS WHEN COMMIT OFFENCE UNDER THIS SECTION—FATHER AND MOTHER.—S. 6 is confined only to the person who had actual charge of the minor either as parent or guardian at the time of the marriage. I.L.R. (1937) Mad. 854=1937 M. 490. See also 16 Pat.L.T. 629=1935 Pat. 475. In the case of Hindu marriages, it cannot be said that the father of the bridegroom or the bride does not perform or direct the marriage. It is generally the father or the

guardian who arranges for the marriage of the boy and takes the marriage party to the house of the bride. It is the father of the bride who takes part actually in the performance of the marriage ceremonies, as it is he who gives his daughter in marriage. Therefore it cannot be said of either of them that he did not perform or direct the marriage. 58 A. 402=36 Cr.L.J. 1483=A.I.R. 1936 A. 11. The mother has no authority, when the father of the bridegroom who is below 18 years promotes and brings about the marriage, to prevent the marriage; and her mere participation in the marriage cannot be regarded as constituting an offence punishable under this section. I.L.R. (1937) Mad. 854=45 L.W. 437. Where the bridegroom who was below 18 years was in charge of the father, who promoted the marriage and got it performed, the mother of the bridegroom cannot be convicted under this section. I.L.R. (1937) M. 854=1937 M. 490.

BRIDEGROOM AND BRIDE—ONE ONLY IS CHILD—WHETHER FATHER OF THE OTHER GUILTY UNDER THIS ACT—CONFLICT OF VIEWS—ABETMENT.—The Allahabad High Court holds that section 5 is wide enough to cover the case of the fathers of both the bridegroom and the bride. Even where one of them, i.e., the bride or the bridegroom is not of the age specified in the Act for her or him, the fathers of both of them would be liable under this section. 58 A. 402=36 Cr.L.J. 1483=A.I.R. 1936 A. 11. But a different view has been taken by the Madras High Court which holds that the parents of the bridegroom cannot be convicted under this section, merely because the bride was under 14 years, and they can be convicted, if at all under this section, only if the bridegroom, i.e., their own son who was in their charge, was under 18 years at the time of marriage. I.L.R. (1937) M. 854=1937 M. 490. But a reconciliation may be found in the decision of the Patna High Court which has held that although the Act makes no mention of abetting, yet under the provisions of the Indian Penal Code, it is possible for them to be prosecuted for abetting an offence although the accused is not the father of one of the parties who is under age so long as the other party is below the prescribed age. So, even if the bridegroom is not under age, his father would be guilty of abetting the offence under this Act if the bride is of under age. 16 Pat.L.T. 629=1935 P. 474.

NO IMPRISONMENT FOR WOMEN.—This provision in favour of woman offenders is due to the fact that very often they are not the principal offenders, but only happen to be a tool in the hands of some male relations. There is a similar exemption from imprisonment in the case of females, in respect of



extend to one month, or with fine which may extend to one thousand rupees, or with both:

Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed unless and until the contrary is proved, that, where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnised.

7. Notwithstanding anything contained in section 25 of the General Clauses Act, 1897, or section 64 of the Indian Penal Code, a Court sentencing an offender under section 3 shall not be competent to direct that, in default of payment of the fine imposed, he shall undergo any term of imprisonment.

8. Notwithstanding anything contained in section 190 of the Code of Criminal Procedure, 1898, no Court other than that of a Presidency Magistrate or a <sup>1</sup>[Magistrate of the first class] shall take cognizance, of, or try, any offence under this Act.

9. <sup>2</sup>[No Court shall take cognizance of any offence under this Act after the expiry of one year from the date on which the offence is alleged to have been committed.]

#### LEG. REF.

<sup>1</sup> For the words "District Magistrate", the words "Magistrate of the first class" shall be substituted by Act XIX of 1938.

<sup>2</sup> For old section of the new section 9 has been substituted by Act XIX of 1938.

#### NOTES.

offences under section 12 of this Act.

SEC. 7.—This section does not affect the power of the Court to inflict an alternative punishment of imprisonment in default of payment of the fine imposed, where the offence and sentence are under section 12 of this Act, even though the accused is the male husband between the ages of 18 and 21. This section applies only where the sentence is under section 3.

SEC. 8.—The reason for the amendment introduced in this section is to confer upon a large number of officers jurisdiction to take cognizance of offences and to entertain complaints, and try offences under the Act, so that cases may be disposed of with greater facility and quickness. In (1937) 1 M.L.J. 498=A.I.R. 1937 Mad. 637, it was held that an Additional District Magistrate who had been given all the powers of a District Magistrate was empowered to try cases under this Act. But in view of the amendment to the section which empowers every first class Magistrate to try them, there would not be any room for any such doubt arising. On this section, see also 1934 A. 331.

SEC. 9: OBJECT OF AMENDMENT.—The amendment of this section has been made with a view to permit the Court to take proceedings under the Act upon its own motion without the necessity of a formal complaint. The words "*save upon a complaint made*" have been deleted. The ruling in 1938 Rang. L.R. 150=A.I.R. 1938 Rang. 257 which held that a mere 'police report' did not constitute a 'complaint' as required by this section before it was amended, is no longer of any

significance since the words relating to 'complaint' have been deleted in the amended section. The reason for this amendment has been stated as follows in the Statement of Objects and Reasons:—"It is known that one of the principal impediments to the enforcement of the Sarda Act at present lies in the obligation placed upon the complainant to incur the publicity of a formal complaint and, if required by the Court, to execute a bond, to incur also the risk of losing the sum mentioned in the bond. The proposed amendment would enable the Court to proceed upon information obtained privately after taking such steps as it might think necessary to satisfy itself of the correctness of the information"

ONE YEAR—LIMITATION, REASON FOR.—As a general rule, in the absence of statutory limitation a prosecution for an offence may be instituted at any time however long after the commission of the criminal act. But several special Acts have enacted a time limit for the commencement of criminal proceedings. The general rule underlying these provisions is that in respect of minor offences, it is desirable that after the lapse of a long period no prosecution should be entertained. Every act that is prohibited by law and for which a penalty is imposed is not to be deemed a criminal offence. Actions for the violation of several Municipal Ordinances are treated as civil in their nature, the imprisonment or fine imposed for non-compliance with the order being looked upon not as a punishment but as compelling a compliance with the order. It is the policy of this Act more to restrain and prevent the performance of child marriages than to punish the offenders. Hence a time limit of one year has been fixed for taking cognizance of an offence under this Act, with a view to avoid vexatious and stale prosecutions. Section 14 of the Limitation Act is in terms restricted to civil proceedings and cannot be availed of in respect of proceed-



10. The Court taking cognizance of an offence under this Act shall, unless it dismisses the complaint under section 203 of the Code of Criminal Procedure, 1898, either itself make an inquiry under section 202 of that Code, or direct a Magistrate of the first class subordinate to it to make such inquiry.

11. <sup>1</sup>[(1) When the Court takes cognizance of any offence under this Act upon a complaint made to it, it may for reasons to be recorded in writing, at any time after examining the complainant and before issuing process for compel-

## LEG. REF.

<sup>1</sup>Sub-section (1) of section 11 has been substituted by sec. 5 of Act XIX of 1938.

## NOTES.

*ings under the Child Marriage Restraint Act.* A complaint preferred beyond year of the solemnisation of the marriage cannot be taken cognizance of under section 7. The fact that another unsuccessful complaint had been made to another Magistrate within time would not help to make the second complaint filed beyond time a valid one. 49 L.W. 547 (1)=A.I.R. 1939 Mad. 512=(1939) 1 M.L.J. 775. Marriage in Native State—Complaint within one year but certificate obtained after one year—Trial would be legal. 1940 Nag. 245=1940 N.L.J. 304; *see also* 1939 A.M.L.J. 130; 1939 Mad. 577=47 L.W. 656.

SEC. 10: "TAKING COGNIZANCE".—Formerly the Court can take cognizance of an offence under the Act only on a complaint made to it, but now the Amending Act XIX of 1938 has removed the words "save upon a complaint" in section 9 with the result that the Court can take cognizance of the matter otherwise also.

PRELIMINARY INQUIRY NECESSARY BEFORE ISSUING SUMMONS.—Under this section, the Court taking cognizance of an offence under this Act is bound to hold a preliminary inquiry before taking further action unless it dismisses the complaint under section 203, Criminal Procedure Code. 12 Lah. 383=32 Cr.L.J. 616=1931 Lah. 56 (1); 15 Lah. 63=35 Cr.L.J. 1436=1934 Lah. 155; 20 N.L.J. 115. *See also* 48 L.W. 774. Section 10 is mandatory and clearly prohibits a Court from taking cognizance of an offence under the Act without a preliminary inquiry being held. A process issued without holding an inquiry as required by section 10, is therefore unauthorised and illegal. A.I.R. 1939 Mad. 530=(1939) 1 M.L.J. 900. Section 10 contains provisions which are mandatory, and omission to conform with the procedure prescribed by the section would vitiate all subsequent proceedings. I.L.R. (1940) Kar. 442=1940 Sind 213. Section 10 no doubt requires that a preliminary inquiry must be held. But where a Court finds that there is a *prima facie* case and also holds the offence established after a proper trial, it cannot be held that the conviction must be set aside for the technical reason that no preliminary inquiry was held as required by section 10. This does not mean that Magistrates are entitled to disregard the provisions of section 10. But where the accused does not object to the trial,

he cannot benefit by an objection which is entirely technical in its nature. 20 Pat.L.T. 495=A.I.R. 1939 Pat. 525. Where in respect of an offence under the Child Marriage Restraint Act the accused are tried and convicted without a preliminary enquiry being held as required by section 10 of the Act, and no prejudice had thereby been caused to the accused, the trial and conviction is not on that ground in any way vitiated and the defect is cured by section 537, Cr. P. Code. I.L.R. (1940) Nag. 488=A.I.R. 1940 Nag. 375.

The mere fact that the security bond obtained from the complainant is defective, because the property offered by him did not belong to him, would not vitiate the trial of an offence under section 5, as it does not affect the merits of the case. 1936 O.W.N. 480=A.I.R. 1936 O. 311=37 Cr.L.J. 616.

PROCEDURE AT TRIAL.—Cases under this Act may be summarily tried. 36 Cr.L.J. 677=148 L.C. 351=1934 All. 331. Strictly speaking the accused should be re-examined after the prosecution witnesses are over. But omission to re-examine an accused after the prosecution evidence is completely recorded is not such an irregularity as vitiates the trial of an offence under this Act unless the irregularity is shown to have caused prejudice to the accused or a failure of justice. 1936 O.W.N. 480=A.I.R. 1936 O. 311=37 Cr.L.J. 616. Where, therefore in a case under section 6 of the Act, an accused is examined at length and given full opportunity to state his case, but is not *examined again* after some further prosecution witnesses are produced and no real prejudice or failure of justice has been caused, the omission to re-examine the accused was held not to have vitiated the trial. (*Ibid.*) But, where the Court merely asked the accused, whether he pleaded 'guilty' or 'not guilty', and there was nothing on the record to show that he was questioned *at any time* with a view to enabling him to explain the circumstances appearing in evidence against him, the failure to examine the accused person was held to be an irregularity which went to the root of a fair trial and it was not to be regarded as a mere technical error of procedure, and that it would, therefore, be necessary to set aside the conviction and sentence on him. 1936 O.W.N. 480=37 Cr.L.J. 616=A.I.R. 1936 O. 311; 11 Luck. 461=A.I.R. 1936 O. 16, Expl.

SEC. 11 (1).—This sub-section applies only to cases where the Court takes cognizance



ling the attendance of the accused, require the complainant to execute a bond, with or without sureties, for a sum not exceeding one hundred rupees, as security for the payment of any compensation which the complainant may be directed to pay under section 250 of the Code of Criminal Procedure, 1898, and if such security is not furnished within such reasonable time as the Court may fix, the complaint shall be dismissed.]

(2) A bond taken under this section shall be deemed to be a bond taken under the Code of Criminal Procedure, 1898, and Chapter XLII of that Code shall apply accordingly.

12. (1) Notwithstanding anything to the contrary contained in this Act, the Court may, if satisfied from information laid before it through a complaint or otherwise that a child marriage in contravention of this Act has been arranged or is about to be solemnized, issue an injunction against any of the persons mentioned in sections 3, 4, 5 and 6 of this Act prohibiting such marriage.

(2) No injunction under sub-section (1) shall be issued against any person unless the Court has previously given notice to such person, and has afforded him an opportunity to show cause against the issue of the injunction.

(3) The Court may either on its own motion or on the application of any person aggrieved rescind or alter any order made under sub-section (1).

#### LEG. REF.

1 Section 12 has been inserted by section 6 of Act XIX of 1938.

#### NOTES.

of an offence under this Act upon a complaint and not where it takes cognizance otherwise. Generally security would be demanded from the complainant only in cases where the Court entertains a doubt as to the truth of the complainant's allegation, or opines that the complaint has not been *bona fide*. [20 N.L.J. 115 is not now good law.]

OBJECT AND SCOPE OF AMENDMENT.—As regards taking security, it was obligatory on the Court to do so under the old sub-section (1); and the words used were "shall require". If the Court did not want to take any security it was required to state its reasons therefor. But under the present substituted sub-section (1), the words used are "may require" and also the Court has to state its reasons not for *waiving* security but for *requiring* security. Under the old sub-section (1), it was held that the failure of a Magistrate to record any reason for not requiring the complainant to execute a bond was a material irregularity which could not be cured by section 537, Criminal Procedure Code. 37 C.W.N. 626=34 Cr.L.J. 554=1933 Cal. 433 (1). But this would be no longer correct under the amended sub-section (1), under which reason has to be given only for 'taking' security and not for 'not taking'. On this section *see also* 20 N.L.J. 115; 162 I.C. 389=37 Cr.L.J. 616=A.I.R. 1936 Oudh 311.

SEC. 12: OBJECT.—The reason for the insertion of section 12 has been stated as follows in the Statement of Objects and Reasons:—"for facilitating the more effective enforcement of the Act," it is necessary to put "beyond question that the Courts empowered to take proceedings under the Act may at their discretion issue an injunction prohibiting a marriage arranged in contraven-

tion of the Act. Already Civil Courts in Bombay Presidency are known in several cases to have issued injunction orders against marriages known to have been arranged in contravention of the Act. It is not known whether similar action has been taken in any other province. But since doubts have been thrown upon the legality or practicability of this method, it seems desirable to remove such doubts by providing for it directly through the proposed amendment. The draft bill proposes to impose a higher maximum penalty for the breach of such an injunction than the penalty provided in the Act in the case of prosecutions after the marriage had already taken place, on the ground that breach of a Court injunction involves contempt of Court." As interference of the Court in the matter of contemplated marriages by way of injunction orders is a serious matter and is likely to lead sometimes to irreparable damages, several safeguards have been provided in sub-sections (2) to (4) of this section. Previous notice to be given and opportunity to be afforded to the party to show cause to the contrary before an injunction order can be issued; and further, power is reserved to the Court to dissolve the injunction order *suo motu* or on the application of any aggrieved party. Sub-section (4) also enjoins on the Court the duty of a speedy disposal of applications to dissolve the injunction orders passed by it, and the Court is required to state its reasons in writing if it happens to reject the application. This provision shows that the rejection of such an application is not a matter of mere discretion for the Court, but that it can be only for valid and sufficient grounds which have to be expressly stated so that the Court of revision may be in a position to judge about the sufficiency of the grounds.

PROVISO—NO IMPRISONMENT FOR WOMAN.—*See notes under section 6 supra.*



(4) Where such an application is received, the Court shall afford the applicant an early opportunity of appearing before it either in person or by pleader; and if the Court rejects the application wholly or in part, it shall record in writing its reasons for so doing.

(5) Whoever knowing that an injunction has been issued against him under sub-section (1) of this section disobeys such injunction shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both:

Provided that no woman shall be punishable with imprisonment.]

## THE CHILDREN (PLEDGING OF LABOUR) ACT (II OF 1933).

**PREFATORY NOTE: *Statement of Objects and Reasons.***—"The Royal Commission on Labour found evidence in such widely separated areas as Amritsar, Ahmedabad and Madras of the practice of pledging child labour—that is, the taking of advances by parents or guardians on agreements, written or oral, pledging the labour of their children. In some cases, the children so pledged were subjected to particularly unsatisfactory working conditions. The Commission considered that the State would be justified in adopting strong measures to eradicate the evil and the Bill seeks to do so by imposing penalties on parties to agreements pledging the labour of children and on persons knowingly employing children whose labour has been pledged."

The following are extracts from the Report of the Royal Commission on Labour on which the provisions of this Act are based:—

**CHILD LABOUR IN "BIDI" FACTORIES.**—"The paramount matter for concern, in a number of areas, particularly in the Madras Presidency, is the question of child (*i.e.*, boy) labour. In many cities, large numbers of young boys are employed for long hours and discipline is strict. Indeed there is reason to believe that corporal punishments and other disciplinary measures of a reprehensible kind are sometimes resorted to in the case of the smaller children. Workers as young as five years of age may be found in some of these places working without adequate meal intervals or weekly rest days, and often for 10 or 12 hours daily, for sums as low as 2 annas in the case of those of tenderest years. This recalls some of the worst features of child apprenticeship in England at the time of the agitation prior to the passing of the first Factory Act, particularly when it is realised that many of the parents of these child workers are in debt to the employer. As a result they are not in a position to enquire too closely into the treatment meted out to their children or to do other than return an absconding child. Although it is impossible to give even an approximate figure of the numbers of such child workers in the provinces where this type of labour is most prevalent, we are confident from the evidence submitted to us, as well as from our own personal observations, that it is sufficiently large in certain areas to constitute an evil which demands immediate remedy.

**CHILDREN IN AMRITSAR CARPET FACTORIES.**—"The main point to be observed in the carpet weaving industry is the employment of young children. In the Carpet Factories of Amritsar these children are employed not directly by the Factory owner but by the weaving masters, who are responsible both for engaging them and for paying their wages. The manager concerns himself solely with the master weaver who is paid on a contract basis, *i.e.*, so much for each carpet, according to its size, quality and design. There is for the most part no limitation on the children's hours other than that imposed by the exigencies of daylight and the need of rest intervals, though holidays are generally obtained by taking advantage of both Hindu and Mussalman religious festivals. No girl labour is employed. For the most part boys start at 9 years of age, though in some cases it might be as low as six years. Although the method by which this boy labour is obtained varies in details in different parts of the district, its essential characteristics are the same throughout. Where the child is not the son or a near relative of the weaving master, he is normally the child of a man who, in return for a loan of money from the weaving master, contracts out the labour of his child at so many rupees (7, 9, etc., according to the age of the child) per month. The duration of the contract, which is sometimes set out in a formal document, would appear to be determined by the repayment of the loan. It is not without significance that one witness, who was Managing Director of a leading carpet manufacturing firm, declared, when shown such a document found by us on his own premises and drawn up only a few weeks previously, that that was the first time he had ever heard of the existence of the written contracts of the kind, excusing his ignorance on the ground that he had "nothing to do with the children" and dealt only with the master weavers. Yet, on his own admission, in this industry two of the four persons on the normal sized loom are generally children under 12 years, the remaining two being a boy of over 14 years and the master weaver himself. It was clear to us from the evidence that these children were in the position of being obliged to work any number of hours per day required of them by their masters. They were without the protection of the law as regards their physical fitness to labour, the number of hours they might be required to work without any interval or, indeed any other of the more elementary protections afforded by the Factories Act in respect of child workers, and they were subjected in some cases to corporal punishment. Yet the



bulk of such children were two to five years below the statutory working age in respect of child workers employed in factories under the Act. We understand that the Local Government drew the attention of the industry to the position of these children as long ago as 1923, and that in 1927, after an enquiry which showed that conditions were unchanged, made suggestions for the regulation of child labour. These included the fixing of a minimum age of 9 years and a maximum day of 8 hours for children up to 12 years. The factory owners were prepared to accept a minimum age of 8 years and to provide educational facilities, but the opposition of the master weavers prevented any agreement by their unwillingness to accept, either then or subsequently, any reduction in the working hours. The matter of a voluntary trade agreement in respect of the working conditions of these children is believed still to be under consideration. We are convinced that here, as in the *bidi* factories, official regulation is required primarily in the interests of the child worker.

**COMPULSION AND THE PARENT.**—As far as the parents of the child workers typical of these industries are concerned, we realise that we are here dealing with a class wholly illiterate, exceedingly poor and only too often heavily indebted. It is inevitable that to these the child's right to its childhood and even to such education as may be available should make no appeal comparable to that of its earning capacity, however small. There would appear in their case, as in that of the employers, no course open but that of compulsion by means of legislation so framed and so applied as to achieve the necessary end with the minimum of dislocation and hardship. Yet we realise that far-reaching changes, which involve not only serious economic dislocation but also a radical alteration in social custom, cannot be achieved successfully, if imposed too drastically and rapidly. It is as essential to society as to industry to allow time for adjustment to new standards. If this is not done the true purpose of Governmental interference is defeated, resulting either in 'paper' legislation or in legislation the very reality of which results in oppression and dislocation. The recommendations that follow are designed to achieve the desired end whilst avoiding both these dangers. For this reason, while many reforms in these factories are desirable, we would concentrate in the first instance on the two most outstanding and urgent needs, namely, protection of the child and the elimination of the worst dangers to the health of the workers generally.

**PLEDGING OF CHILD LABOUR.**—Reference has been made to the existence in some of these factories of a system of mortgaging the labour of children. The system is indefensible; it is worse than the system of indentured labour, for the indentured labourer is, when he enters on the contract, a free agent while the child is not. The state would be justified in adopting strong measures to eradicate this evil. The giving of advances to secure the labour of children and the execution of bonds pledging such labour could both be made criminal offences. But, as there may be other questions of policy to be taken into account, we commend the proposal for examination by Government. In any case we recommend that a bond pledging the labour of any person under the age of 15 years, executed for, or on account of the receipt of any consideration should be void. This will not interfere with any honest system of apprenticeship, for in the cases where a bond is executed on behalf of an apprentice, any preliminary payment is made by and not to the parent or guardian of the apprentice. This recommendation is intended for application not merely to work in the factories mentioned in this chapter, but generally. Unfortunately there is evidence that similar abuses have occurred in connection with the employment of children in some of the Ahmedabad cotton mills."

*The following are the lines on which legislation on the subject was recommended by the Royal Commission:*

"The expediency of penalising the giving of advances to secure the labour of children and the execution of bonds pledging such labour shall be examined by Government. In any case a bond pledging the labour of a person under 15 years executed for or on account of any consideration should be void.

The above recommendation is general and not confined to factories mentioned in this chapter (Chap. VII). [See *Whitley Commission Report*, pp. 96-99 and 102.]

## THE CHILDREN (PLEDGING OF LABOUR) ACT (II OF 1933).

[24th February, 1933.]

*An Act to prohibit the pledging of the labour of children.*

WHEREAS it is expedient to prohibit the making of agreements to pledge the labour of children, and the employment of children whose labour has been pledged; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE CHILDREN (PLEDGING OF LABOUR) ACT, 1933.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) This section and sections 2 and 3 shall come into force at once, and the remaining sections of this Act shall come into force on the first day of July, 1933.



## Definitions.

2. In this Act, unless there is anything repugnant in the subject or context—

“an agreement to pledge the labour of a child” means an agreement, written or oral, express or implied, whereby the parent or guardian of a child, in return for any payment or benefit received or to be received by him, undertakes to cause or allow the services of the child to be utilised in any employment:

Provided that an agreement made without detriment to a child, and not made in consideration of any benefit other than reasonable wages to be paid for the child's services, and terminable at not more than a week's notice, is not an agreement within the meaning of this definition;

“child” means a person who is under the age of fifteen years; and

“guardian” includes any person having legal custody of or control over a child.

Agreements contrary to the Act to be void.

3. An agreement to pledge the labour of a child shall be void.

Penalty for parent or guardian making agreement to pledge the labour of a child.

4. Whoever, being the parent or guardian of a child, makes an agreement to pledge the labour of that child, shall be punished with fine which may extend to fifty rupees.

Penalty for making with a parent or guardian an agreement to pledge the labour of a child.

5. Whoever makes with the parent or guardian of a child an agreement whereby such parent or guardian pledges the labour of the child shall be punished with fine which may extend to two hundred rupees.

6. Whoever, knowing or having reason to believe that an agreement has been made to pledge the labour of a child, in furtherance of such agreement employs such child, or permits such child to be employed in any premises or place under his control, shall be punished with fine which may extend to two hundred rupees.

Penalty for employing a child whose labour has been pledged.

## THE INDIAN CHRISTIAN MARRIAGE ACT (XV OF 1872).

## EFFECT OF LEGISLATION.

Year.	No.	Short title.	Repealed or otherwise how affected by legislation.
1872	XV	The Indian Christian Marriage Act, 1872	Repealed in part by Act XVI of 1874. Repealed in part and amended by Act XII of 1891, Act I of 1938. Amended by Acts VI of 1886, S. 30, cls. (a), (b), (d), and II of 1891. Section 81 substituted by Act XIII of 1911. Section 82 and Sch. II amended by Act I of 1903. Section 86 amended by Acts X of 1914. and XXXVIII of 1920. Amended Act XVIII of 1928.

**PREFATORY NOTE.**—Mr. Ritchie, to whom the task of drafting the Christian Marriage Bill and getting it passed in the Legislative Council was entrusted, thus explained the object of the Bill:—The object of the Bill is to put an end to the state of uncertainty which now exists in regard to marriages in India of persons, one or both of whom are of the Christian religion, but which are solemnized in any of the modes expressly recognized by the law as valid. These modes are three in number, two of them being gene-

## NOTES.

**SEC. 2.**—Where the labour pledged is not to be expended till after the time by which

the child becomes 15 years old, the agreement is not one to pledge the labour of a child under 15. A.I.R. 1938 Rang. 359.



rally applicable to all persons of whatever denomination of the Christian religion, and one being applicable only to a particular class. The first consists in the performance of the marriage ceremony by a clergyman in Holy Orders, according to the sense in which the English Law understands that term, that is a clergyman who has been episcopally ordained. No particular rite or religious ceremony is legally requisite to this form of marriage, but the presence of a clergyman in Orders at the time of the mutual promise to become man and wife is essential. The clergyman need not be of the same religious denomination as either of the parties. But the clergyman of the denomination which does not recognise episcopacy, who has not been ordained by a Bishop confers no special privilege by his presence, and stands on the same footing in this respect as a layman. This was the only form of marriage recognised by the English Common Law as valid, as was decided in 1844 in the House of Lords in the well-known case of *The Queen v. Mills*. In 1848 it was provided by an Act of Parliament (58 Geo. III, c. 84) that marriages between persons one or both of whom were of the Church of Scotland solemnized by ordained ministers of that church as by law established or by a chaplain of the East India Company in India should be of the same force and effect as if they were solemnized by ordained clergyman of the Church of England according to the rites and ceremonies of the Church of England. The privilege was subsequently extended by the Legislative Council to ordained Ministers of the Church of Scotland other than Government Chaplains (see Act XXIV of 1860). Until the reign of Queen Victoria no other positive law regarding the solemnization of marriages existed in India. But there was a general impression in consequence of Lord Stowell's famous decision in *Darlymple v. Darlymple*, that the presence of a Clergyman in Orders required by the English Marriage Act was not essential to the validity of a marriage in any part of the British Dominions beyond the operation of these Acts; and that a simple contract of marriage in words showing that it was to take effect at once would suffice. The House of Lords in *Mill's case* decided upon the opinion of the English Judges, that the English Common Law of marriage as above stated obtained in Ireland, though the Marriage Act did not extend there, and that the presence of ordained Clergyman in Orders was thus essential. In consequence of the doubt thus thrown upon the validity of the marriages in India the absence of a Clergyman in Orders, the Statute 14 and 15 Vict. c. 40 commonly called the Indian Marriage Act, was passed. This was followed by Act V of 1852 which gave effect to the provisions of the Statute. Under these Acts, marriages in the presence of a Marriage Registrar were legalized. No religious ceremony was necessary, but it was optional to the parties to go through any religious ceremony they please. The Act of Parliament legalized all past marriages solemnized in India by persons not in Holy Orders, not being otherwise invalid, by declaring them valid in law to all intents and purposes. But the doubt which existed as to the validity of such marriages at Common Law was not cleared up in regard to marriages contracted after the Statute. For it was provided that "nothing in the Act shall invalidate any marriage which might be solemnized in India by any person in Holy Orders, or under the Statute of George III already cited, or any other marriage which under the law in force for the time being in India might have been there solemnized if the Act had not been passed, provided that the Governor-General in Council might provide by laws and regulations for the registration of such marriages." The doubt thus left open as to marriages contracted since 1851 still existed in 1872. On the one hand Sir Erskine Perry when Chief Justice of Bombay, and Doctor Lushington, as Dean of the Arches, had held that the principle laid down in *Queen v. Mills* could not be applied to a country such as India or Australia in which on the first introduction of English laws and institutions, there were clergymen in Holy Orders before whom marriage could be celebrated (see the case of *Malcolm v. Cristall*, Perry's Oriental Cases 75; Indian Decisions, Old Series, Vol. IV, p. 69) and the House of Lords by passing a Divorce Bill founded on Sir Erskine Perry's decision, has, to some extent though by no means conclusively, sanctioned that view. On the other hand the Court of Exchequer had held that the decision in question extended to invalidate a marriage performed between British subjects in Beyout solemnized before a British clergyman not in Orders. And the Statute of 1848, and the Act of 1860, in favour of marriages performed by Ministers of the Scotch Church, seemed to show that the legislatures both in England and in India considered that the English Common Law applied to Indian marriages. It was almost impossible to determine which of these views was correct though it might be the former was right in principle. But the result of the doubt was, that there was a distressing degree of uncertainty as to the validity of many marriages solemnized since 1857, and that a great deal of fraud with regard to the performance of a sham marriage ceremony by persons having no special qualifications but pretending to be qualified has passed unpunished. In 1854 it was brought to the notice of the Government, that a person who had once been a schoolmaster but had never been ordained to the ministry in any way, professed to have authority to marry, and did perform the ceremony of marriage between several couples of Native Christians in the Backergunge District. Similar practices had been found to have prevailed in other districts, but as the person officiating did not profess to be a Marriage Registrar but only to have authority to marry, and as according



to the view of the law the marriages thus solemnized were legal, and the persons referred to therefore, as witnesses did assist in rendering the marriages effectual, it was found impossible to punish him for his imposition. It was felt by the Government of India to be time to put end to the uncertainty which then surrounded the question and which on so important a subject as the validity of marriages, ought not to be allowed to continue for a day longer than could be avoided. One ground upon which it was supposed that the Legislature in India left the question unsettled for some year prior to 1872, was that a law effectually dealing with the subject of Christian marriage must to some extent, effect, or interfere with the provisions of the English Statute of 1851, which it was then beyond the power of the Legislative Council as then constituted, to touch. The difficulty was removed as the Indian Councils Act contained no restriction upon the interference with the Act of Parliament passed in the year above mentioned, and the proposed change of law was quite within the competency of the Council as was constituted, after the Indian Councils Act. The only effectual mode of dealing with the question appeared to be to pass a law declaring that after the passing of the proposed Christian Marriage Act no marriage between persons, both or one of whom shall profess the Christian religion, shall be valid in law unless it be celebrated in one of the modes expressly declared and recognized by law (*see* sections 4 and 5 of the Act). There was then no hardship in thus declaring the law in 1872. For the Marriage Acts of 1851-52 had been previously for over 10 years in operation. Their provisions were generally well-known throughout India and the facilities for contracting marriage under those Acts had been rendered great by the appointment of Registrars at every place of any importance, both in the British Dominions and in those foreign States in alliance with Great Britain. In regard to past marriages it was proposed to declare that all marriages previously contracted in the presence of persons not in Holy Orders if not otherwise invalid, should be deemed good and valid. This was the course which had been adopted on occasions on which Parliament has prescribed a stricter rule for the future than that which had previously existed, or had been supposed to exist in regard to marriages. (*See Proceedings in Council and Statement of Objects and Reasons.*)

## CONTENTS.

### PREAMBLE.

### PRELIMINARY.

#### SECTIONS.

1. Short title.  
Extent.
2. [*Repealed*].
3. Interpretation-clause.

### PART I.

#### THE PERSONS BY WHOM MARRIAGES MAY BE SOLEMNIZED.

4. Marriages to be solemnized according to Act.
5. Persons by whom marriages may be solemnized.
6. Grant and revocation of licences to solemnize marriages.
7. Marriage Registrars.  
Senior Marriage Registrar.  
Magistrate when to be Marriage Registrar.
8. Marriage Registrars in Indian States.
9. Licensing of persons to grant certificates of marriage between Native Christians.

### PART II.

#### TIME AND PLACE AT WHICH MARRIAGES MAY BE SOLEMNIZED.

10. Time for solemnizing marriage.  
Exceptions.
11. Place for solemnizing marriage.  
Fee for special licence.

### PART III.

#### MARRIAGES SOLEMNIZED BY MINISTERS OF RELIGION LICENSED UNDER THIS ACT.

12. Notice of intended marriage.

### SECTIONS.

13. Publication of such notice.  
Return or transfer of notice.
14. Notice of intended marriage in private dwelling.
15. Sending copy of notice to Marriage Registrar when one party is a minor.
16. Procedure on receipt of notice.
17. Issue of certificate of notice given and declaration made.  
Proviso.
18. Declaration before issue of certificate.
19. Consent of father, or guardian, or mother.
20. Power to prohibit by notice issue of certificate.
21. Procedure on receipt of notice.
22. Issue of certificate in case of minority.
23. Issue of certificates to Native Christians.
24. Form of certificate.
25. Solemnization of marriage.
26. Certificate void if marriage not solemnized within two months.

### PART IV.

#### REGISTRATION OF MARRIAGES SOLEMNIZED BY MINISTERS OF RELIGION.

27. Marriages when to be registered.
28. Registration of marriages solemnized by Clergymen of Church of England.
29. Quarterly Returns to Archdeaconry.  
Contents of returns.
30. Registration and returns of marriages.



## SECTIONS.

ages solemnized by Clergymen of Church of Rome.

31. Registration and returns of marriages solemnized by Clergymen of Church of Scotland.

32. Certain marriages to be registered in duplicate.

33. Entries of such marriages to be signed and attested.

34. Certificate to be forwarded to Marriage Registrar, copied and sent to Registrar-General.

35. Copies of certificates to be entered and numbered.

36. Registrar to add number of entry to certificate, and send to Registrar-General.

37. Registration of marriages between Native Christians by persons referred to in clauses (1), (2) and (3) of section 5.

Custody and disposal of register-book.

## PART V.

MARRIAGES SOLEMNIZED BY, OR IN THE PRESENCE OF, A MARRIAGE REGISTRAR.

38. Notice of intended marriage before Marriage Registrar.

39. Publication of notice.

40. Notice to be filed and copy entered in Marriage Notice Book.

41. Certificate of notice given and oath made.

Proviso.

42. Oath before issue of certificate.

43. Petition to High Court to order certificate in less than fourteen days.

Order on petition.

44. Consent of father or guardian.

Protest against issue of certificate.

Effect of protest.

45. Petition where person whose consent is necessary is insane, or unjustly withholds consent.

Procedure on petition.

46. Petition when Marriage Registrar refuses certificate.

Procedure on petition.

47. Petition when Marriage Registrar in Indian State refuses certificate.

48. Petition when Registrar doubts authority of person forbidding.

Procedure on petition.

Reference when marriage Registrar in Indian State doubts authority of person forbidding.

Procedure on reference.

49. Liability for frivolous protest against issue of certificate.

50. Form of certificate.

51. Solemnization of marriage after issue of certificate.

52. When marriage not had within two months after notice, new notice required.

53. Marriage Registrar may ask for particulars to be registered.

54. Registration of marriage solemnized under Part V.

55. Certificate to be sent monthly to

## SECTIONS.

Registrar-General.

Custody of register-book.

56. Officers to whom Registrars in Indian States shall send certificates.

57. Registrars to ascertain that notice and certificate are understood by Native Christians.

58. Native Christians to be made to understand declarations.

59. Registration of marriages between Native Christians.

## PART VI.

MARRIAGE OF NATIVE CHRISTIANS.

60. On what conditions marriages of Native Christians may be certified.

61. Grant of certificate.

62. Keeping of register-book and deposit of extracts therefrom with Registrar-General.

63. Searches in register-book and copies of entries.

64. Books in which marriages of Native Christians under Part I or Part III are registered.

65. Part VI not to apply to Roman Catholics.

Saving of certain marriages.

## PART VII.

PENALTIES.

66. False oath, declaration, notice or certificate for procuring marriage.

67. Forbidding, by false personation, issue of certificate by Marriage Registrar.

68. Solemnizing marriage without due authority.

69. Solemnizing marriage out of proper time, or without witnesses.

Saving of marriages solemnized under special licence.

70. Solemnizing, without notice or within fourteen days after notice, marriage with minor.

71. Issuing certificate, or marrying without publication of notice;

marrying after expiry of notice;

solemnizing marriage with minor within fourteen days without authority of Court, or without sending copy of notice;

issuing certificate against authorised prohibition.

72. Issuing certificate after expiry of notice, or, in case of minor, within fourteen days after notice or against authorized prohibition.

73. Persons authorized to solemnize marriage (other than Clergy of Churches of England, Scotland or Rome);

issuing certificate, or marrying without publishing notice, or after expiry of certificate;

issuing certificate for, or solemnizing, marriage with minor within fourteen days after notice;

issuing certificate authorizedly forbidden;

solemnizing marriage authorizedly forbidden.



## SECTIONS.

74. Unlicensed person granting certificate pretending to be licensed.  
 75. Destroying or falsifying register-books.  
 76. Limitation of prosecutions under Act.

## PART VIII.

## MISCELLANEOUS.

77. What matters need not be proved in respect of marriage in accordance with Act.  
 78. Correction of errors.  
 79. Searches and copies of entries.  
 80. Certified copy of entry in marriage register, etc., to be evidence.  
 81. Certificates of certain marriages for Secretary of State.  
 82. Provincial Government to prescribe fees.  
 83. Power to make rules.

## SECTIONS.

84. Power to prescribe fees and rules for Indian States.  
 85. Power to declare who shall be District Judge.  
 86. Powers and functions exercisable as regards Indian States.  
 87. Saving of Consular marriages.  
 88. Non-validation of marriages within prohibited degrees.  
 SCHEDULE I.—NOTICE OF MARRIAGE.  
 SCHEDULE II.—CERTIFICATE OF RECEIPT OF NOTICE.  
 SCHEDULE III.—FORM OF REGISTER OF MARRIAGES.  
 SCHEDULE IV.—MARRIAGE REGISTER-BOOK.  
 CERTIFICATE OF MARRIAGE.  
 SCHEDULE V.—[*Repealed.*].

THE INDIAN CHRISTIAN MARRIAGE ACT (XV OF 1872).<sup>1</sup>

[N.B.—Throughout the Act for 'Native State' and 'Native States' the words 'Indian State' and 'Indian States' have been substituted by Order in Council, 1937.]

[18th July, 1872.]

*An Act to consolidate and amend the law relating to the solemnization in India of the marriages of Christians.*

WHEREAS it is expedient to consolidate and amend the law relating to the solemnization in India of the marriages of persons professing the Christian religion; It is hereby enacted as follows:—

Preamble.

## PRELIMINARY.

Short title.

1. This Act may be called THE INDIAN CHRISTIAN MARRIAGE ACT, 1872.

It extends to the whole of British India,<sup>2</sup> and so far only as regards

## LEG. REF.

<sup>1</sup> For the Statement of Objects and Reasons, see *Gazette of India*, 1871, Pt. V. p. 473; for Proceedings in Council, see *ibid.*, 1870, Supplement, p. 1077; *ibid.*, 1871; Supplement, pp. 1426, 1643; *ibid.*, 1802; Supplement, pp. 257, 728 742, 805, 813 and 858. This Act is based on 14 and 15 Viet., c. 40, and 58 Geo. III, c. 84 (both Statutes relate to marriages in India and are now no longer in force), and Acts V of 1852 and V of 1865; the last two Acts were repealed by this Act.

<sup>2</sup> Act XV of 1872 has been declared in force in Upper Burma generally (except the Shan States) by the Burma Laws Act (XIII of 1898), section 4 (1), and Sch. I, Bur. Code; in the Hill District of Arakan by the Arakan Hill District Laws Regulation (IX of 1874), section 3, *ibid.*; in British Baluchistan by the Baluchistan Laws Regulation (I of 1890), section 3, Bal. Code; and in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation (III of 1872), as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), Ben. Code; also by notification under sec-

tion 3 of the Scheduled Districts Act (XIV of 1874), *infra*, in the following scheduled Districts, namely:—the Districts of Hazaribagh, Lohardaga and Manbhum, and Pargana Dhalbhum and Kolhan in the District of Singhbhum [see *Gazette of India*, 1881, Pt. I, p. 504]; and the North-Western Provinces Tarai [see *ibid.*, 1876, Pt. I, p. 505]. The District of Lohardaga now called the Ranchi District (see *Calcutta Gazette*, 1899, Pt. I, p. 44) included at this time in the Palamau District, which was separated in 1894.

## NOTES.

SEC. 1.—There is nothing either in the Divorce Act or in Christian Marriage Act as regards the age of consent for a Christian marriage. Under section 7, Divorce Act, the Indian High Courts have to act according to the principles and rules of English Courts. Therefore in India the age of consent for a Christian marriage will be determined according to the law in England at the time of the marriage. 55 A. 243=144 I.C. 960=1933 A.L.J. 168=1933 All. 135 (2).



Extent. Christian subjects of Her Majesty, to the <sup>1</sup>[Indian States.].

[Commencement.] Repealed by the Repealing Act, 1874 (XVI of 1874).

2. [Enactments Repealed.] (Repealed by Act I of 1938.)

Interpretation Clause.

3. In this Act, unless there is something repugnant in the subject or context,—

“Church of England” and “Anglican” mean and apply to the Church of England as by law established;

“Church of Scotland” means the Church of Scotland as by law established;

“Church of Rome” and “Roman Catholic” mean and apply to the Church which regards the Pope of Rome as its spiritual head;

“Church” includes any chapel or other building generally used for public Christian worship;

“minor” means a person who has not completed the age of twenty-one years and who is not a widower or a widow;

<sup>2</sup>[\* \* \* \*]

the expression “Christians” means persons professing the Christian religion;

and the expression “Native Christians” includes the Christian descendants of Natives of India converted to Christianity, as well as such converts;

<sup>3</sup>[“Registrar-General of Births, Deaths and Marriages” means a Registrar-General of Births, Deaths and Marriages appointed under the Births, Deaths and Marriages Registration Act, 1886.]

## PART I.

### THE PERSONS BY WHOM MARRIAGES MAY BE SOLEMNIZED.

4. Every marriage between persons, one or both of whom is <sup>4</sup>[or are] a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void.

#### LEG. REF.

<sup>1</sup> Substituted by Order in Council, 1937.

<sup>2</sup> Omitted by Order in Council, 1937.

<sup>3</sup> This paragraph was added by the Births, Deaths and Marriages Registration Act (VI of 1886), section 30, cl. (a).

<sup>4</sup> These words were inserted by the Repealing and Amending Act (XII of 1891), section 2 and Sch. II.

#### NOTES.

SEC. 3.—The word “means” in this section is an inclusive term. See 40 A. 393 noted under section 68 *infra*. “Christian,” see 18 M. 230; “Native Christian,” see 40 A. 393=45 I.C. 519=16 A.L.J. 414.

SEC. 4: MARRIAGE OPPOSED TO RULES OF CHURCH—VALIDITY OF.—The distinction advanced in a contention that though a marriage carried out in complete disregard of the rules of the Church to which the parties to the marriage belonged, may be gravely unlawful, it would nevertheless, according to the canon law of the Roman Church, be valid is a distinction unknown to civil law,

55 A. 185=144 I.C. 906=1933 All. 122. A marriage solemnized by an official authorised in this respect cannot be declared void under section 4 of the Act. The fact that one of the parties induced the Marriage Registrar to solemnise the marriage as the result of a false declaration as to the age of the other party to the marriage and as to their residence, does not render the marriage illegal. 46 L.W. 481=A.I.R. 1937 Mad. 895=(1937) 2 M.L.J. 590.

SECS. 4 AND 5.—Validity of marriage of Christian with non-Christian. See U.B.R. (1897-1901), Vol. II, 488 at 491. As to scope and applicability of the section, see 40 A. 393; 14 M. 342; 19 M. 273; 47 I.C. 544. As to persons authorised to perform marriages, see also 32 I.C. 897. A Hindu by religion, performing a marriage according to the Hindu mode between two persons one of whom is a Christian commits an offence under section 68. See 40 M. 1030=33 M.L.J. 148. A mixed marriage celebrated by the Catholic Church otherwise



Persons by whom marriages may be solemnised.

## 5. Marriages may be solemnized in India—

(1) by any person who has received episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of which he is a Minister;

(2) by any Clergyman of the Church of Scotland, provided that such marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of Scotland;

(3) by any minister of Religion licensed under this Act to solemnize marriages;

(4) by, or in the presence of, a marriage Registrar appointed under this Act;

(5) by any person licenced under this Act to grant certificates of marriage between Native Christians.

6. The [Provincial Government,] so far as regards the territories under its administration, and the [Central Government] so far as regards any [Indian State], may, by notification in the official Gazette <sup>1</sup>[\* \* \*] grant licences<sup>2</sup> to Ministers of Religion to solemnize marriages within such territories and State, respectively, and may, by a like notification, revoke such licences.

7. The [Provincial Government] may appoint one or more Christians, either by name or as holding any office for the time being, to be the Marriage Registrar or Marriage Registrars<sup>3</sup> for any district subject to its administration.

Where there are more Marriage Registrars than one in any district, the Senior Marriage Registrar, Provincial Government shall appoint one of them to be the Senior Marriage Registrar.

When there is only one Marriage Registrar in a district, and such Registrar is absent from such district, or ill, or when his office is temporarily vacant, the Magistrate of the district shall act as, and be, Marriage Registrar thereof during such absence, illness or temporary vacancy.

### LEG. REF.

<sup>1</sup> Omitted by A.O., 1937.

<sup>2</sup> As to validation of licences granted under former Acts, see the Indian Christian Marriages Act (1872) Amendment Act (II of 1891), section 1 (2) and (3).

<sup>3</sup> For notifications under the powers conferred by this section in (1) Ajmer-Merwara see Aj.R. & O.; (2) Bombay, see Bom.R. & O.; (3) British Baluchistan, see *Gazette of India*, 1892, Pt. II, p. 53; (4) Burma, Bur. R. M.; (5) Central Provinces, see C. P. R. & O.; (6) Punjab, see Punj. R. & O.; (7) the United Provinces of Agra and Oudh, see North-Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894, p.42.

### NOTES.

valid, is not invalidated for want of banns. 56 A. 428=1934 A.L.J. 1129=1934 A. 273.

JURISDICTION.—The various grounds on which the Court can give a decree of nullity under the Divorce Act refer to cases where there has been a marriage validly perform-

ed. Questions arise under sections 4 and 5, Christian Marriage Act, when the marriage has not been validly performed. There is a clear distinction between a decree of nullity of a valid marriage and a declaration that the marriage itself is illegal and void. There can therefore be no doubt that there is jurisdiction in the High Court to hear and decide questions under the Christian Marriage Act. [47 I.C. 544, Rel. on; 13 Beng. L.R. 109 and 12 Cal. 706 (F.B.), Ref.] 55 A. 185=144 I.C. 906=1933 All. 122.

SEC. 5: SCOPE.—Rules in section 5 refer to those things which must be done before the ceremony of marriage can be performed. The section deals only with the necessary preliminaries to the ceremony, the ceremony itself, and the person who performs it. It has nothing to do with Canon law. 55 A. 185=144 I.C. 906=1933 A. 122.

SEC. 6.—This section was substituted for the original section 6 by the Indian Christian Marriage Act (1872), Amendment Act (II of 1891), section 1 (1).

For notifications in the North-Western



8. The [Central Government] may, by notification in the [Official Gazette] appoint any Christian, either by name or as Marriage Registrars in holding any office for the time being to be a Marriage Registrar in respect of any district or place within Indian States. <sup>1</sup>[any Indian State.]

The [Central Government] may, by like notification, revoke any such appointment.

9. The [Provincial Government]<sup>6</sup> or (so far as regards any [Indian State] the [Central Government] may grant a licence<sup>2</sup> to any Christian, either by name or as holding any office for the time being, authorising him to grant certificate of marriage between Native Christians.

Any such licence may be revoked by the authority by which it was granted, and every such grant or revocation shall be notified in the official Gazette.

## PART II.

### TIME AND PLACE AT WHICH MARRIAGES MAY BE SOLEMNIZED.

10. Every marriage under this Act shall be solemnized between the hours of six in the morning and seven in the evening:

Exceptions.

Provided that nothing in this section shall apply to—

(1) a Clergyman of the Church of England solemnizing a marriage under a special licence permitting him to do so at any hour other than between six in the morning and seven in the evening, under the hand and seal of the Anglican Bishop of the Diocese or his Commissary, or

(2) a Clergyman of the Church of Rome solemnizing a marriage between the hours of seven in the evening and six in the morning, when he has received a general or special licence in that behalf from the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is so solemnized, or from such person as the same Bishop has authorized to grant such licence, <sup>3</sup>[or

(3) a Clergyman of the Church of Scotland solemnizing a marriage according to the rules, rites, ceremonies and customs of the Church of Scotland].

11. No Clergyman of the Church of England shall solemnize a marriage in any place other than a church <sup>4</sup>[where worship is generally held according to the forms of the Church of England],

unless there is no <sup>5</sup>[such] church within five miles distance by the shortest road from such place, or

unless he has received a special licence authorizing him to do so under the hand and seal of the Anglican Bishop of the Diocese or his Commissary.

For such special licence, the Registrar of the Diocese may charge such additional fee as the said Bishop from time to time authorizes.

#### LEG. REF.

<sup>1</sup> Substituted by A.O., 1937.

<sup>2</sup> For instances of such licenses granted in Burma, see *Burma Gazette*, 1899, Pt. 1, p. 248.

<sup>3</sup> This portion was added by the Indian Christian Marriage Act (1872), Amendment Act (II of 1891), section 2.

<sup>4</sup> These words were added by the Indian Christian Marriage Act (1872), Amendment

Act (II of 1891), section 3.

<sup>5</sup> The word "such" was inserted by the Indian Christian Marriage Act (1872), Amendment Act (II of 1891), section 3.

#### NOTES.

Provinces and Oudh, under the powers conferred by sections 6, 7, 9, 62, 82, 83 and 85, see *North-Western Provinces and Oudh List of Local Rules and Orders*, Ed., 1894, p. 42.



## PART III.

## MARRIAGES SOLEMNIZED BY MINISTERS OF RELIGION LICENSED UNDER THIS ACT.

Notice of intended marriage.

12. Whenever a marriage is intended to be solemnized by a minister of Religion licensed to solemnize marriages under this Act—

one of the persons intending marriage shall give notice in writing, according to the form contained in the first schedule hereto annexed, or to the like effect, to the Minister of Religion whom he or she desires to solemnize the marriage, and shall state therein—

(a) the name and surname, and the profession or condition, of each of the persons intending marriage,

(b) the dwelling-place of each of them.

(c) the time during which each has dwelt there, and

(d) the church or private dwelling in which the marriage is to be solemnized:

Provided that, if either of such persons has dwelt in the place mentioned in the notice during more than one month, it may be stated therein that he or she has dwelt there one month and upwards.

13. If the persons intending marriage desire it to be solemnized in a particular church, and if the Minister of Religion to whom such notice has been delivered be entitled to officiate therein, he shall cause the notice to be affixed in some conspicuous part of such church.

But if he is not entitled to officiate as a Minister in such church, he shall, at his option, either return the notice to the person who delivered to him, or deliver it to some other Minister entitled to officiate therein, who shall thereupon cause the notice to be affixed as aforesaid.

14. If it be intended that the marriage shall be solemnized in a private dwelling, the Minister of Religion, on receiving the notice prescribed in section 12, shall forward it to the Marriage Registrar of the district, who shall affix the same to some conspicuous place in his own office.

15. When one of the persons intending marriage is a minor, every Minister receiving such notice shall, unless within twenty four hours after its receipt he returns the same under the provisions of section 13, send by the post or otherwise a copy of such notice to the Marriage Registrar of the district, or, if there be more than one Registrar of such district, to the Senior Marriage Registrar.

16. The Marriage Registrar or Senior Marriage Registrar, as the case may be, on receiving any such notice, shall affix it to some conspicuous place in his own office, and the latter shall further cause a copy of the said notice to be sent to each of the other Marriage Registrars in the same district, who shall likewise publish the same in the manner above directed.

17. Any Minister of Religion consenting or intending to solemnize any such marriage as aforesaid, shall, on being required so to do by or on behalf of the person by whom the notice was given, and upon one of the persons intending marriage making the declaration hereinafter

Issue of certificate of notice given and declaration made.

## NOTES.



required, issue under his hand a certificate of such notice having been given and of such declaration having been made :

Proviso.

Provided—

(1) that no such certificate shall be issued until the expiration of four days after the date of the receipt of the notice by such Minister;

(2) that no lawful impediment be shown to his satisfaction why such certificate should not issue; and

(3) that the issue of such certificate has not been forbidden, in manner hereinafter mentioned, by any person authorized in that behalf.

18. The certificate mentioned in section 17 shall not be issued until one

Declaration before issue of certificate.

of the persons intending marriage has appeared personally before the Minister and made a solemn declaration—

(a) that he or she believes that there is not any impediment of kindred or affinity or other lawful hindrance to the said marriage,

and, when either or both of the parties is or are a minor or minors,

(b) that the consent or consents required by law has or have been obtained thereto, or that there is no person resident in India having authority to give such consent, as the case may be.

19. The father, if living, of any minor, or, if the father be dead, the guar-

Consent of father, or guardian, or mother.

dian of the person of such minor, and, in case there be no such guardian, then the mother of such minor, may give consent to the minor's marriage,

and such consent is hereby required for the same marriage, unless no person authorized to give such consent be resident in India.

20. Every person whose consent to a marriage is required under section

Power to prohibit by notice issue of certificate.

19 is hereby authorized to prohibit the issue of the certificate by any Minister, at any time before the issue of the same, by notice in writing to such Minister, subscribed by the person so authorised with his or her name and place of abode and position with respect to either of the persons intending marriage, by reason of which he or she is so authorized as aforesaid.

21. If any such notice be received by such Minister, he shall not issue his

Procedure on receipt of notice.

certificate and shall not solemnize the said marriage until he has examined into the matter of the said prohibition, and is satisfied that the person prohibiting the marriage has no lawful authority for such prohibition,

or until the said notice is withdrawn by the person who gave it.

22. When either of the persons intending marriage is a minor, and the

Issue of certificate in case of minority.

Minister is not satisfied that the consent of the person whose consent to such marriage is required by section 19 has been obtained, such Minister shall not issue such certificate until the expiration of fourteen days after the receipt by him of the notice of marriage.

23. When any Native Christian about to be married takes a notice of

Issue of certificate to Native Christians.

marriage to a Minister of Religion, or applies for a certificate from such Minister under section 17, such Minister shall, before issuing the certificate, ascertain whether such Native Christian is cognizant of the purport and effect of the said notice or certificate, as the case may be, and, if not, shall translate or cause to be translated the notice or certificate to such Native Christian into some language which he understands.

#### NOTES.

SEC. 18.—See 16 All. 212.



21. The certificate to be issued by such Minister shall be in the form contained in the second schedule hereto annexed, or to the like effect.

Form of certificate.

25. After the issue of the certificate by the Minister, marriage may be solemnized between the persons therein described according to such form or ceremony as the Minister thinks fit to adopt:

Solemnization of marriage.

Provided that the marriage be solemnized in the presence of at least two witnesses beside the Minister.

26. Whenever a marriage is not solemnized within two months, after the date of the certificate issued by such Minister as aforesaid, such certificate and all proceedings (if any), thereon shall be void,

Certificate void if marriage not solemnized within two months.

and no person shall proceed to solemnize the said marriage until new notice has been given and a certificate thereof issued in manner aforesaid.

#### PART IV.

##### REGISTRATION OF MARRIAGES SOLEMNISED BY MINISTERS OF RELIGION.

27. All marriages hereafter solemnized in India between persons one or both of whom professes or profess the Christian religion, except marriages solemnized under Part V or Part VI of this Act, shall be registered<sup>1</sup> in manner hereinafter prescribed.

Marriages when to be registered.

28. Every Clergyman of the Church of England shall keep a register of marriages and shall register therein according to the tabular form set forth in the third schedule hereto annexed, every marriage which he solemnizes under this Act.

Registration of marriages solemnized by Clergyman of Church of England.

29. Every Clergyman of the Church of England shall send four times in every year returns in duplicate, authenticated by his signature, of the entries in the register of marriages solemnized at any place where he has any spiritual charge, to the Registrar of the Archdeaconry to which he is subject, or within the limits of which such place is situate.

Quarterly returns to Archdeaconry.

Such quarterly returns shall contain all the entries of marriages contained in the said register from the first day of January to the thirty-first day of March, from the first day of April to the thirtieth day of June, from the first day of July to the thirtieth day of September, and from the first day of October to the thirty-first day of December, of each year respectively, and shall be sent by such Clergyman within two weeks from the expiration of each of the quarters above specified.

Contents of returns.

The said Registrar upon receiving the said returns shall send one copy thereof to the<sup>1</sup> [Registrar-General of Births, Deaths and Marriages].

30. Every marriage solemnized by a Clergyman of the Church of Rome shall be registered by the person and according to the form directed in that behalf by the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is solemnized,

Registration and returns of marriages solemnized by Clergymen of Church of Rome.

and such person shall forward quarterly to the<sup>2</sup> [Registrar-General of Births, Deaths and Marriages] returns of the entries of all marriages registered by him during the three months next preceding.

#### LEG. REF.

<sup>1</sup> As to the establishment of general registry offices of births, deaths and marriages, see the Births, Deaths and Marriages Registration Act (VI of 1886), Ch. II.

<sup>2</sup> These words were substituted for the words "Secretary to the Local Government" by the Births, Deaths and Marriages Registration Act (VI of 1886), section 30 cl. (b).



Registration and returns of marriages solemnized by Clergymen of Church of Scotland.

31. Every Clergyman of the Church of Scotland shall keep a register of marriages,

and shall register therein, according to the tabular form set forth in the third schedule hereto annexed, every marriage which he solemnizes under this Act,

and shall forward quarterly to the <sup>1</sup>[Registrar-General of Births, Deaths and Marriages], through the Senior Chaplain of the Church of Scotland, returns, similar to those prescribed in section 29, of all such marriages.

32. Every marriage solemnized by any person who has received episcopal ordination, but who is not a Clergyman of the Church of England, or of the Church of Rome, or by any Minister of Religion licensed under this Act to solemnize marriages, shall, immediately after the solemnization thereof, be registered in duplicate by the person solemnizing the same; (that is to say) in a marriage register-book to be kept by him for that purpose according to the form contained in the fourth schedule hereto annexed, and also in a certificate attached to the marriage-register-book as a counterfoil.

33. The entry of such marriage in both the certificate and marriage-register-book shall be signed by the person solemnizing the marriage, and also by the persons married, and shall be attested by two credible witnesses, other than the person solemnizing the marriage, present at its solemnization.

Every such entry shall be made in order from the beginning to the end of the book, and the number of the certificate shall correspond with that of the entry in the marriage-register-book.

34. The person solemnizing the marriage shall forthwith separate the certificate from the marriage-register-book and send it, within one month from the time of the solemnization, to the Marriage Registrar of the district in which the marriage was solemnized, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar,

who shall cause such certificate to be copied into a book to be kept by him for that purpose,

and shall send all the certificates which he has received during the month, with such number and signature or initials added thereto as are hereinafter required, to the <sup>1</sup>[Registrar-General of Births, Deaths and Marriages].

35. Such copies shall be entered in order from the beginning to the end of the said book, and shall bear both the number of the certificate as copied, and also a number to be entered by the Marriage Registrar, indicating the number of the entry of the said copy in the said book, according to the order in which he receives each certificate.

36. The marriage Registrar shall also add such last-mentioned number of the entry of the copy in the book to the certificate, with his signature or initials, and shall, at the end of every month, send the same to the <sup>1</sup>[Registrar-General of Births, Deaths and Marriages].

#### LEG. REF.

<sup>1</sup> These words were substituted for the words "Secretary to the Local Government"

by the Births, Deaths and Marriages Registration Act (VI of 1886), section 30. cl.(b).



37. When any marriage between Native Christians is solemnized <sup>1</sup>[by any such person, Clergyman or Minister of Religion as is referred to in clause (1), clause (2), or clause (3) of section 5], the person solemnizing the same shall, instead of proceeding in the manner provided by sections 28 to 36, both inclusive, register the marriage in a separate register-book, and shall keep it safely until it is filled, or, if he leave the district in which he solemnized the marriage before the said book is filled, shall make over the same to the person succeeding to his duties in the said district.

Whoever has the control of the book at the time when it is filled, shall send it to the Marriage Registrar of the district, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar, who shall send it to the <sup>2</sup>[Registrar-General of Births, Deaths and Marriages], to be kept by him with the records of his office.

## PART V.

### MARRIAGES SOLEMNIZED BY, OR IN THE PRESENCE OF, A MARRIAGE REGISTRAR.

38. When a marriage is intended to be solemnized by, or in the presence of, a Marriage Registrar, one of the parties to such marriage shall give notice in writing in the form contained in the first schedule hereto annexed, or to the like effect, to any Marriage Registrar of the District within which the parties have dwelt,

or, if the parties dwell in different districts, shall give the like notice to a Marriage Registrar of each district

and shall state therein the name and surname, and the profession or condition, of each of the parties intending marriage, the dwelling-place of each of them, the time during which each has dwelt therein, and the place at which the marriage is to be solemnized:

Provided that, if either party has dwelt in the place stated in the notice for more than one month, it may be stated therein that he or she has dwelt there one month and upwards.

39. Every Marriage Registrar shall, on receiving any such notice, cause a copy thereof to be affixed in some conspicuous place in his office.

When one of the parties intending marriage is a minor, every Marriage Registrar shall, within twenty-four hours after the receipt by him of the notice of such marriage, send, by post or otherwise, a copy of such notice to each of the other Marriage Registrars (if any) in the same district, who shall likewise affix the copy in some conspicuous place in his own office.

Notice to be filed and copy entered in Marriage Notice-Book.

40. The Marriage Registrar shall file all such notices and keep them with the records of his office,

and shall also forthwith enter a true copy of all such notices in a book to be furnished to him for that purpose by the Provincial Government, and to be called the "Marriage Notice-Book";

## LEG. REF.

<sup>1</sup>Substituted for the words "under Part I or Part III of this Act" by S. 2 and Sch. I of Act XVIII of 1928.

<sup>2</sup>These words were substituted for the words "Secretary to the Local Government" by the Births, Deaths and Marriages Registration Act (VI of 1886), S. 30, cl. cl. (b).

## NOTES.

SEC. 38: SCOPE—NOTICE—AGE—IF TO BE FILLED IN.—The section governs the schedule and the space left for age is not necessary to be filled with that particular, because no such provision is made in the section. (*Dean v. Green*, 8 P.D. 89, Foll.; *In re Bains*, 1 Cr. & P. 31, Diss. from.) 39 C.W.N. 1303=36 Cr.L.J. 1462=1935 C. 678.



and the Marriage Notice-Book shall be open at all reasonable times, without fee, to all persons desirous of inspecting the same.

41. If the party by whom the notice was given request the Marriage Registrar to issue the certificate next hereinafter mentioned, and if one of the parties intending marriage has made oath as hereinafter required, the Marriage Registrar shall issue under his hand a certificate of such notice having been given and of such oath having been made:

Certificate of notice given and oath made.

Proviso.

Provided—

that no lawful impediment be shown to his satisfaction why such certificate should not issue;

that the issue of such certificate has not been forbidden, in manner hereinafter mentioned, by any person authorized in that behalf by this Act;

that four days after the receipt of the notice have expired; and further, that where, by such oath, it appears that one of the parties intending marriage is a minor, fourteen days after the entry of such notice have expired.

42. The certificate mentioned in section 41 shall not be issued by any Marriage Registrar, until one of the parties intending marriage appears personally before such Marriage Registrar, and makes oath—

Oath before issue of certificate.

(a) that he or she believes that there is not any impediment of kindred or affinity, or other lawful hindrance, to the said marriage, and

(b) that both the parties have, or (where they have dwelt in the districts of different Marriage Registrars) that the party making such oath has, had their, his or her usual place of abode within the district of such Marriage Registrar,

and, where either or each of the parties is a minor,—

(c) that the consent or consents to such marriage required by law has or have been obtained thereto, or that there is no person resident in India authorized to give such consent, as the case may be.

43. When one of the parties intending marriage is a minor, and both such parties are at the time resident in any of the towns of Calcutta, Madras and Bombay, and are desirous of being married in less than fourteen days after the entry of such notice as aforesaid, they may apply by petition to a Judge of the High Court, for an order upon the Marriage Registrar to whom the notice of marriage has been given, directing him to issue his certificate before the expiration of the said fourteen days required by section 41.

And, on sufficient cause being shown, the said Judge may, in his discretion, make an order upon such Marriage Registrar, directing him to issue his certificate at any time to be mentioned in the said order before the expiration of the fourteen days so required.

And the said Marriage Registrar, on receipt of the said order, shall issue his certificate in accordance therewith.

Consent of father or guardian.

44. The provisions of section 19 apply to every marriage under this Part, either of the parties to which is a minor;

and any person whose consent to such marriage would be required there-

Protest against issue of certificate.

under may enter a protest against the issue of the Marriage Registrar's certificate, by writing, at any time before the issue of such certificate, the word

#### NOTES.

SECS. 41 AND 42.—As to the meaning of "oath," see the General Clauses Act (X of 1897), section 3, cl. (36) and section 4. See

16 C.W.N. 417 (Marriage between a Christian husband and a Jewess divorced according to Jewish Law).



"forbidden" opposite to the entry of the notice of such intended marriage in the Marriage Notice-Book, and by subscribing thereto his or her name and place of abode, and his or her position with respect to either of the parties, by reason of which he or she is so authorized.

When such protest has been entered, no certificate shall issue until the Marriage Registrar has examined into the matter of the protest, and is satisfied that it ought not to obstruct the issue of the certificate for the said marriage, or until the protest be withdrawn by the person who entered it.

Petition where person whose consent is necessary is insane, or unjustly withholds consent.

45. If any person whose consent is necessary to any marriage under this Part is of unsound mind,

or if any such person (other than the father) without just cause withholds his consent to the marriage,

the parties intending marriage may apply by petition, where the person whose consent is necessary is resident within any of the towns of Calcutta, Madras and Bombay, to a Judge of the High Court, or if he is not resident within any of the said towns, then to the District Judge.

Procedure on petition.

And the said Judge of the High Court, or District Judge, as the case may be, may examine the allegations of the petition in a summary way;

and, if upon examination such marriage appears proper, such Judge of the High Court or District Judge, as the case may be shall declare the marriage to be a proper marriage.

Such declaration shall be as effectual as if the person whose consent was needed had consented to the marriage;

and, if he has forbidden the issue of the Marriage Registrar's certificate, such certificate shall be issued and the like proceedings may be had under this Part in relation to the marriage as if the issue of such certificate had not been forbidden.

46. Whenever a Marriage Registrar refuses to issue a certificate under this Part, either of the parties intending marriage may apply by petition, where the district of such Registrar is within any of the towns of Calcutta, Madras and Bombay, to a Judge of the High Court, or if such district is not within any of the said towns, then to the District Judge.

The said Judge of the High Court, or District Judge, as the case may be, may examine the allegations of the petition in a summary way, and shall decide thereon.

The decision of such Judge of the High Court or District Judge, as the case may be, shall be final, and the Marriage Registrar to whom the application for the issue of a certificate was originally made shall proceed in accordance therewith.

Petition when Marriage Registrar in Indian State refuses certificate.

47. Whenever a Marriage Registrar resident in any <sup>1</sup>[Indian State] refuses to issue his certificate, either of the parties intending marriage may apply by petition to the Central Government, who shall decide thereon.

Such decision shall be final, and the Marriage Registrar to whom the application was originally made shall proceed in accordance therewith.



48. Whenever a Marriage Registrar, acting under the provisions of section 44, is not satisfied that the person forbidding the issue of the certificate is authorized by law so to do, the said Marriage Registrar shall apply by petition, where his district is within any of the towns of Calcutta, Madras and Bombay, to a Judge of the High Court, or, if such district be not within any of the said towns, then to the District Judge.

*Petition when Registrar doubts authority of person forbidding.* The said petition shall state all the circumstances of the case, and pray for the order and direction of the Court concerning the same, and the said Judge of the High Court or District Judge, as the case may be, shall examine into the allegations of the petition and the circumstances of the case;

and if, upon such examination, it appears, that the person forbidding the issue of such certificate is not authorized by law so to do, such Judge of the High Court or District Judge, as the case may be, shall declare that the person forbidding the issue of such certificate is not authorized as aforesaid,

and thereupon such certificate shall be issued, and the like proceedings may be had in relation to such marriage as if the issue had not been forbidden.

*Reference when Marriage Registrar in Indian State doubts authority of person forbidding.* Whenever a Marriage Registrar appointed under section 8 to act within any <sup>1</sup>[Indian State] is not satisfied that the person forbidding the issue of the certificate is authorised by law so to do, the said Marriage Registrar shall send a statement of all the circumstances of the case, together with all documents relating thereto, to the

#### Central Government.

If it appears to the Central Government that the person forbidding the issue of such certificate is not authorized by law so to do, the Central Government shall declare that the person forbidding the issue of such certificate is not authorized as aforesaid, and thereupon such certificate shall be issued, and the like proceedings may be had in relation to such marriage, as if the issue of the certificate had not been forbidden.

49. Every person entering a protest with the Marriage Registrar, under this Part, against the issue of any certificate, on grounds which such Marriage Registrar, under section 44, or a Judge of the High Court or the District Judge, under section 45 or 46, declares to be frivolous and such as ought not to obstruct the issue of the certificate, shall be liable for the costs of all proceedings in relation thereto and for damages, to be recovered by suit by the person against whose marriage such protest was entered.

50. The certificate to be issued by the Marriage Registrar under the provisions of section 41 shall be in the form contained in the second schedule to this Act annexed or to the like effect,

and the Provincial Government shall furnish to every Marriage Registrar a sufficient number of forms of certificate.

*Solemnization of marriage after issue of certificate.* 51. After the issue of the certificate of the Marriage Registrar, or, where notice is required to be given under this Act to the Marriage Registrars for different districts, after the issue of the certificates of the Marriage Registrars for such districts,

marriage may, if there be no lawful impediment to the marriage of the parties described in such certificate or certificates, be solemnized between them, according to such form and ceremony as they think fit to adopt.



But every such marriage shall be solemnized in the presence of some Marriage Registrar (to whom shall be delivered such certificate or certificates as aforesaid) and of two or more credible witnesses besides the Marriage Registrar.

And in some part of the ceremony each of the parties shall declare as follows, or to the like effect:—

"I do solemnly declare that I know not of any lawful impediment why I A.B., may not be joined in matrimony to C.D."

And each of the parties shall say to the other as follows or to the like effect:—"I call upon these persons here present to witness that I, A.B., do take thee, C.D., to be my lawful wedded wife [or husband]."

52. Whenever a marriage is not solemnized within two months after the copy of the notice has been entered by the Marriage Registrar, as required by section 40 the notice and the certificate, if any, issued thereupon, and all other proceedings thereupon, shall be void;

When marriage not had within two months after notice, new notice required.

and no person shall proceed to solemnize the marriage, nor shall any Marriage Registrar enter the same, until new notice has been given, and entry made, and certificate thereof given, at the time and in the manner aforesaid.

Marriage Registrar may ask for particulars to be registered.

53. A Marriage Registrar before whom any marriage is solemnized under this Part may ask of the persons to be married the several particulars required to be registered touching such marriage.

54. After the solemnization of any marriage under this Part, the Marriage Registrar present at such solemnization shall forthwith register the marriage in duplicate; that is to say, in a marriage register-book, according to the form of the fourth schedule hereto annexed, and also in a certificate attached to the marriage-register-book as a counterfoil.

The entry of such marriage in both the certificate and the marriage-register-book shall be signed by the person by or before whom the marriage has been solemnized, if there be any such person, and by the Marriage Registrar present at such marriage, whether or not it is solemnized by him, and also by the parties married, and attested by two credible witnesses other than the Marriage Registrar and person solemnizing the marriage.

Every such entry shall be made in order from the beginning to the end of the book and the number of the certificate shall correspond with that of the entry in the marriage-register-book.

Certificates to be sent monthly to Registrar-General.

55. The Marriage Registrar shall forthwith separate the certificate from the marriage-register-book and send it, at the end of every month, to the <sup>1</sup>[Registrar-General of Births, Deaths and Marriages].

The Marriage Registrar shall keep safely the said register-book until it is filled, and shall then send it to the <sup>1</sup>[Registrar-General of Births, Deaths and Marriages], to be kept by him with the records of his office.

Custody of register-book.

Officers to whom Registrars in Indian States shall send certificates.

56. The Marriage Registrars in <sup>2</sup>[Indian states] shall send the certificates mentioned in S. 54 to such officers as the Central Government from time to time, by notification in the official Gazette appoints in his behalf.<sup>3</sup>

#### LEG. REF.

<sup>1</sup> These words were substituted for the words "Secretary to the Local Government" by the Births, Deaths and Marriages Regis-

tration Act (VI of 1886), section 30, cl. (b).

<sup>2</sup> Substituted by A.O., 1937.

<sup>3</sup> Cf. section 24 (2) of the Births, Deaths and Marriages Registration Act (VI of 1886).



57. When any Native Christian about to be married gives a notice of marriage or applies for a certificate from a Marriage Registrar, such Marriage Registrar shall ascertain whether the said Native Christian understands the English language, and, if he does not, the Marriage Registrar shall translate, or cause to be translated,

Registrars to ascertain that notice and certificate are understood by Native Christians.

such notice or certificate or both of them, as the case may be, to such Native Christian into a language which he understands;

or the Marriage Registrar shall otherwise ascertain whether the Native Christian is cognizant of the purport and effect of the said notice and certificate.

58. When any Native Christian is married under the provisions of this Part, the person solemnizing the marriage shall as-

Native Christians to be made to understand declarations.

certain whether such Native Christian understands the English language, and if he does not, the person solemnizing the marriage shall, at the time of the solemnization, translate, or cause to be translated, to such Native Christian, into a language which he understands, the declarations made at such marriage in accordance with the provisions of this Act.

59. The registration of marriages between Native Christians under this Part shall be made in conformity with the rules laid down in section 37 (so far as they are applicable), and not otherwise.

Registration of marriages between Native Christians.

## PART VI.<sup>1</sup>

### MARRIAGE OF NATIVE CHRISTIANS.

On what conditions marriages of Native Christians may be certified.

60. Every marriage between Native Christians applying for a certificate shall, without the preliminary notice required under Part III, be certified under this Part, if the following conditions be fulfilled, and

not otherwise:—

(1) the age of the man intending to be married shall exceed sixteen years, and the age of the woman intending to be married shall exceed thirteen years;

(2) neither of the persons intending to be married shall have a wife or husband still living;

(3) in the presence of a person licenced under section 9, and of at least two credible witnesses other than such person, each of the parties shall say to the other—

“I call upon these persons here present to witness that I, A.B., in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee, C.D., to be my lawful wedded wife [or husband]” or words to the like effect:

Provided that no marriage shall be certified under this Part when either of the parties intending to be married has not completed his or her eighteenth year, unless such consent as is mentioned in section 19 has been given to the intended marriage, or unless it appears that there is no person living authorized to give such consent:

#### LEG. REF.

The Commissioner of Ajmer-Merwara has been appointed under this section for the Rajputana States, see Aj.R.O.; the Resident for the Central India States for States in Central India, see *Brit. Enact.*, I.S., Vol. III; the Registrar-General of Births, Deaths and Marriages, Madras, for the Mysore State, see *ibid.*, Vol. VI, p. 47; the First

Assistant to the Resident for the Hyderabad State, see *ibid.*, Vol. V, p. 26.

<sup>1</sup>As to the validation of past marriages solemnized under Part VI between persons of whom one only was a Native Christian, and penalty for solemnizing such marriages under Part VI in future, see the Marriages Validation Act (II of 1892).



61. When, in respect to any marriage solemnized under this Part, the conditions prescribed in section 60 have been fulfilled, the person licenced as aforesaid, in whose presence the said declaration has been made, shall, on the application of either of the parties to such marriage, and on the payment of a fee of four annas, grant a certificate of the marriage.

The certificate shall be signed by such licenced person, and shall be received in any suit touching the validity of such marriage as conclusive proof of its having been performed.

<sup>1</sup>[62. (1) Every person licenced under section 9 shall keep in English, or in the vernacular language in ordinary use in the district or State in which the marriage was solemnized, and in such form as the Provincial Government by which he was licenced may from time to time prescribe,<sup>2</sup> a register-book of all marriages solemnized under this Part in his presence, and shall deposit in the office of the Registrar-General of Births, Deaths and Marriages for the territories under the administration of the said Provincial Government in such form and at such intervals as that Government may prescribe, true and duly authenticated extracts from his register-book of all entries made therein since the last of those intervals.

(2) Where the person keeping the register-book was licenced as regards <sup>3</sup>[an Indian State] by the [Central Government], references in sub-section (1) to the Provincial Government therein mentioned shall be read as references to the Provincial Government to whose Registrar-General of Births, Deaths and Marriages certified copies of entries in registers of births and deaths are for the time being required to be sent under section 24, sub-section (2), of the Births, Deaths and Marriages Registration Act, 1886.]

63. Every person licenced under this Act to grant certificates of marriage, and keeping a marriage-register-book under section 62, shall, at all reasonable times, allow search to be made in such book, and shall, on payment of the proper fee, give a copy, certified under his hand, of an entry therein.

Books in which marriages of Native Christians under Part I or Part III are registered. 64. The provisions of sections 62 and 63, as to the form of the register-book, depositing extracts therefrom, allowing searches thereof, and giving copies of the entries therein, shall, *mutatis mutandis* apply to the books kept under section 37.

65. This Part of this Act, except so much of sections 62 and 63 as are referred to in section 64 shall not apply to marriages between Roman Catholics. But nothing herein contained shall invalidate any marriage celebrated between Roman Catholics under the provisions of Part V of Act No. XXV of 1864<sup>4</sup> previous to the twenty-third day of February, 1865.

#### LEG. REF.

<sup>1</sup>This section was substituted for the original section 62 (relating to the keeping and form of the register-book) by the Indian Christian Marriage Act (1872) Amendment Act (II of 1891), section 4.

<sup>2</sup>For notifications issued under the powers conferred by this section in—(1) Assam, see *Assam Gazette*, 1901, Pt. II, p. 397; (2) Bengal, see Ben. R. & O.; (3) Burma, see Bur. R. M.; (4) the Central Provinces, see C. P. R. & O.; (5) Punjab, see Pun. R.

& O.; (6) the United Provinces of Agra and Oudh, see North-Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894, p. 42. For notifications in the United Provinces of Agra and Oudh, under the powers conferred by sections 62, 6, 7, 9, 82, 83 and 85, see North-Western Provinces and Oudh Lists of Local Rules and Orders, Ed. 1894, p. 42.

<sup>3</sup>Substituted by A.O., 1937.

<sup>4</sup>Act XXV of 1864 was repealed by Act V of 1865, which was repealed by this Act.



## PART VII.

## PENALTIES.

False oath, declaration,  
notice or certificate for pro-  
curing marriage.

<sup>1</sup>[66. Whoever, for the purpose of procuring a marriage or licence of marriage, intentionally,—

(a) where an oath or declaration is required by this Act, or by any rule or custom of a Church according to the rites and ceremonies of which a marriage is intended to be solemnized, such Church being the Church of England or of Scotland or of Rome, makes a false oath or declaration, or,

(b) where a notice or certificate is required by this Act, signs a false notice or certificate,

shall be deemed to have committed the offence punishable under section 193 of the Indian Penal Code with imprisonment of either description for a term which may extend to three years and, at the discretion of the Court, with fine.]

67. Whoever forbids the issue, by a Marriage Registrar, of a certificate, by falsely representing himself to be a person whose consent to the marriage is required by law, knowing or believing such representation to be false, or not having reason to believe it to be true, shall be deemed guilty of the offence described in section 205 of the Indian Penal Code.

Forbidding, by false per-  
sonation, issue of certificate  
by Marriage Registrar.

<sup>2</sup>[68. Whoever, not being authorized by section 5 of this Act to solemnize marriages solemnizes or professes to solemnize in the absence of a Marriage Registrar of the district in which the ceremony takes place, a marriage between persons one or both of whom is or are a Christian or Christians, shall be punished with imprisonment which may extend to ten years, or (in lieu of a sentence of imprisonment for seven years or upwards) with transportation for a term of not less than seven years, and not exceeding ten years,

or, if the offender is an European or American, with penal servitude according to the provisions of Act XXIV of 1855 (*to substitute penal servitude for the punishment of transportation in respect of European and American convicts* \* \* \*),

and shall also be liable to fine.]

69. Whoever knowingly and wilfully solemnizes a marriage between persons one or both of whom is or are a Christian or Christians, at any time other than between the hours of six in the morning and seven in the evening, or in the absence of at least two credible witnesses other than the person solemnizing the marriage, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

Solemnizing marriage out  
of proper time, or without  
witnesses.

## LEG. REF.

<sup>1</sup> This section was substituted for the original section 66 by Act II of 1891, section 5.

<sup>2</sup> This section was substituted for the original section 68 by Act II of 1891, section 6.

<sup>3</sup> The words "and to amend the law relating to the removal of such convicts" were repealed by the Repealing and Amending Act (XII of 1891).

## NOTES.

SECS. 66 AND 68.—See 16 A. 212; 40 A. 393; 14 M. 342; 17 M. 391; 18 M. 230; 19 M. 273; 20 M. 12; 6 Mad. H. C. Rep. Ap. 20. No one except a person who professes the Christian religion comes under section 68

of the Act. The mere fact that a person was baptized as an infant or that he is attending a Christian school or he is dressing as a Christian is not sufficient to treat him as such. There is no express prohibition preventing a person professing Christianity from doing violence to his faith and marrying a non-Christian, by a non-Christian ceremony. Section 68 does not make it penal for a Christian to marry by a ceremony which is void under section 4 of the Act, 40 A. 393. A Hindu by religion performing a marriage according to the Hindu mode between two persons one of whom is a Christian commits an offence under section 68. 40 M. 1030=33 M.L.J. 148.



This section does not apply to marriages solemnized under special licences granted by the Anglican Bishop of the Diocese or by his Commissary, nor to marriages performed between the hours of seven in the evening and six in the morning by a Clergyman of the Church of Rome, when he has received the general or special licence in that behalf mentioned in section 10.

<sup>1</sup>[Nor does this section apply to marriages solemnized by a Clergyman of the Church of Scotland according to the rules, rites, ceremonies and customs of the Church of Scotland.]

70. Any Minister of Religion licenced to solemnize marriages under this Act who, without a notice in writing, or, when one of the parties to the marriage is a minor, and the required consent of the parents or guardians to such marriage has not been obtained, within fourteen days after the receipt by him of notice of such marriage, knowingly and wilfully solemnizes a marriage under Part III, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

Issuing certificate, or marrying without publication of notice;

71. A Marriage Registrar under this Act, who commits any of the following offences:—

(1) knowingly and wilfully issues any certificate for marriage, or solemnizes any marriage, without publishing the notice of such marriage as directed by this Act;

(2) <sup>2</sup>[after the expiration of two months after the copy of the notice has been entered as required by section 40 in respect of any marriage, solemnizes such marriage;]

(3) solemnizes, without any order of a competent Court authorizing him to do so, any marriage, when one of the parties is a minor, before the expiration of fourteen days after the receipt of the notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Senior Marriage Registrar of the district if there be more Marriage Registrars of the district than one, and if he himself be not the Senior Marriage Registrar;

(4) issues any certificate the issue of which has been prohibited, as in this Act provided, by any person authorized to prohibit the issue thereof,

shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to fine.

Issuing certificate after expiry of notice, or in case of minor, within fourteen days after notice, or against authorized prohibition.

72. Any Marriage Registrar knowingly and wilfully issuing any certificate for marriage after the expiration of <sup>3</sup>[two months] after the notice has been entered by him as aforesaid.

or knowingly and wilfully issuing, without the order of a competent Court authorizing him so to do, any certificate for marriage, where one of the parties intending marriage is a minor, before the expiration of fourteen days after the entry of such notice or any certificate the issue of which has been forbidden as aforesaid by any person authorized in this behalf.

shall be deemed to have committed an offence under section 166 of the Indian Penal Code.

#### LEG. REF.

<sup>1</sup> Last paragraph was added by section 7 of the Indian Christian Marriage Act (1872), Amendment Act (II of 1891).

<sup>2</sup> Clause (2) was substituted for the original

nal cl. (2) by Act II of 1891, section 8 (1).

<sup>3</sup> The words within brackets were substituted for the words "three months" by section 8 (2) of the Indian Christian Marriage Act, (1872), Amendment Act (II of 1891).



Persons authorized to solemnize marriage (other than Clergy of Churches of England, Scotland or Rome;

73. Whoever, being authorized under this Act to solemnize a marriage,

and not being a Clergyman of the Church of England, solemnizing a marriage after due publication of banns, or under a licence from the Anglican Bishop of the Diocese or a Surrogate duly authorized in that behalf,

or, not being a Clergyman of the Church of Scotland, solemnizing a marriage according to the rules, rites, ceremonies and customs of that church,

or, not being a Clergyman of the Church of Rome, solemnizing a marriage according to the rites, rules, ceremonies and customs of that church,

knowingly and wilfully issues any certificate for marriage under this Act or solemnizes any marriage between such persons as aforesaid, without publishing or causing to be affixed, the notice of such marriage as directed in Part III of this Act, or after the expiration of two months after the certificate has been issued by him;

issuing certificate or marrying, without publishing notice, or after expiry of certificate;

or knowingly and wilfully issues any certificate for marriage, or solemnizes a marriage between such persons when one of the persons intending marriage is a minor, before the expiration of fourteen days after the receipt of notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Marriage Registrar, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar of the district:

issuing certificate for, or solemnizing, marriage with minor, within fourteen days after notice.

or knowingly and wilfully issues any certificate the issue of which has been forbidden, under this Act, by any person authorized to forbid the issue;

issuing certificate authoriz- edly forbidden;

or knowingly and wilfully issues any certificate the issue of which has been forbidden, under this Act, by any person authorized to forbid the issue;

solemnizing marriage au- thorizedly forbidden.

or knowingly and wilfully solemnizes any marriage forbidden by any person authorized to forbid the same;

shall be punished with imprisonment for a term which may extend to four years and shall also be liable to fine.

74. Whoever, not being licensed to grant a certificate of marriage under

Unlicensed person grant- ing certificate pretending to be licensed.

Part VI of this Act, grants such certificate intending thereby to make it appear that he is so licensed, shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to fine.

<sup>1</sup>[Whoever, being licensed to grant certificates of marriage under Part VI of this Act, without just cause refuses, or wilfully neglects or omits, to perform any of the duties imposed upon him by that Part shall be punished with fine which may extend to one hundred rupees].

Destroying or falsifying register-books.

75. Whoever, by himself or another, wilfully destroys or injures any register-book or the counter-foil certificates thereof, or any part thereof or any

authenticated extract therefrom,

or falsely makes or counterfeits any part of such register-book or counterfoil certificates,

LEG. REF.

<sup>1</sup> The last paragraph of section 74 was added by section 9 of the Indian Christian Mar-

riage Act (1872), Amendment Act (II of 1891).



or wilfully inserts any false entry in any such register-book or counter-foil certificate or authenticated extract,

shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.

Limitation of prosecutions under Act.

76. The prosecution for every offence punishable under this Act shall be commenced within two years after the offence is committed.

## PART VIII.

### MISCELLANEOUS.

What matters need not be proved in respect of marriage in accordance with Act.

77. Whenever any marriage has been solemnized in accordance with the provisions of sections 4 and 5 it shall not be void merely on account of any irregularity in respect of any of the following matters, namely:—

(1) any statement made in regard to the dwelling of the persons married or to the consent of any person whose consent to such marriage is required by law:

(2) the notice of the marriage;

(3) the certificate or translation thereof:

(4) the time and place at which the marriage has been solemnized:

(5) The registration of the marriage.

78. Every person charged with the duty of registering any marriage, who discovers any error in the form or substance of any such entry may, within one month next after the discovery of such error, in the presence of the persons married, or, in case of their death or absence, in the presence of two other credible witnesses, correct the error, by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry, and add thereto the date of such correction, and such person shall make the like marginal entry in the certificate thereof.

And every entry made under this section shall be attested by the witnesses in whose presence it was made.

And in case such certificate has been already sent to the <sup>1</sup>[Registrar-General of Births, Deaths and Marriages] such person shall make and send in like manner a separate certificate of the original erroneous entry and of the marginal correction therein made.

Searches and copies of entries.

79. Every person solemnizing a marriage under this Act, and hereby required to register the same,

and every Marriage Registrar or <sup>1</sup>[Registrar-General of Births, Death and Marriages] having the custody for the time being of any register of marriages or of any certificate, or duplicate or copies of certificate, under this Act,

shall, on payment of the proper fees, at all reasonable times, allow searches to be made in such register, or for such certificate, or duplicate, or copies and give a copy under his hand of any entry in the same.

80. Every certified copy, purporting to be signed by the person entrusted under this Act with the custody of any marriage-register or certificate, or duplicate, required to be kept or delivered under this Act, of an entry of a marriage in such register, or of any such certificate

Certified copy of entry in marriage-register, etc., to be evidence.

### LEG. REF.

<sup>1</sup> The words within brackets were substituted for the words "Secretary to the Local

Government" by section 30 (b) of the Births, Deaths and Marriages Registration Act (VI of 1886).



or duplicate, shall be received as evidence of the marriage purporting to be so entered, or of the facts purporting to be so certified therein, without further proof of such register or certificate or duplicate or of any entry therein, respectively, or of such copy.

<sup>1</sup>[81. The Registrar-General of Births, Deaths and Marriages and the officers appointed under section 56 shall at the end of every quarter in each year, select, from the certificates of marriages forwarded to them respectively, during such quarter, the certificates of the marriages of which <sup>2</sup>[the Government by whom he was appointed] may desire that evidence shall be transmitted to England, and shall send the same certificates, signed by them respectively, to the Secretary of State for India.]

Provincial Government to prescribe fees.

82. Fees shall be chargeable under this Act for—

receiving and publishing notice of marriages;

issuing <sup>3</sup>[certificates for marriage] by Marriage Registrars, and registering marriages by the same;

entering protests against, or prohibitions of, the issue of <sup>4</sup>[certificates for marriage,] by the said Registrars:

searching register-books or certificates, or duplicates of copies thereof; giving copies of entries in the same under sections 63 and 79.

The Provincial Government shall fix the amount of such fees respectively, and may from time to time vary or remit them either generally or in special cases, as to it may seem fit.

83. The Provincial Government may make rules in regard to the disposal of the fees mentioned in section 82 the supply of register-books, and the preparation and submission of returns of marriages solemnized under this Act.

Power to make rules.  
Power to prescribe fees and rules for Indian States.  
Central Government.

84. The powers conferred on the Provincial Government by sections 82 and 83 [shall]<sup>5</sup> so far as regards <sup>2</sup>[Indian States] be exercised by the

Power to declare who shall be District Judge.  
be the District Judge.

85. The Provincial Government may, by notification in the official Gazette, declare who shall, in any place to which this Act applies, be deemed to

<sup>6</sup>[86. (1) The powers and functions exercisable by the [Central Government] under sections, 6, 8, 9, 47, 48, 56 and 84 shall, so far as regards any <sup>2</sup>[Indian State] which is within the political charge of a [Provincial Government] be [exercisable]<sup>2</sup> by that [Provincial Government].] The exercise under this section by any [Provincial Government] of

#### LEG. REF.

<sup>1</sup> Substituted by Act XIII of 1911, sec. 2, for the original section.

<sup>2</sup> Substituted by A.O., 1937.

<sup>3</sup> The words "certificates for marriage" were substituted for the words "certificate of marriages" by the Repealing and Amending Act (I of 1903), section 3 and Sch. II.

<sup>4</sup> The words within brackets were substituted for the words "marriage certificates" by the Repealing and Amending Act (I of 1903), section 3 and Sch. II.

<sup>5</sup> Substituted by A.O., 1937 for "may".

<sup>6</sup> Section 86 was substituted by Act XXXVIII of 1920, Sch. I.



powers and functions under sections 6, 8, 9 and 56 shall be by notification in the Official Gazette.

(2) The powers and functions exercisable under this Act by the [Central Government] may be delegated to, and exercised by, such officers as <sup>1</sup>[it] may from time to time appoint in this behalf.]

Saving of Consular marriages.

87. Nothing in this Act applies to any marriage performed by any Minister, Consul or Consular Agent between subjects of the State which he represents and according to the laws of such State.

Non-validation of marriages within prohibited degrees.

88. Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into.

### SCHEDULE I.

(See sections 12 and 38.)

#### NOTICE OF MARRIAGE.

To \_\_\_\_\_ a minister [or Registrar] of \_\_\_\_\_  
I hereby give you notice that a marriage is intended to be had, within three calendar months from the date hereof, between me and the other party herein named and described (that is to say):

Names.	Condition.	Rank or profession.	Age.	Dwelling place.	Length of residence.	Church, chapel or place of worship in which the marriage is to be solemnized.	District in which the other party resides, when the parties dwell in different districts.
<i>James Smith.</i>	<i>Widower.</i>	<i>Carpenter.</i>	<i>Of full age.</i>	<i>16, Clive Street.</i>	<i>23 days.</i>	<i>Free Church of Scotland Church, Calcutta.</i>	
<i>Martha Green,</i>	<i>Spinster.</i>	<i>..</i>	<i>Minor.</i>	<i>20, Hastings Street.</i>	<i>More than a month.</i>		

Witness my hand, this

day of

*seventy-two.*

(Signed) *JAMES SMITH.*

[The *italics* in this schedule are to be filled up as the case may be, and the blank division thereof is only to be filled up when one of the parties lives in another district.]

#### LEG REF.

<sup>1</sup>Substituted for "he" by A.O., 195.

#### NOTES.

SEC. 88.—The Christian Marriage Act is only concerned with the forms in which the marriage is to be solemnized and does not deal with objections to the validity of the marriage A Civil Marriage before a Re-

gistrar between persons professing the Roman Catholic religion is valid in law. Personal laws in section 88 includes any personal law apart from any personal law as to the form of the marriage, forbidding any of the parties to enter into a contract of marriage with one another. 32 Bom. L. R. 17=1930 Bom. 105.



## SCHEDULE II.

(See sections 24 and 50.)

## CERTIFICATE OF RECEIPT OF NOTICE.

I, \_\_\_\_\_, do hereby certify that, on the \_\_\_\_\_ day of \_\_\_\_\_, notice was duly entered in my Marriage Notice Book of the marriage intended between the parties therein named and described, delivered under the hand of \_\_\_\_\_ one of the parties (that is to say):—

Names.	Condition.	Rank or profession.	Age.	Dwelling place.	Length of residence.	Church, chapel, or place of worship in which the marriage is to be solemnized.	District in which the other party resides, when the parties dwell in different districts.
<i>James Smith.</i>	<i>Widower.</i>	<i>Carpenter.</i>	<i>Of full age.</i>	<i>16, Clive Street.</i>	<i>23 days.</i>	<i>Free Church of Scotland Church, Calcutta.</i>	
<i>Martha Green.</i>	<i>Spinster.</i>	<i>..</i>	<i>Minor.</i>	<i>20, Hastings Street.</i>	<i>More than a month.</i>		

and that the declaration, <sup>1</sup>[or oath] required by section 17 or 41 of the Indian Christian Marriage Act, 1872, has been duly made by the said (*James Smith*).

Date of notice entered } The issue of this certificate has not been prohibited by  
 Date of certificate given } any person authorized to forbid the issue thereof.  
 Witness my hand, this \_\_\_\_\_ day of \_\_\_\_\_ *seventy-two.*

(Signed).

This certificate will be void, unless the marriage is solemnized on or before the \_\_\_\_\_ day of \_\_\_\_\_

[The *italics* in the schedule are to be filled up, as the case may be, and the blank division thereof is only to be filled up when one of the parties lives in another district.]

## SCHEDULE III.

(See sections 28 and 31.)<sup>2</sup>

## FORM OR REGISTER OF MARRIAGES.

Quarterly Returns

of

MARRIAGES.

for

The Archdeaconry of

{ *Calcutta.*  
*Madras.*  
*Bombay.*

I, \_\_\_\_\_, Registrar of the Archdeaconry of { *Calcutta,*  
*Madras,*  
*Bombay,* } do hereby

certify that the annexed are correct copies of the originals and Official Quarterly Returns of

Marriage within the Archdeaconry of { *Calcutta,*  
*Madras,*  
*Bombay,* } as made and transmitted to me for

the quarter commencing the \_\_\_\_\_ day of \_\_\_\_\_ ending the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ of Our Lord,

## LEG. REF.

<sup>1</sup> These words were added by the Repealing and Amending Act (I of 1903), section 3.

<sup>2</sup> This reference was substituted for the original reference by Act XII of 1891, Second Schedule.



Registrar of the Archdeaconry of
 

[Signature of Registrar.]  
 Calcutta.  
 Madras.  
 Bombay.

MARRIAGES solemnized at
 

Allahabad,  
 Barrackpore,  
 Bareilly,  
 Calcutta, etc., etc.

WHEN MARRIED.			NAMES OF PARTIES.		Age.	Condition.	Rank or profession.	Residence at the time of marriage.	Father's name and surname.	By banns or licence.	Signatures of the parties.	Signatures of two or more witnesses present.	Signature of the person solemnizing the marriage.
Year.	Month.	Day.	Christian.	Surname.									

SCHEDULE IV.  
 (See sections 32 and 54.)  
 MARRIAGE REGISTER BOOK.

Number.	When married.			Names of Parties.		Age.	Condition.	Rank or profession.	Residence at the time of marriage.	Father's name and surname.
				Christian name.	Surname.					
	Day	Month.	Year.							
				James	White	26 years	Widower	Carpenter	Agra	William White,
				Martha	Duncan	17 years	Spinster	..	Agra	John Duncan

Married in the  
 This marriage was solemnized between us
 

James White,  
 Martha Duncan

 in the presence of us
 

John Smith  
 John Green

 CERTIFICATE OF MARRIAGE.

Number.	When married.			Names of parties.		Age.	Condition.	Rank or profession.	Residence at the time of marriage.	Father's name and surname.
				Christian name.	Surname.					
	Day	Month.	Year.							
				James	White	26 years	Widower	Carpenter	Agra	William White,
				Martha	Duncan	17 years	Spinster	..	Agra	John Duncan.



Married in the  
This marriage was solemn- { *James White,* } in the presence of us { *John Smith,* }  
nized between us { *Martha Duncan* } { *John Green* }

## SCHEDULE V.

## ENACTMENTS REPEALED.

(Repealed by Act I of 1938).

## THE CODE OF CIVIL PROCEDURE (V OF 1908).

## STATEMENTS OF REPEALS AND AMENDMENTS.

- S. 2 am., Act XXXV of 1934, S. 2, and Sch.; A.O., 1937.  
S. 5 rep. in part and am., Act XXXVIII of 1920, S. 2 and Sch. I; A.O., 1937.  
S. 7 am., Act I of 1926, S. 3.  
S. 8 am., Act I of 1914, S. 2; A.O., 1937.  
Ss. 10, 25 and 29 am., A.O., 1937.  
S. 29 am., Act XXXIV of 1940.  
S. 35-A inserted Act IX of 1922, S. 2.  
S. 43 am., A.O., 1937.  
S. 44 substituted A.O., 1937.  
S. 44-A inserted, Act VIII of 1937, S. 2.  
S. 45 substituted, A.O., 1937.  
S. 48 am., Act XXXIV of 1940.  
S. 51 am., Act XXI of 1936, S. 2.  
S. 54 am., A.O., 1937.  
S. 55 am., Act III of 1921, S. 2; A.O., 1937.  
Ss. 57 and 59 am., A.O., 1937.  
S. 60 am., Act X of 1914, S. 3 and Sch. II; Act XXXV of 1934, S. 2 and Sch.; Act IX of 1937, S. 2; A.O., 1937.  
S. 61 am., Act XXXVIII of 1920, S. 2 and Sch. I; A.O., 1937.  
S. 67 am., Act I of 1914, S. 3; Act XXXVIII of 1920, S. 2 and Sch. I; A.O., 1937.  
S. 68 am., Act XXXVIII of 1920, S. 2 and Sch. I; A.O., 1937.  
Ss. 70 and 73 am., Act XXXVIII of 1938, S. 2 and Sch. I; A.O., 1937.  
S. 78 am., Act X of 1932, S. 2; A.O., 1937.  
Part IV second heading am., A.O., 1937.  
S. 79 substituted, A.O., 1937.  
S. 80 am., A.O., 1937.  
S. 82, heading to Ss. 83, 84, 85, 86, 87, 92 and 93 am., A.O., 1937.  
S. 98 am., Act XVIII of 1928, S. 2 and Sch. I.  
S. 103 am., Act VI of 1926, S. 2.  
S. 104 am., Act IX of 1922, S. 3.  
S. 111 am., A.O., 1937.  
S. 111-A inserted, A.O., 1937.  
S. 116 am., A.O., 1937.  
S. 120 am., Act III of 1909, S. 127 and Sch. III.  
S. 122 am., Act XVIII of 1919, S. 2 and Sch.; Act XI of 1923, S. 3 and Sch. II; Act XXXII of 1925, S. 2 and Sch.; A.O., 1937.  
S. 123 am., Act XIII of 1926, S. 2 and Sch.; Act XVIII of 1919, S. 2 and Sch. I; Act XI of 1923, S. 3 and Sch. II; Act XXXII of 1925, S. 2 and Sch.; Act XXXIV of 1926, S. 2 and Sch.; A.O., 1937.  
S. 125 am., Act XXXVIII of 1920, S. 2 and Sch. I; A.O., 1937.  
S. 126 substituted, A.O., 1937.  
Ss. 127 and 129 am., A.O., 1937.  
S. 130 substituted, A.O., 1937.  
Ss. 131 and 133 am., A.O., 1937.  
S. 135-A inserted, Act XXIII of 1925, S. 3.  
S. 135-A am., A.O., 1937.  
Ss. 136 and 137 am., A.O., 1937.  
S. 138 am., Act IV of 1914, S. 2 and Sch.; A.O., 1937.  
S. 139 am., A.O., 1937.  
S. 143 am., Act XXXVIII of 1920, S. 2 and Sch. I; A.O., 1937.  
S. 156 rep., Act XVII of 1914, S. 3 and Sch. II. Sch. I, O. 3 am., Act XXII of 1926, S. 2. Sch. I, O. 5 am., Act XVII of 1914, S. 2 and Sch. I; Act X of 1927, S. 2 and Sch. I; Act XXXV of 1934, S. 2 and Sch.; A.O., 1937.  
Sch. I, O. 9 am., Act XXIV of 1920, S. 2.  
Sch. I, O. 21 am., Act XXIX of 1923, Ss. 2 and 3; Act XXI of 1936, Ss. 3 and 4; Act VIII of 1937, S. 3; A.O., 1937.  
Sch. I, O. 26 am., Act XXVI of 1939, Amending O. 21, R. 48; Act X of 1932, S. 3; A.O., 1937.  
Sch. I, O. 27, am., A.O., 1937.  
Sch. I, O. 28, am., Act X of 1927, S. 2 and Sch. I; Act XXXV of 1934, S. 2 and Sch.; A.O., 1937.  
Sch. I, O. 32 am., Act XVI of 1937, S. 2; A.O., 1937.  
Sch. I, O. 33 am., A.O., 1937.  
Sch. I, O. 34, am., Act XXI of 1929, Ss. 4, 5, 6 and 7.  
Sch. I, O. 37 am., Act XXX of 1926, S. 4; A.O., 1937.  
Sch. I, O. 38 am., Act I of 1926, S. 4.  
Sch. I, O. 41, am., Act IX of 1922, S. 4; A.O., 1937.  
Sch. I, O. 43, am., Act XVI of 1930, S. 2.  
Sch. I, O. 45 am., Act XXVI of 1920, Ss. 3 and 5; A.O., 1937.  
App. A am., A.O., 1937.  
App. B am., Act XXX of 1926, S. 4.  
App. D am., Act XXI of 1929, S. 8 and Sch.  
App. E am., Act X of 1914, S. 2 and Sch. I; A.O., 1937.  
App. F am., Act X of 1914, S. 2 and Sch. I. Sch. III am., A.O., 1937.  
Sch. V rep., Act XVII of 1914, S. 3 and Sch. II.



# CONTENTS.

## PRELIMINARY.

### SECTIONS.

1. Short title, commencement and extent.
2. Definitions.
3. Subordination of Courts.
4. Savings.
5. Application of the Code to Revenue Courts.
6. Pecuniary jurisdiction.
7. Provincial Small Cause Courts.
8. Presidency Small Cause Courts.

## PART I.

### SUITS IN GENERAL.

#### *Jurisdiction of the Courts and res judicata.*

9. Courts to try all civil suits unless barred.
10. Stay of suit.
11. *Res judicata*.
12. Bar to further suit.
13. When foreign judgment not conclusive.
14. Presumption as to foreign judgments.

#### *Place of suing.*

15. Court in which suits to be instituted.
16. Suits to be instituted where subject-matter situate.
17. Suits for immovable property situate within jurisdiction of different Courts.
18. Place of institution of suit where local limits of jurisdiction of Courts are uncertain.
19. Suits for compensation for wrongs to person or movables.
20. Other suits to be instituted where defendants reside or cause of action arises.
21. Objections to jurisdiction.
22. Power to transfer suits which may be instituted in more than one Court.
23. To what Court application lies.
24. General power of transfer and withdrawal.
25. Power of Provincial Government to transfer suits.

#### *Institution of Suits.*

26. Institution of suits.

#### *Summons and Discovery.*

27. Summons to defendants.
28. Service of summons where defendant resides in another province.
29. Service of foreign summonses.
30. Power to order discovery and the like.
31. Summons to witness.
32. Penalty for default.

#### *Judgment and Decree.*

33. Judgment and decree.

#### *Interest.*

34. Interest.

#### *Costs.*

35. Costs.
- 35-A. Compensatory costs in respect of false or vexatious claims or defences.

## PART II.

### EXECUTION.

#### *General.*

36. Application to orders.
37. Definition of Court which passed a decree.

### SECTIONS.

#### *Courts by which decrees may be executed.*

38. Court by which decree may be executed.
39. Transfer of decree.
40. Transfer of decree to Court in another province.
41. Result of execution proceedings to be certified.
42. Powers of Court in executing transferred decree.
43. Execution of decrees passed by British Courts in places to which this Part does not extend or in foreign territory.
44. Execution of decrees passed by Courts of Indian States.
- 44-A. Execution of decrees passed by Courts in the United Kingdom and other reciprocating territory.
45. Execution of decrees in foreign territory.
46. Precepts.

#### *Questions to be determined by Court executing decree.*

47. Questions to be determined by the Court executing decree.

#### *Limit of time for execution.*

48. Execution barred in certain cases.

#### *Transferees and legal representatives.*

49. Transferee.
50. Legal representative.

#### *Procedure in execution.*

51. Powers of Court to enforce execution.
52. Enforcement of decree against legal representative.
53. Liability of ancestral property.
54. Partition of estate or separation of share.

#### *Arrest and Detention.*

55. Arrest and detention.
56. Prohibition of arrest or detention of women in execution of decree for money.
57. Subsistence-allowance.
58. Detention and release.
59. Release on ground of illness.

#### *Attachment.*

60. Property liable to attachment and sale in execution of decree.
61. Partial exemption of agricultural produce.
62. Seizure of property in dwelling-house.
63. Property attached in execution of decrees of several Courts.
64. Private alienation of property after attachment to be void.

#### *Sale.*

65. Purchaser's title.
66. Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.
67. Power for Provincial Government to make rules as to sales of land in execution of decrees for payment of money.

#### *Delegation to Collector of power to execute decrees against immovable property.*

68. Power to prescribe rules for transferring to Collector execution of certain decrees.



## SECTIONS.

- 69. Provisions of Third Schedule to apply.
- 70. Rules of procedure.  
Jurisdiction of Civil Courts barred.
- 71. Collector deemed to be acting judicially.
- 72. Where Court may authorize Collector to stay public sale of land.

*Distribution of assets.*

- 73. Proceeds of execution-sale to be rateably distributed among decree-holders.

*Resistance to Execution.*

- 74. Resistance to execution.

## PART III.

## INCIDENTAL PROCEEDINGS.

*Commissions.*

- 75. Power of Court to issue commissions.
- 76. Commission to another Court.
- 77. Letter of request.
- 78. Commissions issued by foreign Courts.

## PART IV.

## SUITS IN PARTICULAR CASES.

*Suits by or against the Crown or Public Officers in their Official Capacity.*

- 79. Suits by or against the Crown.
- 80. Notice.
- 81. Exemption from arrest and personal appearance.
- 82. Execution of decree.

*Suits by Aliens and by or against Foreign Rulers and Rulers of Indian States.*

- 83. When aliens may sue.
- 84. When foreign States may sue.
- 85. Persons specially appointed by Government to prosecute or defend for Princes or Chiefs.
- 86. Suits against Princes, Chiefs, ambassadors and envoys.
- 87. Style of Princes and Chiefs as parties to suits.

*Interpleader.*

- 88. Where interpleader-suit may be instituted.

## PART V.

## SPECIAL PROCEEDINGS.

*Arbitration.*

- 89. Arbitration. [*Repealed by the Arbitration Act X of 1940.*]

*Special case.*

- 90. Power to state case for opinion of Court.

*Suits relating to Public Matters.*

- 91. Public nuisances.
- 92. Public charities.
- 93. Exercise of powers of Advocate-General outside Presidency-towns.

## PART VI.

## SUPPLEMENTAL PROCEEDINGS.

- 94. Supplemental proceedings.
- 95. Compensation for obtaining arrest, attachment or injunction on insufficient grounds.

## SECTIONS.

## PART VII.

## APPEALS.

*Appeals from Original Decrees.*

- 96. Appeal from original decree.
- 97. Appeal from final decree where no appeal from preliminary decree.
- 98. Decision where appeal heard by two or more Judges.
- 99. No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.

*Appeals from Appellate Decrees.*

- 100. Second appeal.
- 101. Second appeal on no other grounds.
- 102. No second appeal in certain suits.
- 103. Power of High Court to determine issues of fact.

*Appeals from Orders.*

- 104. Orders from which appeal lies.
- 105. Other orders.
- 106. What Courts to hear appeals.

*General Provisions relating to Appeals.*

- 107. Powers of Appellate Court.
- 108. Procedure in appeals from appellate decrees and orders.

*Appeals to the King in Council.*

- 109. When appeals lie to King in Council.
- 110. Value of subject-matter.
- 111. Bar of certain appeals.
- 111-A. Appeals to Federal Court.
- 112. Savings.

## PART VIII.

## REFERENCE, REVIEW AND REVISION.

- 113. Reference to High Court.
- 114. Review.
- 115. Revision.

## PART IX.

## SPECIAL PROVISIONS RELATING TO THE CHARTERED HIGH COURTS.

- 116. Part to apply only to certain High Courts.
- 117. Application of Code to High Courts.
- 118. Execution of decree before ascertainment of costs.
- 119. Unauthorized persons not to address Court.
- 120. Provisions not applicable to High Court in original civil jurisdiction.

## PART X.

## RULES.

- 121. Effect of rules in First Schedule.
- 122. Power of certain High Courts to make rules.
- 123. Constitution of Rule Committees in certain provinces.
- 124. Committee to report to High Court.
- 125. Power of other High Courts to make rules.
- 126. Rules to be subject to approval.
- 127. Publication of rules.
- 128. Matters for which rules may provide.
- 129. Power of Chartered High Courts to make rules as to their original civil procedure.



SECTIONS.

- 130. Powers of other High Courts to make rules as to matters other than procedure.
- 131. Publication of rules.

PART XI.

MISCELLANEOUS.

- 132. Exemption of certain women from personal appearance.
- 133. Exemption of other persons.
- 134. Arrest other than in execution of decree.
- 135. Exemption from arrest under civil process.
- 135-A. Exemption of members of legislative bodies from arrest and detention under civil process.
- 136. Procedure where person to be arrested or property to be attached is outside district.
- 137. Language of subordinate Courts.
- 138. Power of High Court to require evidence to be recorded in English.
- 139. Oath on affidavit by whom to be administered.
- 140. Assessors in causes of salvage, etc.
- 141. Miscellaneous proceedings.
- 142. Orders and notices to be in writing.
- 143. Postage.
- 144. Application for restitution.
- 145. Enforcement of liability of surety.
- 146. Proceedings by or against representatives
- 147. Consent or agreement by persons under disability.

SECTIONS.

- 148. Enlargement of time.
- 149. Power to make up deficiency of court-fees.
- 150. Transfer of business.
- 151. Saving of inherent powers of Court.
- 152. Amendment of judgments, decrees or orders.
- 153. General power to amend.
- 154. Saving of present right of appeal.
- 155. Amendment of certain Acts.
- 156. *Repealed.*
- 157. Continuance of orders under repealed enactments.
- 158. Reference to Code of Civil Procedure and other repealed enactments.

SCHEDULES.

- THE FIRST SCHEDULE.—Rules of Procedure.
- Appendix A.—Pleadings.
- Appendix B.—Process.
- Appendix C.—Discovery Inspection and Admission.
- Appendix D.—Decrees.
- Appendix E.—Execution.
- Appendix F.—Supplemental Proceedings.
- Appendix G.—Appeal, Reference and Review
- Appendix H.—Miscellaneous.
- THE SECOND SCHEDULE.—Arbitration. *Repealed.*
- Appendix.—Forms. *Repealed.*
- THE THIRD SCHEDULE.—Execution of Decrees by Collectors.
- THE FOURTH SCHEDULE.—Enactments amended.
- THE FIFTH SCHEDULE.—*Repealed.*

THE CODE OF CIVIL PROCEDURE (V OF 1908).

[21st March, 1908.]

*An Act to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature.*

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature ; It is hereby enacted as follows :—

PRELIMINARY.

Short title, commencement and extent.

1. <sup>1</sup>(1) This Act may be cited as THE CODE OF CIVIL PROCEDURE, 1908.

LEG. REF.

<sup>1</sup> For Statement of Objects and Reasons, see Gazette of India, 1907, Pt. V, p. 179 ; for Report of Select Committee, see *ibid.*, 1908, Pt. V, p. 35 and for Proceedings in Council, see *ibid.*, 1907, Pt. VI, p. 135 and *ibid.*, 1908, pp. 8, 12 and 212.

For portion of the Civil Procedure Code extended to the Presidency Small Cause Court, Calcutta, see Calcutta Gazette, 1910, Pt. I, p. 814, Schedule A to Rules of Practice.

The Act has been extended by notification under Ss. 5 and 5-A of the Scheduled Districts Act, 1874, (XIV of 1874), to the following Scheduled Districts :—

(1) The Districts of Jalpaiguri, Cachar (excluding the North Cachar Hills), Sylhet, Goalpara (including the Eastern Duars), Kamrup, Darrang, Nowgong (excluding the Mikir Hill Tracts), Sibsagar (excluding the Mikir Hill

NOTES.

SEC. 1 : CODE.—The object of codification of any branch of law is that on any point specifically dealt with in that Code, the law should, thenceforward be ascertained by interpreting the language used therein, and not by a search among the authorities to discover as to what may be the law as laid down in prior decisions. 23 C. 563=6 M.L.J. 71=23 I.A. 18 (P.C.) ; 28 C. 517.

CONSOLIDATE.—The object of consolidation is to gather and bring up to date the statutory law relating to any particular subject, so that it may serve as a useful Code applicable to the circumstances existing at the time when the consolidating Act is passed. 22 C. 788=22 I.A. 107 (P.C.).

SCOPE.—This Code is intended mainly to regulate procedure in Civil Court ; it is not primarily intended to create new rights or



(2) It shall come into force on the first day of January, 1909.

(3) This section and sections 155 to 158 extend to the whole of British India : the rest of the Code extends to the whole of British India, except the Scheduled Districts.

#### LEG. REF.

Tracts) and Lakhimpur (excluding the Dibrugarh Frontier Tracts), Gazette of India, 1909, Pt. I, p. 5 and Gazette of India, 1914, Pt. I, p. 1690.

(2) The Province of Sind, Bombay Government Gazette, Extraordinary, 1909, Pt. I, and Gazette of India, 1909, Pt. I, p. 32.

(3) The Districts of Darjeeling and the Districts of Hazaribagh, Ranchi Palamau and Manbhum in Chota Nagpur, Calcutta Gazette, 1909, Pt. I, p. 25 and Gazette of India, 1909, Pt. I, p. 33.

(4) The Province of Kumaun and Garhwal and the Tarai Parganas with modifications, United Provinces Gazette, 1909, Pt. I, p. 3 and Gazette of India, 1909, Pt. I, p. 31.

(5) The Pargana of Janswar Bawar in Dehradun and the Scheduled portion of the Mirzapur District, United Provinces Gazette, 1909, Pt. I, p. 4, and Gazette of India, 1909, Pt. I, p. 32.

(6) Coorg, Gazette of India, 1909, Pt. I, p. 32.

(7) Scheduled Districts in Punjab, Gazette of India, 1909, Pt. I, p. 33.

(8) The Districts of Peshawar, Hazara, Kohat, Bannu, Dera Ismail Khan, composing the North West Frontier Province, Gazette of India, 1909, Pt. II, p. 80.

(9) Sections 36 to 43 to all the Scheduled Districts in Madras, Gazette of India, 1909, Pt. I, p. 152.

(10) To the Scheduled Districts of the Central Provinces, except so much as is already in force and so much as authorizes the attachment and sale of immovable property in execution of a decree not being a decree directing the sale of such property, Gazette of India, 1909, Pt. I, p. 239.

(11) To Ajmer-Merwara, except Ss. 1 and 155 to 158, Gazette of India, 1909, Pt. II, p. 480.

(12) To Pargana Dhalbhum, the Municipality of Chaibassa in the Kolhan and the Porahat Estate in the District of Singhbhum, Calcutta Gazette, 1909, Pt. I, p. 453 and Gazette of India, 1909, Pt. I, p. 443.

Under S. 3 (3) (a) of the Sonthal Parganas Settlement Regulation (III of 1872), Ss. 38 to 42 and 156 and Rr. 4 to 9 in Order XXI in the first Schedule have been declared in force in the Sonthal Parganas and the rest of the Code for the trial of suits referred to in S. 10 of the Sonthal Parganas Justice Regulation, 1893 (V of 1893), Calcutta Gazette, 1909, Pt. I, p. 45 ; and the whole Code in the Angul District under S. 3 of the Angul Laws Regulation, 1936 (V of 1936).

It has been declared in force in British Baluchistan under S. 3 of the Baluchistan Laws Regulation, 1913 (II of 1913), Bal. Code.

It has been declared in force in Panth Piploda Reg. I of 1929, S. 2.

It has been declared in force in the District of Khondmals by Reg. IV of 1936, S. 3 and Sch.

#### NOTES.

take away existing ones. 13 L. 618=1932 L.

401 ; 1930 R. 317=128 I.C. 382. The Code is not exhaustive. An equitable set-off can be claimed independently of the specific provisions of this Code. 1930 A. 875=128 I.C. 763. There is no provision in this Code for making a counter-claim although a set-off is permitted to a defendant. 32 Bom.L.R. 212=1930 B. 216. But this Code is to be deemed exhaustive on points specifically dealt with therein. See 24 M.L.J. 235 ; 10 C.L.J. 527. Where there is no specific provision in the Code it is the duty of the Court to act according to justice, equity and good conscience and to decide the point upon general principles. 2 Pat.L.J. 306=39 I.C. 779 ; 33 C. 927 ; 2 P.L.T. 240=61 I.C. 922 ; 1 L. 339=58 I.C. 748 ; 36 C. 193=1 I.C. 913 ; 33 C. 1094=10 C.W.N. 719. A Court passing any order with jurisdiction to pass the same, has an inherent power to order that the same be carried into effect. 2 Pat.L.J. 361=39 I.C. 763.

OPERATION.—As the Code deals with procedure only it applies to all actions pending as well as future, in accordance with the general principle that alterations in procedure have always retrospective operation, unless there are good reasons for the contrary. 8 B. 511 ; 12 C. 583 ; 21 B. 822 ; 19 B. 204 ; 21 C. 940 ; 27 M. 538 ; 14 M.L.J. 340 ; 7 I.C. 11 ; 9 I.C. 815. See also 19 C.L.J. 545 ; 1931 A. 735 ; 1930 C. 34=56 C. 1117 ; 8 Luck. 504=1933 O. 274 ; 1930 A. 706. Where a suit was filed when the Code of 1882 was in force but the same was decreed after the new Code took effect and the question of substitution of heirs was raised, the procedure under the new Code was held applicable. 57 C. 148=1930 C. 422=124 I.C. 817. But change of law cannot annul decree already obtained under the old procedure. 34 B. 260 at p. 266 ; 1925 N. 377 ; 1930 L. 1044. Nor can an appellate Court reverse an order of the Court of first instance because a different rule has been enacted since then. 12 I.C. 553=(1911) 2 M.W.N. 386. See also 36 A. 350 (P.C.). The coming into force of this Code was deferred by Cl. (2), to a long period, with a view to enable persons who had rights under the old Code to have them enforced before this Code came into operation. 40 C. 704. Also S. 154 expressly preserves the right of appeal which shall have accrued to any party at the commencement of this Code.

APPLICATION.—The Code is inapplicable to Village Munsif's Courts. 29 M.L.J. 474 ; 1930 M. 795. The provisions of the Code do not apply *en bloc* to proceedings in Revenue Courts. 48 I.C. 119=21 O.C. 220. See 21 C. 428 ; 14 Bom.L.R. 947. As to applicability of the Code to proceedings under Agra Tenancy Act, see 1938 A.L.J. 63 ; to proceedings under Probate and Administration Act, see 20 I.C. 281=6 Bur.L.T. 87. A Municipal election tribunal should be guided wherever possible by the provisions of this Code. 91 I.C. 450=



Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "Code" includes rules :

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the

## NOTES.

1926 M. 1043 (F.B.). In cases where the Cr. P. Code prescribes no procedure a magistrate may well follow procedure laid down in this Code (as in proceedings under S. 202, Cr. P. Code). 52 C. 670=29 C.W.N. 817=88 I.C. 862. The Code is not applicable to proceedings before the Controller of Accounts under the Patents and Designs Act. But the principles underlying the Code in so far as they are principles of natural justice must be followed by him, as they must be observed by all authorities exercising judicial or quasi-judicial functions. 61 C. 450=38 C.W.N. 729=1934 C. 725.

CONSTRUCTION.—What the law was prior to the Act being enacted, is immaterial for the purpose of construing the Act. 6 M.L.J. 71=23 C. 563=23 I.A. 18 (P.C.). It is not right to interpret the Code of 1908 with reference to the Codes of 1859 and 1882. 5 Luck. 552=1930 O. 148 (F.B.). See also 1931 A. 735; 19 I.C. 793. Where the intention of the legislature is apparent in the Act itself, and the language of the Act is sufficiently flexible, a construction favourable to that intention should be adopted in preference to a strictly literal construction of the words used in the Act. 21 A. 391. The following should not be made to prevail in the matter of construing an Act. (i) Proceedings in the legislature. 22 C. 788=22 I.A. 107 (P.C.); 18 B. 133; but see 33 M.L.J. 591 (593) and 2 C.L.J. 546 (553). (ii) Marginal notes. 26 A. 393=8 C.W.N. 699=31 I.A. 132 (P.C.); 23 C. 55; 25 C. 862=2 C.W.N. 577. (iii) illustrations to sections. 21 C.W.N. 257=39 I.C. 401=43 I.A. 256 (P.C.); 32 M.L.J. 347; 49 M. 728 (F.B.). (iv) Forms given in the Schedule. 21 C.W.N. 1147=40 I.C. 816; 22 I.C. 690. See also 29 M.L.J. 766. (v) As to by-laws and rules framed under an enactment, see 1921 O. 121.

DIVISION OF THE CODE INTO SECTIONS, RULES AND SCHEDULES—RULES OF CONSTRUCTION.—The body of the Code creates jurisdiction and the rules indicate the mode in which that jurisdiction is to be exercised and they must be read together. 44 C. 929 (F.B.); 41 C. 108. See also 43 C. 148. In case of conflict between the body of the Code and the schedules, the former should prevail. I.L.R. (1939) N. 250 (F.B.)=1939 N.L.J. 228=1939 N. 186. Provisions of this Code and of the Limitation Act are to be read and interpreted together. See 85 I.C. 29=6 Pat.L.T. 729; I.L.R. (1939) A. 647=182 I.C. 242=1939 A. 403.

JUDICIAL DISCRETION.—Where the Code leaves certain matters to the discretion of Courts, such discretion should be exercised in accordance with judicial principles and be guided by justice and equity and must not be exercised arbitrarily and in a vague or fanciful manner. 9 R. 281=1931 R. 194; 1924 B. 1=48 B. 87 (F.B.); 5 C. 259.

"BRITISH INDIA."—For definition of, see S. 3,

Cl. 17 of the General clauses Act. 'British India' includes also Cantonment of Wadhwan. 9 B. 244. The Code does not apply to Agency Tracts. 13 M.L.J. 15; nor to tributary mahals of Orissa. 29 C. 400. As to application of Code to Sonthal Parganas, see 18 C. 133; 42 C. 116 (P.C.). For a list of Scheduled Districts, see Schedule I to the Scheduled Districts Act (XIV of 1874). Under the powers conferred by S. 5 of the said Act, the Code has been extended to several Scheduled Districts, including Sind, Ajmer, Merwara and the Scheduled Districts of the Punjab.

FOREIGNERS.—Code extends to the whole of British India and foreigners are not excepted from the jurisdiction of British Indian Courts. 49 A. 669=25 A.L.J. 356, following 22 C. 222 (P.C.).

SEC. 2 : "UNLESS THERE BE SOMETHING REPUGNANT IN THE SUBJECT OR CONTEXT."—These words have been inserted with a view to enable anomalies being avoided in cases where a strict adherence to the definitions contained in the Code would involve such anomalies. 46 B. 990=24 Bom.L.R. 496=1923 B. 26.

SEC. 2 (2) : DECREE.—'FORMAL EXPRESSION OF AN ADJUDICATION.'—Unless and until a decree is formally drawn up in terms of the judgment there can be neither appeal nor execution. 15 I.C. 935=8 N.L.R. 22; 34 B. 182=4 I.C. 829; 37 B. 480=19 I.C. 894. See also 25 Bom.L.R. 826=76 I.C. 763 and 76 I.C. 1014=1924 B. 33. Misdescription of a decision as an order, while in fact it amounts to a decree, does not make the decision any the less a decree. 54 M. 337=1931 M. 471=60 M.L.J. 167. See also 62 I.C. 467; 26 N.L.R. 24=1930 N. 122.

"MATTERS IN CONTROVERSY IN THE SUIT."—The expression must not be understood as relating solely to the merits of the case. It would cover any question relating to the character and status of a party suing, to the jurisdiction of the Court, to the maintainability of a suit and to other preliminary matters which necessitate an adjudication before a suit is enquired into. It does not include proceedings preliminary to institution of a suit. (e.g.,) an application for leave to sue as a pauper and proceedings passed in execution as well as orders granting day costs. 2 L.W. 519=29 I.C. 393, nor an order of punishment for contempt. 27 A. 380. See also I.L.R. 1940 Mad. 3. Application after preliminary and before final decree in partition suit, asking for allotment of certain properties alienated *pendenti lite* by the respondent to his share is not one relating to "matters in controversy in suit." and hence its rejection is not a decree. 50 L.W. 541=1939 M. 897. The term 'suit' does not include an application under S. 72, C. P. Code, and an order under the section is not a decree. 1 Pat.L.T. 296=57 I.C. 421.

WHAT ARE DECREES.—The decision of a



parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144, but shall not include—

## NOTES.

District Court on appeal that the Court below has no jurisdiction, is a decree. 54 I.C. 749=11 L.W. 3. Revisional order passed by High Court. 148 I.C. 893=1934 A.L.J. 552=1934 A. 134. A decision as to possession in a suit for possession and mesne profits is a preliminary decree. 25 I.C. 435=19 C.L.J. 346. Final decree in mortgage suit is decree. 39 C.W.N. 1284. Where one issue is settled and the case remanded to the lower Court for the determination of another issue, the order is a decree. 45 I.C. 100=3 Pat.L.J. 99. An order of abatement of a suit is a decree. 45 C. 94=33 M.L.J. 486=44 I.A. 218 (P.C.); 1 L. 493=57 I.C. 137; 34 I.C. 822=128 P.R. 1916 (F.B.). So also order that appeal or cross-objection has abated. 1938 N.L.J. 399. A formal order recognizing the abatement which is an accomplished fact, is not a decree. 38 M.L.J. 266 (abatement owing to the cause of action not surviving). Order rejecting plaint. 151 I.C. 696=59 C.L.J. 250=1934 C. 623. As to order dismissing appeal under O. 41, R. 11, see 30 C.W.N. 334=93 I.C. 909=1926 C. 638. Order refusing to admit appeal as time barred is decree. 30 C.W.N. 926=1926 C. 1105. See also 14 Pat.L.T. 609=1933 P. 498 (incidental decision as to limitation in an application for restitution under S. 144). Order rejecting memo of appeal for insufficiency in Court-fee without giving time to make it up. 17 Pat. 687=178 I.C. 150=1939 Pat. 83. Order rejecting application for leave to appeal *in forma pauperis* is decree. 42 L.W. 831=159 I.C. 718=69 M.L.J. 781. Finding in a remand judgment clearly adjudicating rights of parties is a decree. 105 I.C. 567. An order limiting the right of the decree-holder to recover mesne profits for a certain period. 1928 I.C. 804=115 I.C. 591. An order determining the period within which compensation shall be payable. 7 P. 491=1928 P. 565=113 I.C. 577. Finding on the question of liability in a suit for contribution. 148 I.C. 1052=11 O.W.N. 606=1934 O. 337. An order dismissing a suit on the ground that the right to sue had come to an end and that the suit had abated under O. 222, R. 1, C. P. Code. 3 Luck. 628. Order dismissing application by legal representative to be brought on record. 36 P.L.R. 359=1935 L. 47. The order for staying execution of a decree till the decision of the appeal as it conclusively determines the right of the decree-holder to reap the fruits of his decree. 1930 L. 187. But see 1931 A. 129 (2). Order striking off name of a party is a decree. 53 A. 466. So are orders, prescribing the mode of selling mortgaged properties, 53 A. 391, providing for payment of costs to solicitor of party, 1932 B. 378, dismissing application for final decree in mortgage suit, 1932 L. 214. Order refusing personal relief under O. 34, R. 6. 1933 A.L.J. 738=1933 A. 429. Order dismissing appeal as withdrawn. 56 M. 520=1933 M. 442=64 M.L.J. 695. Order dis-

missing cross-objections. 1933 L. 961. Order refusing interest *pendente lite*. 14 Pat.L.T. 133=1933 P. 207. Order passed under S. 144 is decree. 1935 A.L.J. 995=158 I.C. 908=1935 A. 873; 1936 C. 812=41 C.W.N. 182. Decree containing adjudications regarding several items—Each adjudication is a decree. 55 A. 672=1933 A.L.J. 1425=1933 A. 473.

WHAT ARE NOT DECREES.—An order granting leave to sue under S. 18 of the Religious Endowments Act is not a decree. 34 C. 584. Order passed by District Judge under S. 84 (2) of that Act 1935 M. 373=58 M.L.J. 423. See also 11 M. 26 (35)=14 I.A. 160. Order of District Judge setting aside rejection of plaint. 152 I.C. 241=1934 Pesh. 88; also an order rejecting an application for leave to sue as a pauper. 21 A. 133. Order passed on application for directions under S. 34, Trusts Act. 11 O.W.N. 1533=1935 O. 72; also an order under Trusts Act refusing to remove a trustee, 19 A. 131; also an order under S. 4 of the Bengal Regulation, V of 1799. 9 I.C. 994=18 C.L.J. 877. Order as to costs in application for transfer under S. 15 of the Upper Burma Civil Court Regulation, 44 I.C. 690=(1917) 3 U.B.R. 61; also an order raising attachment of a residential house of the insolvent in insolvency proceedings under the special provisions of the Punjab Laws Act, 67 I.C. 794=3 Lah.L.J. 338. So also order on a proceeding before the manager dealing with a claim under the Chota Nagpur Encumbered Estates Act. 16 Pat.L.T. 693=158 I.C. 324=1935 P. 515. An order overruling a plea against the maintainability of a suit. 33 I.C. 664=9 Bur.L.T. 195; also a decision in plaintiff's favour on an issue as to his *locus standi* to sue, 20 C.L.J. 476=27 I.C. 317=19 C.W.N. 755; order or remand, 7 Pat.L.T. 535=97 I.C. 105=1926 P. 457. See also 144 I.C. 129=1934 A. 261; 14 Pat.L.T. 735; 37 C.W.N. 1084. A decision on a preliminary issue such as limitation and *res judicata* merely enabling the plaintiff to go on with the suit is not a preliminary decree. 36 I.C. 431=9 Bur.L.T. 119; 21 I.C. 387=18 C.L.J. 48. See also 39 I.C. 100=7 P.R. 1917; 15 I.C. 566=10 A.L.J. 78; 39 B. 421; 15 I.C. 536=16 P.R. 1913. But see 97 I.C. 780=1926 Lah. 638. Order directing drawing up of final decree. 57 M. 437=1934 M. 193=66 M.L.J. 178. Order refusing to pass final decree in mortgage suit. 13 P. 379=149 I.C. 40=1934 P. 225. An order appointing a Commissioner to take accounts is not a decree. 38 B. 302=16 Bom.L.R. 206. Order referring a partnership suit to the Official Referee for determining shares is neither a decree nor a 'judgment.' 73 I.C. 903. An order granting leave to withdraw a suit with permission to sue again is not a decree. 65 C. 719=1922 L. 267; 51 M. 664=55 M.L.J. 345=1928 M. 416; 51 I.C. 766; 11 I.C. 830; 51 I.C. 69=6 O.L.J. 151 (order also directing payment of costs by plaintiff); 17 A. 97; 18 C. 322; 27 C. 362; 15 B. 370. But an order allowing a party to withdraw a



## NOTES.

partition suit after a preliminary decree affects the rights of the parties and is appealable as a decree. 1912 M.W.N. 494=14 I.C. 259. An order declaring that an appeal has abated is not a decree. 20 A.L.J. 214=65 I.C. 838 (14 A. 172, Foll.). Neither order of original Court returning plaint under O. 7, R. 10, nor decision of appellate Court on appeal from such order is decree. 33 A. 479; 1925 B. 431; 158 I.C. 252=1935 M. 574. Order of amendment of decree made under Ss. 151 and 152 of the Code. 41 Bom.L.R. 800=184 I.C. 775=1939 B. 389. A decision on an application to file a private award is not a decree. 66 P.R. 1915=31 I.C. 80. See also 9 L. 380=107 I.C. 756=1928 L. 137. Also an order overruling objections to an award. 1 P.L.R. 1911=9 I.C. 385. Also an order filing or refusing to file an award. 110 I.C. 302=1929 L. 367. An order of dismissal of suit as against minor defendants on the ground that the plaintiff had not taken steps to appoint a Court-guardian does not amount to a decree. 33 C.W.N. 742=1929 C. 669. So also order refusing to stay execution is not a decree. 122 I.C. 182=1930 A. 121 (1); 141 I.C. 841=29 N.L.R. 121=1933 N. 84; 40 Bom.L.R. 1198=1939 B. 65. Also order passed when the existence of the decree itself is denied is not a decree. 1931 A. 490=1931 A.L.J. 715 (F.B.). So are orders refusing to accept security (32 P.L.R. 806), orders in furtherance of scheme decree. (1931 A. 765). See also 73 C.L.J. 532; 11 O.W.N. 1533; orders rejecting appeal memo. for deficient Court-fee. 59 C. 388=163 I.C. 462; 1936 Pesh. 140. Order holding that Court-fee paid was correct is not decree. 63 C.L.J. 16=1936 C. 784. Opinion pronounced by a Judge on a reference by Registrar under Cl. 26, R. 50, Original Side Rules (Calcutta High Court) is not decree. 40 C.W.N. 1264. So also order directing an execution case to be dismissed for non-prosecution. 162 I. C. 777=1936 C. 267. Also order in execution giving leave to decree-holder to amend execution petition. 44 L.W. 99=1936 M. 623=71 M.L.J. 256.

"CONCLUSIVELY DETERMINES."—To constitute a decree, there must be final adjudication. No particular form is necessary. 16 I.C. 45=1912 M.W.N. 1122. See also 1940 N.L.J. 663. If a decision really determines the rights of the parties fully and finally, it is in the eye of the law a decree and as such appealable even though the Court giving the decision has not formally embodied its result in the form of a decree. 26 N.L.R. 24=1930 N. 122; 54 M. 337=33 L.W. 143=1931 M. 471=60 M.L.J. 167. A conditional decree in pre-emption suit ordering possession on payment of certain sum to vendee within a fixed time and providing for dismissal of suit on default, is a decree, and not subsequent order dismissing the suit for non-payment. 41 P.L.R. 381=1939 L. 376. Decree becomes final when there is no appeal and appeal time expires. 86 I.C. 957=47 A. 533=1925 A. 291. An order disposing of the defendant's claim to set-off is not a decree; the decision could be attacked in an appeal against the final order. 39 I.C. 508=62 P.R. 1917. Regarding decisions upon preliminary

issues in a case, such as misjoinder, limitation and jurisdiction, see 39 B. 339 (F.B.). See also 1941 O.W.N. 957; 1941 Nag. 84. As to when a decision whether plaintiff is an agriculturist under the Dekkhan Agriculturists' Relief Act, 1879, amounts to a decree. See 12 Bom.L.R. 762; 39 B. 422. An interlocutory order accepting security for stay of execution proceedings is not a decree. 41 C. 160=20 I.C. 72=17 C.W.N. 1240; also an order directing assessment of mesne profits, 15 I.C. 573; Also order rejecting application under O. 20, R. 12, as to future mesne profits left open in the decree in the suit, 1939 M. 667=(1939) 2 M.L.J. 356. Also an order refusing leave to bid, to a decree-holder under O. 21, R. 72. 38 C. 717. Also an order under S. 148 extending time. 35 A. 582. Also an order directing partition in a particular manner passed after the confirmation in appeal of a preliminary decree for a partition and before the final decree. 35 A. 159. See also I.L.R. (1940) Mad. 394. Also an order giving directions to the commissioner appointed subsequent to the preliminary decree to take accounts in partnership suit. 107 I.C. 214=1928 Sind 100; 1929 L. 699=120 I.C. 429. Also an order extending time for payment of mortgage money under a decree. 39 M. 876=29 M.L.J. 708. But see 14 A. 520; 1940 Rang.L.R. 72; also an order disallowing interrogatories. 58 I.C. 721=14 S.L.R. 28.

"RIGHTS OF PARTIES."—The words mean rights of parties *inter se* in the subject-matter of the suit. 13 I.C. 800=82 P.R. 1911. It includes general rights, such as those relating to status, jurisdiction, limitation, frame of suits, accounts, etc., which if decided must have a general effect upon the proceedings in the suit. 38 B. 392=23 I.C. 889=16 Bom.L.R. 206; 2 L.W. 519; 29 I.C. 393. See also 1941 Pat. 108. The word "parties" includes only those that are joined as plaintiffs or defendants. 20 I.C. 898=16 O.C. 350. The determination of the right of one party to an account is a decree. 40 I.C. 579=3 Pat.L.J. 67 [23 A. 152 (P.C.), Foll.] Also an order striking out the name of a defendant and dismissing suit as against him. 42 M. 219=36 M.L.J. 169. Also an order finally deciding that a particular defendant is not liable for mesne profits. 1923 C. 308. Also an order dismissing an application for final decree for sale in a mortgage suit. 42 M. 52=35 M.L.J. 552=48 I.C. 298. See also 33 C.L.J. 115=59 I.C. 177=25 C.W.N. 595; 1932 L. 214. Also an order refusing to make a decree under O. 34, R. 6. 40 A. 553=47 I.C. 561=16 A.L.J. 488. But an order rejecting the application of one of two claimants not parties to suit is not a decree. 47 M.L.J. 3=1924 M. 813. An order rejecting an application to be added as a party to the suit is not a decree. 13 C. 100. Also order dismissing application to be brought on record as legal representative, 1 L. 493=57 I.C. 137; 20 I.C. 808=16 O.C. 350; 62 I.C. 303=17 N.L.R. 45 (a suit for declaration is not barred by the order). 38 I.C. 833=13 N.L.R. 32. But see 39 M.L.J. 218=58 I.C. 498=43 M. 812, where it has been held that such an order is an adjudication on the applicant's claim and hence is a decree.



## NOTES.

(42 M. 219, Appl., 39 M. 488, Dist.). Where one of several applicants was brought on record as legal representative, there is no abatement within the meaning of O. 43, R. 1 (k) nor any decree within the meaning of S. 2, Cl. (2). 1924 M. 622=46 M.L.J. 129. An order directing a surety to pay the debt of a judgment-debtor is not a decree except for purposes of an appeal under S. 145. 2 Pat.L.J. 197=39 I.C. 648. Order passed on application by surety for cancellation of surety bond. 55 A. 548=1933 A. 382. Conditional order of remand. 144 I.C. 129=1933 A. 261. *See also* 37 C.W.N. 1084=1933 C. 416; 14 P.L.T. 735.

**REJECTION OF PLAINT, ETC.**—(a) *What orders are decrees.*—Order rejecting plaint for non-payment of Court-fee is a decree. 67 I.C. 901 1941 N.L.J. 240. Also dismissal of suit for deficient Court-fee. 54 I.C. 733=22 O.C. 289; 1941 N.L.J. 260. Also rejection of plaint before registration of suit for non-payment of deficient Court-fee ordered to be paid. 62 C. 61=156 I.C. 126=1935 C. 336 (2). As to rejection of plaint where appellate Court has extended time for payment of deficient Court-fee and the same was paid within that time, *see* 1937 A.L.J. 1346=1938 A. 150. An order dismissing an appeal for deficiency in Court-fee is a decree. 15 N.L.R. 15=1922 N. 62. *See also* 63 I.C. 99=6 P.L.J. 625; 51 I.C. 114; 98 I.C. 663=1927 N. 100. Also an order rejecting an appeal memorandum. 16 M. 285; 22 M. 157; 190 I.C. 671. But *see* 59 C. 388. Also an order rejecting an appeal as time barred. 98 I.C. 748; 13 M.L.J. 300; 19 I.C. 931=17 C.W.N. 807. Order rejecting appeal for non-payment of additional Court-fee demanded is not a decree, I.L.R. (1938) Nag. 106 (F...B.)=1938 Nag. 122. But dismissal of appeal after deficient fee has been paid after limitation but within time extended by the Court is a decree, (1938) N.L.J. 155=177 I.C. 505=1938 Nag. 322. Order dismissing suit under O. 17, R. 3. 101 I.C. 618=1927 R. 148. As to rejection of appeal for failure to amend as directed, *see* 17 Pat. 245=1938 Pat. 461; Rejection of an application for a final decree for sale in a mortgage suit, is a decree and not an order under S. 47. 42 M. 52=35 M.L.J. 552; 1932 L. 214. *See also* 1941 N.L.J. 260 (Order dismissing suit for plaintiff's failure to furnish certain particulars to Court). 1941 P.W.N. 25 (Order dismissing suit as against some defendants for want of sanction of Provincial Government). As to order directing defaulting bidder to make good loss on resale, *see* 23 N.L.R. 14.

(b) *What orders are not decrees.*—But an order returning plaint for amendment is not a decree. 96 P.R. 1911=11 I.C. 231=216 P.L.R. 1911. Also an order returning a memorandum of appeal for presentation to proper Court. 13 A. 320. As to order of remand, *see* 103 I.C. 864; 6 P. 380=103 I.C. 722.

**ORDERS IN EXECUTION PROCEEDINGS.**—(*See also notes under S. 47.*)—Every order in execution proceedings is not a decree. It must be an order determining the rights of the parties in the execution proceedings. An order for arrest without notice is not a final order. 1929 M. 718; 1935 R. 500. *See also* 1929 L. 815.

An order granting or refusing process for examination of a witness or determining a point of law arising incidentally and not granting or refusing any relief is not a decree. 115 P.L.R. 1920=55 I.C. 173; 1927 A. 208=99 I.C. 455. *Also* order dismissing for default the objection petition to an execution filed by the judgment-debtor. 26 A.L.J. 1395=112 I.C. 380=1929 A. 123. A decision under S. 47 is not a decree unless it determines the rights of the parties with regard to all or any of the matters in controversy. A decision on a question of the valuation to be inserted in a sale proclamation is not a decree. 5 Pat.L.J. 270=55 I.C. 452. Nor order in execution granting leave to decree-holder to amend execution petition. 1936 M. 623=71 M.L.J. 256. Nor order granting leave to execute a decree against any person on the ground that he is a partner made under O. 21, R. 50 (2) and (3). 53 B. 839. Also refusal to postpone a sale. 1929 A. 85. An order determining question of under valuation of property to be sold. 6 O.W.N. 1085. Order under O. 21, R. 66 (proclamation of sale). 59 I.C. 282=1 Pat.L.T. 647. Nor an order on application under O. 21, R. 90. 1936 A.L.J. 959=1936 A. 763. As to order under O. 21, R. 93, *see* 1940 Bom. 210. An order in proceedings for a recovery of the loss caused by re-sale owing to the default of the prior purchaser in depositing the purchase-money is a decree. 44 A. 266. An order that the decree-holder is liable for mesne profits by way of restitution is a decree. 56 C. 550. As to order for security to stay execution, *see* 5 R. 534=1927 R. 317. Order passed against judgment-debtor in fight between him and decree-holder auction-purchaser is a decree, 177 I.C. 643=1938 N. 212.

**DISMISSAL FOR DEFAULT.**—An order dismissing a suit for default is not a decree. 12 M.L.J. 473; 29 C. 60; 18 C.L.J. 128=20 I.C. 1=18 C.W.N. 604; also an order dismissing an appeal for default. 15 C.L.J. 334=14 I.C. 823 (1); 39 C. 241; 23 C. 115; 23 C. 827; 22 M.L.J. 284; 2 P. 739=75 I.C. 284; 101 I.C. 618=1927 R. 148. Also dismissal for default on an objection of a judgment-debtor in execution proceedings. 1 O.W.N. 854. *See also* 53 C. 679=96 I.C. 705=30 C.W.N. 570; 94 I.C. 1=1926 A. 401.

**DECREE—PRELIMINARY AND FINAL.**—The preliminary decree is not a dependent on the final one but the latter is dependent and subordinate to the former, and does not extinguish it but gives effect to it. 21 C.W.N. 1174=35 I.C. 873 (F. B.). Where in a suit for the recovery of money, the amount found due to the decree holder is declared and it is also laid down in the decree in what manner that amount should be paid and there is nothing more left to be done in the suit, such a decree is not a preliminary decree but a final decree capable of execution. 1941 O. W. N. 1138=1941 O. A. 865. A preliminary decree, ascertains what is to be done while the final decree states the result achieved by means of the preliminary decree. The cases where the legislature contemplates a preliminary decree are specified in O. 20, Rr. 12 to 18. 27 I.C. 317=19 C.W.N. 755. There should be only one preliminary decree in a suit to be followed



- (a) any adjudication from which an appeal lies as an appeal from an order, or  
 (b) any order of dismissal for default.

*Explanation.*—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final :

(3) "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made :

(4) "district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court :

#### NOTES.

by one final decree, (*ibid.*) As to what amounts to 'preliminary decree' in partition suit, see 1938 O.W.N. 916=1938 O. 229. Second preliminary decree in a suit for partition is not impossible where there are facts or circumstances alleged to have come into existence after the passing of the first. 15 I.C. 372=11 A.L.J. 120. See also 1925 P. 433. 57 M. 437=66 M.L.J. 178. Failure to deposit commission fee after preliminary decree in partition suit—Dismissal of suit is not decree—No appeal lies, but only revision. 86 I.C. 785=1925 P. 433. In a partnership suit order granting directions to commissioner does not amount to a preliminary decree. 107 I.C. 214. Where, in a suit for accounts, the Court after passing a preliminary decree for accounts, passed a further order fixing the mode of taking accounts and the period for which it should be done, the latter is also preliminary decree. 27 C.W.N. 989=1924 C. 160. See also 1940 Rang.L.R. 72; 1941 O.W.N. 957=1941 A.W.R. (Rev.) 629 (Decision on a preliminary point holding pre-emption suit is maintainable, not a decree and no appeal lies). See also 1941 Nag. 84 (Decision on a preliminary issue in respect of one of two alternative claims). Mere omission to style an order a preliminary decree or to embody it as such does not negative the party's right to appeal. 27 I.C. 317=19 C.W.N. 755. A finding whether a party is an agriculturist under the Dekkhan Agriculturists' Relief Act is not a preliminary decree. 45 B. 627=60 I.C. 885=23 Bom.L.R. 92; 70 I.C. 728. But if the finding necessarily involves a direction for the taking of an account in the manner provided by S. 13 of the Dekkhan Agriculturists' Relief Act it amounts to a preliminary decree. 39 B. 422. A decree for accounts is not a mere direction to report but is one determining the rights of the party and is a final decree. 13 I.C. 374=14 C.L.J. 603. An adjudication cannot be partly a decree and partly an order not amounting to a decree. 42 C. 914=29 M.L.J. 70 (P.C.). An order in a suit for taking accounts of a partnership declaring the partnership as dissolved from a particular date and ordering an enquiry by the referee as to who were the partners is a decree in so far as it declares the rights of the parties. It does not cease to be so, because a part of it might have been separately made as an order. So the whole decree cannot be challenged in an appeal against the final decree, not being itself appealed against. 42 C. 914. The decree in appeal is decree in suit, C. C. M.—49

for appeal is a continuation of the suit. 30 M.L.J. 379. In a decree for possession and for mesne profits the decree for possession is final and the decree for mesne profits is only preliminary as the amount has to be found upon further enquiry. In such a suit although one decree is made it is partly preliminary and partly final. 1929 C. 383=118 I.C. 852. Amended decree is the final decree after modification in review. 34 C.W.N. 1002=1931 C. 323.

**CONSENT DECREE.**—'Decree' includes a compromise or a consent decree. 34 C.L.J. 96=66 I.C. 273 (2).

**SEC. 2 (3) : 'DECREE-HOLDER.'**—[See under DECREE.] "Decree-holder" is not confined only to plaintiff. A sub-mortgagee and a puisne or prior mortgagee sometimes become decree-holders as against the judgment-debtor in suits brought for foreclosure or sale of mortgaged property or for redemption thereof, as on the happening of certain contingencies they acquire the right to have property sold to discharge the amount declared to be due to them. 116 I.C. 212=1929 L. 492. Decree for specific performance can be executed by the defendants as well as by the plaintiff, and the defendants in such a case are "decree-holders" 46 B. 990=24 Bom.L.R. 496=1923 B. 26; 59 C. 501=36 C.W.N. 172=1932 C. 579. There is no difference between a decree-holder as defined in S. 2 (3) and holder of a decree referred to in O. 21, R. 10, 21 P.L.T. 146=1940 P. 472. An attaching creditor of the decree-holder is not a decree-holder. 80 I.C. 947=1925 A. 123. In R. 89 of O. 21, this word refers only to the person in satisfaction of whose decree the sale had been ordered, and it does not include any other person who may have a right to claim rateable distribution under S. 73 in the sale proceeds. 37 B. 387=15 Bom.L.R. 244=19 I.C. 475.

**SEC. 2 (3) AND O. 1, R. 10.**—Where some of the defendants are discharged on the ground of a want of cause of action against them and the suit is decreed as against the rest the correctness of the order of discharge could be questioned only in an appeal against that order inasmuch as it amounts to a decree. It could not be agitated in an appeal against the decree in the suit. 1941 N.L.J. 235.

**SEC. 2 (4) : DISTRICT COURT.**—Though the word "District" includes the local limits of a High Court in its Ordinary Original Civil Jurisdiction, still it is not legitimate to construe the words "District Court" wherever they appear to mean and include a High Court.



(5) "foreign Court" means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by <sup>1</sup>[the Central Government or the Crown Representative] :

(6) "foreign judgment" means the judgment of a foreign Court :

(7) "Government Pleader" includes any officer appointed by the [Provincial Government] to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader :

(8) "Judge" means the presiding officer of a Civil Court :

(9) "Judgment" means the statement given by the Judge of the grounds of a decree or order :

(10) "judgment-debtor" means any person against whom a decree has been passed or an order capable of execution has been made :

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued :

#### LEG. REF.

<sup>1</sup> Substituted for "the Governor-General in Council" by A.O., 1937.

#### NOTES.

45 C.L.J. 71=100 I.C. 331=1927 C. 290.

SEC. 2 (5) : FOREIGN COURT.—Privy Council is not within the definition. 8 B. 571 (574). All other Courts in England are foreign Courts. 8 B. 571 ; 31 C. 274. The Ceylon Court is a foreign Court. 32 M. 469 (471). And also Courts in Native States in India (1913) M.W.N. 605 ; 191 P.R. 1888. So also the District Court in Secunderabad Cantonment. 60 I.A. 167=56 M. 405=1933 P.C. 134=64 M.L.J. 562 (P.C.). Courts in Berar which have been established or continued by the authority of the Governor-General in Council are not "foreign Courts" within the meaning of the Code of Civil Procedure in British India and *vice versa* : I.L.R. (1941) Nag. 1=1941 Nag. 36 (F.B.). (*Niyogi, J.*, dissenting.).

SEC. 2 (6) : FOREIGN JUDGMENT.—See notes under Cl. (5), *supra*. The decree of a foreign Court against a non-resident foreigner is a nullity. 22 C. 222=4 M.L.J. 267 (P.C.) ; 19 A. 450 ; 24 B. 86 ; 40 B. 551 ; 26 C. 931 ; 20 M. 112. The term has not the meaning as regards the word 'judgment' given by Cl. (9) *infra*. 35 L.W. 763=1932 M. 661=62 M.L.J. 566. A foreign judgment whether can form a cause of action in British India. 39 M. 773 (F.B.).

SEC. 2 (8) : JUDGE.—A Sub-Registrar is not a judge. 12 B. 36 ; nor a Registrar acting under Ss. 72, 75 of Registration Act, a Court. 15 A. 141 ; *contra* 15 M. 138 (F.B.). But this Full Bench decision has not been followed in later Madras cases. See 23 M.L.J. 50 ; 30 M. 326.

SEC. 2 (9) : JUDGMENT.—Order setting aside *ex parte* decree is a judgment. 10 O.W.N. 794=1933 O. 385. What is ordinarily called an "order" is, in fact, a "judgment," as defined in C. P. Code though a document may be so drawn up as to contain not only the reasons for the decision, so as to fulfil the requirements

of a "judgment", but also the formal "expression" of the decision of the Court, so as to fulfil most of the requirements of an "order" as defined in S. 2 (14). 1933 A.L.J. 1301=1933 A. 762. Necessity for containing reasons—Applicability to Original Side of High Court. See 29 Bom.L.R. 126=51 B. 267. See also 15 O.C. 78=15 I.C. 212. As to a written order deciding one of several issues, see 14 I.C. 371. Diary note by judge ordering final decree to be drawn up in a mortgage suit is a judgment. 183 I.C. 894=1939 R. 294.

SEC. 2 (10) : JUDGMENT-DEBTOR.—Definition does not include assignee. 13 I.C. 659=1912 M.W.N. 176. See also (1940) 2 M.L.J. 749 (Subsequent alienation of part of mortgaged property). A person who has stood surety for costs and against whom a decree for costs has been made is a judgment-debtor. 58 B. 485=1934 B. 252. A plaintiff or defendant against whom no decree or order capable of being executed has been passed or who has been released from the decree, does not come under this term. 19 M. 331 ; 23 A. 346. But see 22 M. 131 ; 23 M. 361.

SEC. 2 (11) : LEGAL REPRESENTATIVE.—This definition is in conformity with the law prevailing in England. 87 I.C. 892=28 O.C. 177=1925 O. 330. Scope of this section and O. 22, R. 5, 1938 P.W.N. 803. The definition herein does not modify personal law. 1932 A. 591=54 A. 796=1932 A.L.J. 727. The expression does not necessarily denote the beneficial owner. 42 M. 76=35 M.L.J. 632. See also 79 I.C. 670=1925 L. 2 ; 1923 O. 330. Legal representative need not necessarily be in possession of any property of the deceased. All that is necessary is that he should be a person on whom the estate would devolve. 49 A. 645 ; 1931 Nag. 173. But see 178 I.C. 198=1939 Pat. 47. The expression means and includes one person as well as several persons according as they represent the whole interest of the deceased person. 14 L. 543=142 I.C. 649=1933 L. 356. The definition herein is very wide. 1934 L. 1, and it has been meant for the purposes of the Code only and not as a general statement of substantive rule of law. 150 I.C. 323=1934



## NOTES.

A. 474. 'Legal representative' need not be legal heir. 1938 A. 163=174 I.C. 307. As to when and how far a person who is not the lawful heir can be deemed "legal representative" see 41 P.L.R. 814=1939 L. 321. As to mere intermeddler, see 177 I.C. 531=1938 N. 298. When a member of a Hindu joint family, who has been sued on a pro-note, dies and it is contended that his brothers can be impleaded as legal representatives, it must be shown, *prima facie* that the deceased has an estate before the first definition in S. 2 (11) can be applied. 1930 M. 675. Even when no executor is appointed under the will either expressly or by necessary implication, dispositions of the property and the legacies in the will have not the effect of making the legatees the legal representatives. 108 I.C. 409=1928 M. 243. The term includes a universal legatee. 157 I.C. 956=1936 O. 74 and also donees from deceased legatee. 136 I.C. 543=1932 C. 206=35 C.W.N. 1028. A person in possession is a representative of the estate. 31 M.L.J. 222=35 I.C. 124; 69 I.C. 179. See also 1924 C. 362; 9 N.L.J. 183=96 I.C. 963=1926 N. 476; 89 I.C. 534=1925 O. 515. Court of Wards, is, on the death of the ward in the position of a legal representative. 29 N.L.R. 118=1933 N. 85. (Muhammadan widow in possession in lieu of dower is legal representative.) An intermeddler is within the definition. 1924 A. 717. Although only with a part of the estate. 115 P.R. 1913=39 P.L.R. 1914=22 I.C. 242. See also 29 Bom.L.R. 900; 1934 R. 196. But the definition is only for purpose of procedure and an intermeddler is not the representative for purposes of succession. So the decree passed in a suit in which an intermeddler is impleaded, will not bind the real heir who is not party thereto. 1924 A. 717; 75 I.C. 114. See also 41 P.L.R. 814=1939 Lah. 321. The surviving members of a Hindu joint family are not legal representatives. 2 L. 114. But see 40 Bom.L.R. 964; 1938 A.L.J. 56=174 I.C. 307=1938 A. 163. There is no doubt that in a joint Hindu family the law of inheritance does not apply to the joint family property, and on the death of a coparcener the property passes to the remaining coparceners by right of survivorship; but even in a joint family a coparcener may be possessed of separate property which will be governed by the law of succession and in such a case a member of the joint Hindu family can be added as legal representative under S. 2 (11). I.L.R. (1940) A. 153=1940 A.L.J. 32=1940 A. 99 (F.B.). Succeeding manager of a joint Hindu family is legal representative of previous manager. 86 I.C. 178=1925 M. 456. Succeeding trustee is legal representative. 92 I.C. 520=1926 M. 540. Official Assignee or Receiver in Insolvency will not be a legal representative. 58 M. 403=1935 M. 151=68 M.L.J. 78; 7 A. 752; 21 B. 205; 29 C. 428; But see 28 C. 419=5 C.W.N. 761. Executor is legal representative. 1938 A.M.L.J. 91. As to executor *de son tort*, see 30 C.W.N. 565=96 I.C. 695=1926 C. 825. One of several legal representatives impleaded—Sufficiency of. 14 L. 543=142 I.C. 649=1933 L. 356. A widow, where there is an adopted son, is not legal representative of deceased. 11 M. 403. Hindu reversioners can continue a

suit for possession brought by a Hindu widow as her legal representative after her death. 39 M. 382. See also 45 C.W.N. 105. In a suit for declaration of the invalidity of an adoption or alienation by a Hindu widow instituted by the presumptive reversioner the next presumptive reversioner can continue the suit as legal representative after the former's death. 38 M. 406=28 M. L.J. 535 (P.C.). In a later Madras case it has been held that he is not a 'legal representative' within the definition but can be added as a party in a representative action under O. 1, Rr. 1, 8 and 10. 9 L.W. 166=49 I.C. 268. Decree for injunction against Hindu father cannot be executed against his sons. 42 B. 504; 14 P. 732=16 Pat.L.T. 393=1935 P. 275 (F.B.); but see *contra* 55 B. 709=33 Bom.L.R. 1144=1931 B. 484; 38 Bom.L.R. 977=1936 B. 456. This definition of the term 'legal representative' in the Code is not exhaustive, and it should be qualified by Ss. 50 and 53, *ibid*. The son of a Hindu, where there has been no appointment of an executor or administrator in law represents the estate of his father and is therefore the legal representative within the meaning of S. 2 (11), and where there is an allegation that the estate of the deceased father is in the hands of the son, the son is liable to have a decree passed against him for the father's debt, to be recovered only out of any assets of the father which come to his hands and are not duly accounted for. 42 Bom.L.R. 1066=1941 B. 23. An auction-purchaser is not the representative of the original judgment-debtors in respect of a liability which had arisen subsequent to the mortgages on which the decree for sale was founded but is the representative of the judgment-debtor *qua* the rights and liabilities which stood on the date of the mortgage. 117 I.C. 452=1929 O. 353. A Zamindar, to whom the house and grove in possession of his tenant, escheat on the death of the latter, is not his legal representative. 23 I.C. 969=1 O.L.J. 86. See also 193 I.C. 598. Where a decree for compensation in lieu of specific performance is passed against a holder of an impartible estate and on his death the estate devolves on his son, he is a legal representative of the deceased judgment-debtor and the decree could be executed against the estate. 1940 N.L.J. 275=1940 N. 278=I.L.R. (1941) Nag. 632.

**LEGAL REPRESENTATIVE—PLEAS OPEN TO.**—A person who is added as a legal representative of a deceased defendant cannot and need not set up in defence pleas which are open to him only personally. 1925 M. 59. See also notes under S. 50. He is not at liberty to depart from or contradict the position taken up by the party in the suit whose legal representative he is so long as he is on record only as legal representative. If he has any independent right, then he is bound to apply to come in such right or capacity either with or without assuming the capacity of a legal representative. 1935 M. 52=40 L.W. 730.

**DECREE AGAINST WRONG LEGAL REPRESENTATIVE—BINDING NATURE OF.**—A true legal representative will be bound by a decree passed against the wrong legal representative if the following conditions are satisfied; (i) the plaintiff decree-holder must have acted *bona*



(12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits but shall not include profits due to improvements made by the person in wrongful possession.

## NOTES.

*fide*, (ii) the decree obtained must be free from fraud and collusion, (iii) the person wrongly impleaded must have been impleaded in a representative capacity, (iv) the decree or order must have been passed against him as representing the estate of the deceased, (v) the plaintiff must have been ignorant of facts which operate to displace the title of the supposed legal representative, and (vi) the person having the real title must not have intervened during the pendency of the suit. 30 L.W. 778=1929 M. 482. See also 34 P.L.R. 511=141 I.C. 580=1933 L. 380; 40 P.L.R. 25. It is open to the plaintiff or decree-holder to choose as the legal representative the one who appears to have the *prima facie* title. 30 L.W. 778=1929 M. 482; 63 M.L.J. 319. A compromise decree consented to by an alleged adopted son of a Hindu widow who died pending suit and as whose legal representative he was added, was held not binding on the proper legal representatives of the widow, and that mere failure to make more detailed inquiries would not necessarily lead to the conclusion that the plaintiff had not acted *bona fide*. 144 I.C. 663=29 N.L.R. 89=1933 N. 73.

SEC. 2 (12): MESNE PROFITS.—As to distinction in the meaning of the term between English and Indian Law, see 153 I.C. 232=1935 P. 80. As to meaning of "wrongful" in the definition, see 1939 N.L.J. 21=181 I.C. 106=1939 N. 23; 1939 A. 529. When a plaintiff succeeds in establishing that he was kept out of possession he is entitled to mesne profits. 53 I.C. 124. See also 47 M. 800; also a plaintiff who has obtained a decree under S. 9, Specific Relief Act. 1927 N. 9=97 I.C. 1028; 24 A. 501. As to co-sharers, see 94 I.C. 255=1926 C. 860; 29 N.L.R. 350=1933 N. 316. Where possession is not wrongful no mesne profits can be awarded. 150 I.C. 924=1934 L. 322. Parties in possession are liable for mesne profits although there may be no *mala fides*. 10 W.R. 486. See also 70 I.C. 6=34 C.L.J. 415; 8 W.R. 479; 1 A. 518; 21 C. 14; 1939 A.L.J. 433=1939 A. 529; or possession may have been obtained through the instrumentality of the Court as in the case of an auction-purchaser. 1939 N.L.J. 21=1939 N. 23. Plaintiff claiming mesne profits must be entitled to possession. 37 P.L.R. 50=157 I.C. 96=1935 L. 379. The only relevant consideration for the Court is whether the defendant's possession was wrongful or not; and not the degree of the misconduct or culpability. [1 A. 518 (F.B.); 24 A. 376 and 70 I.C. 6, Diss. from; 1931 M.W.N. 813, Foll.] 57 M. 49=66 M.L.J. 263=1933 M. 825. A wrong doer is liable only to the extent of the wrong he has done. 24 C. 413. As to the extent of the liability of trespasser, see 94 I.C. 118=1926 C. 847. The defendant in wrongful possession is liable only for the time he was actually in possession. If he was excluded from possession, he cannot be said to have been in wrongful

possession. 38 I.C. 660=26 C. L. J. 140; 35 C.W.N. 305=132 I.C. 685=1931 C. 663. See also 6 Pat.L.J. 166=61 I.C. 754; 51 C. 853; 24 C. 413; 10 C. 785; 55 I.C. 48. (Defendant would be liable if he has abetted the trespass by the person in actual possession.) As against a wrong doer, possession relates back to the time when the right to enter accrued. 21 I.C. 590=9 N.L.R. 145 (34 M. 269, Foll.) The possession of a vendee under a conveyance voidable for fraud and undue influence is wrongful *ab initio*, and not merely from the date when a suit is filed to set it aside. 59 I.A. 147=7 Luck. 64=62 M.L.J. 451 (P.C.). As to the maintainability of claim for mesne profits between date of decree for possession conditioned on payment of money and date of payment, see 1928 M.W.N. 51.

ASSESSMENT OF MESNE PROFITS.—See 45 C.W.N. 298. The rental value of the land would ordinarily be the proper basis of calculating mesne profits when the person charged had merely let the land out to others, unless there was evidence that a higher rent could "with ordinary diligence" have been obtained. But when the wrongdoers cultivated the land themselves, the definition of "mesne profits" makes the cultivation profits the primary consideration. The test set by the definition is not what the plaintiff has lost by his exclusion, but what the defendant has or might reasonably have made by his wrongful possession. Land, which was capable of producing more profitable crops, was, in fact, planted by the wrongdoers with indigo, an inferior crop, for their special purpose. The mesne profits can in such a case be calculated upon the basis of more profitable crops which the land was capable of producing. In all such cases the true test would be what the prudent agriculturist would have grown. 57 I.A. 105=58 M.L.J. 215 (P.C.); 59 C. 859=1932 C. 600; 62 C. 217=38 C.W.N. 1197=1935 C. 206. See also 45 C.W.N. 298; 47 M.L.J. 730; 3 C.W.N. 904; 25 A. 266; 24 C. 413; 11 I.C. 504=15 C.W.N. 825; 15 I.C. 1; 19 I.C. 974=17 C.W.N. 984; 46 I.C. 624; 61 I.C. 425=1 P.L.J. 235; 10 I.C. 312=16 C.L.J. 93; 1927 R. 116; 44 C.L.J. 182=1926 C. 1233; 94 I.C. 255=1926 C. 860. But see 16 I.C. 126=9 A.L.J. 774; where the basis was held to be what the plaintiff would have made out of the land but for the defendant's unlawful trespass and not what the defendant has done. See also 30 M.L.J. 326; 1923 N. 64 (1); 1930 C. 53; 35 C.W.N. 367=135 I.C. 876=1931 C. 802. Where the person dispossessed is himself a cultivator of the land in dispute, he is entitled to such profits as the trespasser might have obtained by actual cultivation with due diligence and not merely to what he has really obtained by sub-letting the land. 43 I.C. 53; 20 N.L.R. 112=1924 N. 427. See also 15 W.R. 428; 47 M.L.J. 730; 53 C. 992. Where the person in wrongful possession of land has given no evidence to



## NOTES.

show that he could not cultivate the land himself or that the land was in possession of tenants before he entered upon it as a trespasser he is bound to pay mesne profits on the basis as if he was in direct possession of the lands in suit. 1928 C. 474. The principles which would ordinarily guide a Court in determining the mesne profits are: (1) wrongful trespasser should not profit by it; (2) restoration of status before dispossession financially; and (3) use to which decree-holder would have put land if he was himself in possession. 39 I.C. 516. In order to assess the mesne profits of property in the wrongful possession of tenants, the Court should direct the Commissioner to ascertain (1) the gross profits which the tenants did obtain (or could reasonably have obtained) from his cultivation of the soil; (2) what ought, reasonably, to be deducted from that gross sum for (a) costs of cultivation, (b) on account of rent paid, and (c) the cost of maintenance of the cultivators. After deducting the cost of cultivation, and the rent paid and the cost of maintenance, the balance left is the 'profit' referred to in S. 2 (12). 151 I.C. 922=38 C.W.N. 384=1934 C. 503. As to mode of assessment of mesne profits in the case of a co-sharer's claim based on his exclusion, see 30 N.L.R. 71=147 I.C. 445=1933 N. 316. Assessment can be based by local inspection and crop-cutting experiments conducted by a Commissioner. 47 M. 800. Deduction should be made for cost of cultivation and seasonal fluctuations. 99 I.C. 923=44 C.L.J. 559. See also where lands are subject to floods, deductions ought to be made on that account. 101 I.C. 371=1927 R. 116. In a suit against several trespassers, manner of drawing up decree indicated. 59 C. 859=1932 C. 600. The general law about the liability of joint tort-feasors, if mesne profits are taken to be damages, has been modified by the special provisions of this Code. 35 C.W.N. 357=135 I.C. 876=1931 C. 802.

**COMPENSATION FOR IMPROVEMENTS AND OTHER EXPENSES.**—The person dispossessed is entitled to compensation for improvements effected. 26 C.W.N. 257=35 C.L.J. 121; 42 M.L.J. 243. He is also entitled to compensation for all sums spent by him in managing the property but not for infructuous litigation in connexion with the management. 22 M.L.J. 253. All such payments made by the defendant as the plaintiff would have been bound to make if he had been in possession towards rent, revenue or cesses should be deducted from the gross earnings. 17 B. 35; 21 C. 142; 20 N.L.R. 112=1924 N. 427. See also 33 I.C. 520. But the Court should not allow the expenses of collecting the profits unless the defendant entered on the property in the exercise of a *bona fide* claim of right. 20 N.L.R. 112=1924 N. 427; 70 I.C. 6=34 C.L.J. 415; 16 I.C. 866; 22 A. 262; 24 A. 376. But see 1931 M.W.N. 813. Where it was held that the definition of mesne profits takes no account of the culpability of the party liable, and so the expenses of management or collection should be allowed in the calculation of the mesne profits, even where the defendant has not proved his *bona fides* in taking possession of the property. Cultivation expenses incurred by the trespasser

should be deducted, but not costs of collecting rents due from persons in occupation. 24 M.L.J. 30. Charity expenses charged on the property should be deducted. 1931 M.W.N. 813. See also 57 M. 49.

**INTEREST ON MESNE PROFITS.**—Interest should ordinarily be allowed on mesne profits, though the interest as well as the mesne profits are in the discretion of the Court. 70 I.C. 6=34 C.L.J. 415; 50 A. 857=1928 A. 532. See also 10 C. 785; 27 C. 951 (969) (P.C.); 1927 M.W.N. 661; 44 C.L.J. 182=1926 C. 1233=1931 M. 513. The proper rate of interest to be granted on mesne profits is 6 per cent. in the absence of special circumstances. 62 I.A. 53=62 C. 499=68 M.L.J. 580 (P.C.) (noted *infra*.) The words "together with interest on such profits" do not refer to interest due after the ascertainment of the amount of mesne profits due under the decree. They contemplate that interest should form a separate item in the calculation of that amount due as mesne profits. 30 C. 506. See also 25 A. 275; 1930 A. 525. Mesne profits include interest. Where a decree is silent as to interest on mesne profits, it must be deemed to carry interest at the Court rate of 6 per cent. and executed accordingly. 44 A. 579; 17 I.C. 915=10 A.L.J. 533. But see 53 I.C. 227=30 C.L.J. 205; 21 A. 425 (F.B.); 27 C. 951 (P.C.); 33 C. 329. Interest should not be allowed for more than three years from the decree or until possession within that time, 27 C. 951 (P.C.). The Court has a discretion whether to allow interest on mesne profits after three years or not. 31 I.C. 387=2 L.W. 1129; 1931 M. 513. Mesne profits carry interest from the date of the preliminary decree awarding the same. 46 A. 842; 33 C. 29. As to liability, of joint wrong doer for mesne profits. See 53 C. 992; 1931 C. 802.

**BURDEN OF PROOF.**—When mesne profits are claimed, the onus of proving what profits might with diligence have been received in any year lies upon the party claiming mesne profits. 62 I.A. 53=62 C. 499=1935 P.C. 49=68 M.L.J. 580 (P.C.). Profits always means the difference between the amount realised and the expenses incurred in realizing it. In the case of mesne profits, 10 per cent. is the customary allowance in India for the expenses of collection, and it is unnecessary for the person liable to pay mesne profits to adduce any evidence on the subject (*ibid.*) But the onus of proving what profits the person in wrongful possession actually received lies on the person in possession. 47 M.L.J. 730. See also 47 M. 800; 1933 M.W.N. 1182=1933 M. 825. Where it is shown that a portion of the suit land had been let out at a produce rent, the Court will be justified in presuming that the entire land was so let out. 53 C. 992. See also 99 I.C. 923=44 C.L.J. 559.

**PRACTICE.**—Mesne profits should be determined in the suit itself and not by way of execution for a fixed sum of money. 39 C. 220. Transfer to higher Court of protracted proceedings on account of the mesne profits accruing during the pendency of litigation swelling up to an amount beyond the pecuniary jurisdiction of the original Court is not an interruption so as to make the subsequent proceedings in the higher Court a different suit. 58 I.C. 179=



- (13) "movable property" includes growing crops :  
 (14) "order" means the formal expression of any decision of a Civil Court which is not a decree :  
 (15) "pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court :  
 (16) "prescribed" means prescribed by rules :

## NOTES.

24 C.W.N. 342. Plaintiff filed a suit for loss of crops on 15th October, 1930, alleging that defendants had dispossessed him on 1st June, 1930. It was not shown that defendants had or should have received any profits before that time. It was held that no cause of action as to the claim brought existed on the date of suit. 147 I.C. 709=1933 N. 222 (55 I.A. 299 and 34 M. 502, Dist.).

SEC. 2 (13).—This definition has set at rest the conflicting decisions that existed previously among the different High Courts. Under the General Clauses Act, S. 3 (25) "standing crops" are immovable property. But it is otherwise under this definition. This definition must be taken to be confined to the limited purposes of this Code. 27 I.C. 935.

SEC. 2 (14).—See also notes under S. 2, Cl. (2) and S. 2, Cl. (9). As to nature of order for alimony pending suit for divorce, see 32 C.W.N. 179. An order made on a notice of motion for contempt of Court would be an order within the meaning of S. 2 (14), and be executable under S. 36, C. P. Code. 36 Bom. L.R. 992=1934 B. 452.

SEC. 2 (15).—As to construction of this definition, see 8 B. 105. As to whether vakils of Indian High Courts can practice before the Judicial Committee of Privy Council, see 16 C. 636. Pleader, vakil or attorney duly appointed to act for a party, has authority to do all acts incidental to that general authority, and they will be binding on the party. 9 S.L.R. 218=34 I.C. 928. But the acts must be *bona fide* neither due to fraud or mistake, nor against the express instructions of his client. 34 I.C. 928; 29 I.A. 76=25 M. 367=6 C.W.N. 641 (P.C.). He may withdraw the suit as to frame or withdraw any plea. 21 M. 274=8 M.L.J. 40; may get a witness summoned, dispense with his evidence. 25 M. 367 (P.C.) (noted *supra*); may abandon an issue, 25 M. 367; 38 I.C. 800. But unless specially authorized, he cannot consent to the settlement of a case by oath being taken by the opposite party. 14 B. 455; or give up a portion of the claim. 12 W.R. 279; 3 B.L.R. (App.) 15; or transfer a decree. 2 N.W.P.H.C.R. 695; or consent to a decree in respect of property not in suit. 2 M. (A.C.) 420.

ADMISSION BY PLEADER.—Admissions of fact by pleader made during the actual progress of a suit and not in mere conversation are binding on the party. 9 W.R. 375; 485; 10 W.R. 322; 21 W.R. 332; 21 M. 274; 15 I.C. 156; 20 C.W.N. 995; 7 C.W.N. 351; 86 P.L.R. 1916=35 I.C. 870. It is not necessary that the client must be present when the admission is made. 2 M.I.A. 253; and the party who wants to repudiate the admission as being against his instructions should do so at the earliest opportunity. 38 I.C. 800. The admission should, however, be within the scope of the

pleader's authority. 18 W.R. 436. He may admit liability and a decree may be passed thereon against the client. 21 W.R. 332. Verbal admissions by pleader must be taken as a whole and should not be unduly stretched. 6 A. 406. Court is not to act upon admissions by pleader, where the evidence of the records shows that they were wrongly made. 104 P.L.R. 1916=36 I.C. 212; nor upon mere opinion expressed by pleader adverse to his client's claim. 18 M. 72. Nor upon an erroneous admission as to a point of law. 24 B. 360=2 Bom.L.R. 467; 45 I.C. 983; 52 I.C. 178; 8 S.L.R. 156=27 I.C. 357. See also 27 C. 156. Mere allegation of party to the contrary is not sufficient to contradict his pleader in respect of a statement of fact made on his behalf by the pleader. 136 I.C. 622=1931 A. 415.

AUTHORITY TO COMPROMISE.—A pleader employed to conduct a case has no *implied* authority to compromise it, and there must be express authority in the *Vakalatnama* if the compromise is to bind the client. 21 M. 274; 41 M. 233=41 I.C. 429; 4 C.W.N. 169. But it is otherwise in the case of Counsel. 13 A. 272; and also in the case of attorney or solicitor. 7 Bom.H.C.O.C. 79. In any event, the compromise should not be against client's express instructions. 41 C.L.J. 213=88 I.C. 369=1925 C. 866; 32 C.W.N. 44=106 I.C. 309=1928 C. 378. Nor with reference to matters outside the scope of the particular case. 27 C. 428. A pleader should have special *Vakalatnama* to enter into any particular compromise. 9 S.L.R. 218=34 I.C. 928. But see *contra*. 23 M.L.J. 381. Compromise entered into outside the Court, would be binding only when sanctioned by the Court. 52 C. 386=1925 C. 696; 55 C. 113=1927 C. 714. Compromise may be set aside at the instance of party, if pleader, counsel or solicitor had consented under misrepresentation or mistake. 6 C. 687; 3 R. 261=1925 R. 314. But the application should be made before the judgment is pronounced. 13 A. 272; 13 C. 115.

REFERENCE TO ARBITRATION BY PLEADER.—A pleader duly appointed to act for a party has authority to apply for a reference to arbitration and the same would be binding on his client even if it is against the wishes of his client. 9 S.L.R. 183=34 I.C. 845. The Code of 1908 has effected a change of the law in this respect. 34 I.C. 845; 6 N.W.P. 210 and 14 B. 455, which held otherwise were under the old Code.

WITHDRAWAL OF SUIT BY PLEADER.—Pleader holding *Vakalatnama* to do all acts necessary in connection with the suit, has *prima facie* power to apply to withdraw the suit, provided there is nothing to show that the same is contrary to the client's instructions, or due to misconduct of the pleader. 5 W.R. 80.

SEC. 2 (16) : "RULES."—As to the meaning of this term. see cl. (18) *infra*.



(17) "public officer" means a person falling under any of the following descriptions, namely :—

- (a) every Judge ;
- (b) every member of the Indian Civil Service ;
- (c) every commissioned or gazetted officer in the military <sup>1</sup>[naval or air] forces of His Majesty, <sup>2</sup>\* \* \* while serving under <sup>3</sup>[the Crown] ;

(d) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorised by a Court of Justice to perform any of such duties ;

(e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;

(f) every officer of <sup>3</sup>[the Crown] whose duty it is as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ;

(g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of <sup>3</sup>[the Crown], or to make any survey, assessment or contract on behalf of <sup>3</sup>[the Crown], or to execute any revenue-process, or to investigate, or to report on, any matter affecting the pecuniary interests of <sup>3</sup>[the Crown] or to make, authenticate or keep any document relating to the pecuniary interests of <sup>3</sup>[the Crown], or to prevent the infraction of any law for the protection of the pecuniary interests of <sup>3</sup>[the Crown] and

(h) every officer in the service or pay of <sup>3</sup>[the Crown], or remunerated by fees or commission for the performance of any public duty :

(18) "rules" means rules and forms contained in the First Schedule or made under section 122 or section 125 :

(19) "share in a corporation" shall be deemed to include stock, debenture stock, debentures or bonds : and

#### LEG. REF.

<sup>1</sup> Substituted for "or naval" by S. 2 and Sch. Amending Act XXXV of 1934.

<sup>2</sup> The words "including His Majesty's Indian Marine Service" were omitted by Act XXXV of 1934.

<sup>3</sup> Substituted for "the Government" by A.O., 1937.

#### NOTES.

SEC. 2 (17).—[Note the legislature amendment of this definition.] Cf. definition of 'public servant' in I. P. Code, S. 21. A person may be a 'public servant' without being a 'public officer.' 6 Bom.H.C.R. 64. The following persons have been held to be public officers within S. 2 (17) :—Receiver under the Provincial Insolvency Act, 44 B. 895 ; Receiver appointed by Civil Court, 34 C.W.N. 671 ; 57 C. 1127 ; 1931 C. 503=35 C.W.N. 161=58 C. 850 ; 36 L.W. 694=140 I.C. 458=1933 M. 105 ; see however, 1931 C. 175=53 C.L.J. 31=130 I.C. 894. Official Liquidator 148 I.C. 448=11 O.W.N. 398=1934 O. 158 ; 148 I.C. 714=1934 N. 201 ; 1939 N.L.J. 215=1939 N. 232 ; (1940) 2 M.L.J. 241=52 L.W. 131 (liquidator of co-operative society appointed by Registrar of such society). Where, however, the liquidator has acted through the Deputy Commissioner notice to the Deputy Commissioner would be sufficient and no separate notice to the liquidator is necessary. 30 N.L.R. 240=1934 N. 201. A British officer, in Indian Army, 50 I.C. 683=21

Bom.L.R. 143 ; an officer of the Indian Staff Corps, 24 C. 102 ; a Naib Nazir, 2 N.W.P.H.C.R. 298 ; a Patwari, 2 A.H.C.R. 148 ; but see 18 C. 534 ; a Cantonment Committee constituted under Indian Cantonments Act, 34 B. 583=12 Bom.L.R. 45 ; the Administrator-General, 8 C.W.N. 913 ; the Official Trustee, 7 C. 499 ; 12 M. 250 ; a village headman, 2 Bur.L.J. 29=1923 R. 250 ; officers holding commissioned rank in the Indian Subordinate Medical Service, 23 I.C. 985=17 O.C. 99 ; a common manager appointed under the B. T. Act. 24 C.W.N. 138=30 C.L.J. 279 ; 59 C. 961 ; Official Assignee, 49 B. 638=27 Bom.L.R. 545. The Manager of Court of Wards not a public officer, 55 I.C. 515. See also 105 I.C. 729 ; 1928 S. 76. But see 3 A. 20 ; 1 B. 318 ; 13 B. 343 ; 11 M. 317 ; 43 C.W.N. 1212=1939 C. 720. Municipal Councillor not a public officer, 1930 M.W.N. 821. Nor elected member of Provincial Legislature, 43 C.W.N. 512=1939 C. 428=I.L.R. (1939) 1 Cal. 523 ; nor Agent of Railway Company, I.L.R. (1939) 2 Cal. 46=1939 C. 386 ; 43 C.W.N. 664.

SEC. 2 (19).—As to definition of, 'stock' see S. 2, Indian Trustees Act, XXVII of 1866 ; and of 'bond', see S. 2 (5), Indian Stamp Act II of 1905. 'Debenture' and 'debenture-stock' are nowhere defined in any enactment, but they are well-known terms in the commercial world. A debenture is a bond in the nature of a charge or Government stock or the stock



(20) "signed" save in the case of a judgment or decree, includes stamped.

3. For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court.

4. (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.

5. (1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the [Provincial Government] <sup>1</sup>\* \* \* may, by notification in the [Official Gazette] declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the Provincial Government <sup>1</sup>[\* \* \*] may prescribe.

(2) "Revenue Court" in sub-section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent,

#### LEG. REF.

<sup>1</sup> The words "with the previous sanction of the Governor-General in Council" were omitted by S. 2 and Sch. I, Pt. I of Act XXXVIII of 1920.

#### NOTES.

of a public company. 'Debenture stock' is borrowed capital consolidated into one mass for the sake of convenience. Instead of each lender having a separate bond or mortgage, he has a certificate entitling him to a certain sum, being a portion of one large loan (*Lindley*, p. 346).

SEC. 2 (20).—*Cf.* the definition of the term 'signed' in the General Clauses Act, where it is given a restricted meaning. That a person should be unable to write or sign his name is not a condition precedent to the use of a stamp. 3 A. 575. As to whether signing includes initialling, *see* 8 A. 293; <sup>1</sup>185 P.R. 1889 (F.B.).

SEC. 3.—The list of Subordinate Courts in the section is not exhaustive and does not exclude all other Courts from being subordinate to the High Court. 37 B. 114=17 I.C. 676. So a Collector exercising judicial functions under the Bombay Mamlatdars' Act, is subordinate to the Bombay High Court. 37 B. 114. Judge should follow the rulings of the High Court to which he is subject. 17 B. 555; 10 C. 82; 15 B. 419; 6 M. 424; 19 C.W.N. 841=4 Pat.L.J. 565; 29 M.L.J. 63=42 I.A. 155=37 A. 359 (P.C.). A decision of the Privy Council is binding on Courts in India though delivered in an appeal not coming from an Indian Court. 38 M. 941=25 M.L.J. 162 (P.C.). The original side of High Court sitting in insolvency is not a Court subordinate to the High Court in its appellate jurisdiction. 55 M.L.J. 671=1928 M. 1091.

SEC. 4.—This section cannot be construed as making inapplicable the Code in respect of proceedings under Special or Local Laws, unless there is an inconsistency. 3 C. 221. The law applicable to soldiers is the Army Act and it overrides S. 60. 43 B. 368=28 Bom.L.R. 137. S. 40, gives validity to a local Act and a Court to which a decree is sent for execution outside the local sphere may be bound by the local Act but no local legislature can prescribe the procedure for any Court beyond its territorial jurisdiction. As far as the latter Court is concerned the Act is in the same position as the legislation of a foreign country. Hence the U. P. Court of Wards Act could not be invoked in a proceeding in Bengal. 56 C. 704. It is the section of the Oudh Laws Act that applies to the recording of evidence in criminal cases relating to a proceeding before the Chief Court and not O. XVIII, R. 6. 8 O.W.N. 635=132 I.C. 270=1931 O. 385. So also in case of application for leave to appeal to Privy Council, S. 12 (1) of Oudh Courts Act and not S. 109 of the Code, will apply. 8 O.W.N. 1207=134 I.C. 1017=1932 O. 163. Procedure under Co-operative Societies Act excludes that under C. P. Code, 142 I.C. 487=1933 N. 211. The parties to a suit can validly agree, even apart from the Oaths Act, that they will abide by the statement of a witness, including one who is a party to the suit; and they can leave the decision of all points including costs arising in the case to be made according to the statement. 1933 A.L.J. 1127=1933 A. 861 (F.B.). No declaratory suit lies in Civil Court as to money attached by order of a Criminal Court for enforcing a maintenance order passed by it under S. 488, Cr. P. Code. 39 P.L.R. 100=169 I.C. 100=1937 L. 367.



revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits for proceedings of a civil nature.

6. Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits  
 Pecuniary jurisdiction. the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

7. The following provisions shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say,—

(a) so much of the body of the Code as relates to—

(i) suits excepted from the cognizance of a Court of Small Causes ;

(ii) the execution of decrees in such suits ;

(iii) the execution of decrees against immovable property ; and

(b) the following sections, that is to say,—

section 9, sections 91 and 92, sections 94 and 95 <sup>2</sup>[so far as they authorise or relate to—

(i) orders for the attachment of immovable property,

(ii) injunctions,

(iii) the appointment of a receiver of immovable property, or

(iv) the interlocutory orders referred to in clause (c) of section 94] and sections 96 to 112 and 115.

8. Save as provided in sections 24, 38 to 41, 75, clauses (a), (b) and (c), 76, 77 and 155 to 158, and by the Presidency Small Cause Courts Act, 1882, the provisions in the body of this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay :

#### LEG. REF.

<sup>1</sup> The words "with the sanction aforesaid" were omitted by S. 2 and Sch. I, Pt. I of Act XXXVII of 1920.

<sup>2</sup> Substituted for "so far as they relate to injunctions and interlocutory orders" by S. 3 of Act I of 1926.

#### NOTES.

SEC. 6.—A Court cannot execute a decree sent to it for execution, where the decree has been passed in a suit, the value of which exceeds the pecuniary limits of its jurisdiction. 16 C. 457 ; 17 C. 465 ; 37 C. 574 ; 12 B. 155. But see 7 M. 397 ; 17 M. 309 (*contra*). S. 6 governs the whole Code, that is to say, the word 'suits' means not only all proceedings up to the stage of decree, but includes, proceedings in execution. Its position, appearing as it does under the part headed 'preliminary' indicates that it is designed to govern the whole Code. 1940 N.L.J. 244. In suits for possession of land and mesne profits, both past and future, the pecuniary limits of the jurisdiction of the Court is to be determined only with reference to the past profits claimed and the value of the land. Although when the actual decree is passed for past and future profits, the sum is found to exceed the pecuniary limit of the Court's jurisdiction it does not matter, and the decree will not be one passed without jurisdiction. 40 M. 1=39 I.C. 439 ; 25 M. 543 ; 33 A. 97=7 I.C. 385 ; 16 A. 286 ; 53 C. 14=89 I.C. 726=1926 C. 1076 ; 6 Pat.L.J. 54=60 I.C. 346 ; C. C. M.—50

<sup>2</sup> Pat.L.J. 394=41 I.C. 231. Court is not precluded from trying incidentally an issue as to property the value of which is beyond its jurisdiction. 169 I.C. 933=1937 R. 219. As to applicability of section to proceedings before the Calcutta Improvement Tribunal, see 31 C.W.N. 142=94 I.C. 170=1926 C. 853.

SEC. 7 : POWERS OF SMALL CAUSE COURT IN EXECUTION.—A Small Cause Court acting as such cannot attach immovable properties in execution, even though the Small Cause Court is also an ordinary Court, unless the decree has been formally transferred to the ordinary side. 132 I.C. 208. See 44 I.C. 252 (can attach and sell a preliminary decree for foreclosure). 16 I.C. 816 (can attach a mortgage debt). 132 I.C. 208 ; 10 N.L.R. 17 (cannot attach a share of joint family property).

ATTACHMENT BEFORE JUDGMENT.—A Small Cause Court can order attachment before judgment of movable property. 46 C. 717=53 I.C. 814 ; but not of immovable property. (See O. XXXVIII, R. 13, *infra*). The earlier rulings to the contrary in 52 C. 275=82 I.C. 109=1925 C. 1 (F.B.), being prior to insertion of R. 13, are no longer good law.

SEC. 8.—Decree of Madras Small Cause Court transferred to mofussal District Munsiff for execution—District Judge can hear appeal from order in execution proceedings. 49 M.L.J. 104. When S. 8 says that "the provision in the body of this Code shall not extend to any suit," it means that the provisions shall not also



<sup>1</sup>[Provided that—

(1) the High Courts of Judicature at Fort William, Madras and Bombay, as the case may be, may from time to time, by notification in the Official Gazette, direct that any such provisions not inconsistent with the express provisions of the Presidency Small Cause Courts Act, 1882, and with such modifications and adaptations as may be specified in the notification, shall extend to suits or proceedings or any class of suits or proceedings in such Court ;

(2) all rules heretofore made by any of the said High Courts under section 9 of the Presidency Small Cause Courts Act, 1882, shall be deemed to have been validly made.]

## PART I.

### SUITS IN GENERAL.

#### *Jurisdiction of the Courts and res judicata.*

9. The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Courts to try all civil suits unless barred.

herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is

### LEG. REF.

<sup>1</sup> Provisos (1) and (2) were added by S. 2 of Act I of 1914.

### NOTES.

extend to any decree passed in any such suit. 7 Cut.L.T. 45.

SEC. 9 : SCOPE OF THE SECTION.—The Civil Courts are *prima facie* entitled to determine all civil matters ; legislation that ousts their jurisdiction must be very carefully examined, and unless the Courts are satisfied that the conditions upon which they are ousted are fulfilled to their own satisfaction, they will not hold that they are debarred from inquiring into any matter before them. They will not take the mere *ipse dixit* of the authority which ousts them, unless the law definitely states that they are bound to do so. 11 R. 125=1933 R. 124. See also 67 M.L.J. 1=61 I.A. 177=57 M. 443=1934 P.C. 84 (P.C.). The burden of proof is on the party who seeks to oust the jurisdiction of Civil Courts. 1928 L. 121 (F.B.) When the Statute which creates the right also prescribes a special remedy, the person aggrieved is limited to the remedy so prescribed. If, however, a legal right is recognised, to exist apart from and independently of the statute and no special remedy is provided, the Civil Courts would continue to exercise their jurisdiction under S. 9. 143 I.C. 514=29 N.L.R. 278=1933 N. 193 (F.B.). See also 43 L.W. 262=160 I.C. 209=1936 M. 421. But see 157 I.C. 270=1935 A.L.J. 1111. S. 9 itself postulates the barring of jurisdiction of Civil Courts by a competent legislature with respect to particular class of suits of a civil nature. It is, therefore, open to a Provincial Legislature to bar the jurisdiction of Civil Courts with respect to particular class of suits, provided in doing so, it keeps itself within the field of legislation confided to its charge and does not contravene any provision of the Constitution Act. I.L.R. (1940) A. 455=1940 A.L.J. 274=1940 A. 272 (F.B.). It is a well-recognised principle of law that the nature, and not the merits, of the claim determines the question of jurisdiction. 1940 N.L.J. 582=1940 N. 402.

SPECIAL TRIBUNAL.—The grant of jurisdiction to a Special Tribunal to deal finally or exclusively with the cases arising out of the lawful administration of a particular statute cannot take away the jurisdiction of the Civil Courts to afford relief against any illegality committed under colour of that statute. If the special tribunal arbitrarily refuses to exercise its jurisdiction or if the rules which create the Special Tribunal and lay down the procedure are themselves impeached as being *ultra vires*, then the Civil Courts have jurisdiction to correct the illegality and give proper relief to the aggrieved person. 143 I.C. 514=29 N.L.R. 278=1933 N. 193 (F.B.). Where a right and liability has been created by statute and where the legislature has left to another authority the appointment of a tribunal to try such liability and the framing of the procedure under which the tribunal so to be appointed is to carry out its duties, but the tribunal so contemplated by the legislature has never been brought into existence, the subject has the right to proceed in the ordinary Civil Courts with corresponding rights of appeal, unless and until the legislature carries out its duty of appointment a special tribunal. 14 P. 24=15 Pat.L.T. 623=1934 P. 670 (2) (F.B.). Per *Courtney Terrell, C.J.*,—When a special tribunal has been appointed and its procedure framed, then the subject cannot proceed to a civil suit in the event of the special tribunal refusing or neglecting to carry out its duties in a proper manner, in other words, refusing or neglecting to exercise its jurisdiction. 14 P. 24. Suit for declaration that certain debts shown in application to Debt Conciliation Board are fictitious and to restrain the alleged creditors from proving them before the Board, if barred in Civil Court, 1938 L. 14. Whatever the doubts about the District Courts may be, the C. P. Debt Relief Courts are not Civil Courts. They are special tribunals created for the purpose of the Act. 1941 N.L.J. 485.

JURISDICTION OF CIVIL COURTS IN GENERAL.—Every presumption should be made in favour of the jurisdiction of a Civil Court, which can be taken away only by express words or by necessary implication. 17 C.W.N. 408=17



*Explanation.*—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

## NOTES.

G.L.J. 239; 33 M. 208; 10 Pat.L.T. 167; 1932 O. 199 (F.B.). Jurisdiction depends upon allegations made in the plaint and not upon those which may be ultimately found to be true. 1922 N. 10=18 N.L.R. 121. After annexation of Burmah the *Thathanabaing* or the Burmese Buddhist hierarchy ceased to have jurisdiction to decide civil disputes between members of the Burmese Buddhist priesthood. It is only Civil Courts established by law that could do so. 13 R. 648=158 I.C. 865=1935 R. 376 (F.B.). (6 R. 783=114 I.C. 540=1929 77, Overr.) Courts have power in any matter of spiritual and temporal character to enquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury. 39 M. 1056=30 M.L.J. 423. A Court will interfere in a case of dismissal of an officer of a Trust Corporation where the relationship between the officer and the corporation is one of trust and *cestui que trust* but will not, where the relationship is a contractual one. 41 C. 19. The question of propriety of any fine inflicted by the Dharma-kartha on an inferior spiritual dignitary is within the competence of the Civil Court. 21 N.L.J. 730. Civil Court can question the appointment of a trustee by Devasthanam Committee if it is not made reasonably and in good faith. 42 M. 668. Where certain Jagir money is attached by a Magistrate for realization of arrears of maintenance due under order passed under S. 488, Cr. P. Code, Civil Court has no jurisdiction to entertain suit for declaration that the amount is not liable to attachment. 169 I.C. 100=1937 L. 367. No civil suit lies for a mere declaration that a decree of a Revenue Court was without jurisdiction. 1939 A.L.J. 382=182 I.C. 911=1939 A. 446. Nor for mere declaration that plaintiff is heir of a person. 41 P.L.R. 615=1939 L. 158; 1938 L. 831.

*'EXPRESSLY OR IMPLIEDLY BARRED.'*—The jurisdiction of Civil Court is expressly barred when there is some enactment or rule of law precluding it from taking cognizance of a suit. 14 C. 644. See also 11 O.W.N. 1435=1935 O. 96. As to suits expressly barred by statutes, see 26 A. 594; 42 M. 647=37 M.L.J. 23 (custody of minor under the Guardian and Wards Act). 30 M. 126 (suit for land, as emolument of office under the Hereditary Village Officers Act, 1895) and other cases dealt with by special enactments. See also 36 Bom.L.R. 1245=1935 B. 91=154 I.C. 583 (suit to set aside award made under Co-operative Societies Act); 43 B. 211=21 Bom.L.R. 27 (suit to recover the value of silver confiscated by the order of Collector under the Sea Customs Act). In this case, however, it was held that if there had been no legal adjudication of the matter by the Collector of Customs in accordance with the provisions of the Sea Customs Act, the jurisdiction of the Civil Court to take cognizance of the suit was not ousted. (*Ibid.*) No Court in British India has jurisdiction to grant a declaratory decree that a decree passed by

the Privy Council is illegal and void; as the bar under S. 23 of Act 3 and 4 Will. IV, Cl. 31 (1833) is not confined to execution proceedings. 158 I.C. 338=11 Luck. 486=1936 O. 67. Where a special tribunal out of ordinary course is appointed by an Act to determine questions as to rights which are the creation of that Act, then except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. 157 I.C. 270=1935 A.L.J. 1111; 1938 R. 392 (F.B.). Civil Courts have no jurisdiction, if the tribunal comes to a conclusion after due enquiry. But if the conclusion is arrived at without any sort of enquiry and without an opportunity being given to the parties to be heard, the jurisdiction of the ordinary Civil Courts is not taken away. 43 B. 221; 115 I.C. 650=26 A.L.J. 673=1928 A. 511. The jurisdiction of the Civil Courts is not barred by S. 287 of the Madras City Municipal Act as the Standing Committee of the Madras Corporation cannot be treated as a special tribunal constituted to decide claims between the house-owners and the Corporation. 38 M. 41=23 M.L.J. 531. See also 1939 A.W.R.H.C. 230 (suit against municipality for tax illegally recovered). Cognizance may also be impliedly barred by general principles of law such as suits relating to acts of State and public policy. Suit to declare title to decree not barred by S. 47 or by S. 9, C. P. Code. 1931 R. 24. Suit *re* order in partition proceedings lies. 54 A. 646=138 I.C. 465=1932 A. 293 (F.B.). Suit for profits by one co-sharer of an occupancy holding against another can be tried by the Civil Court, and its jurisdiction is not ousted by S. 230 or the Fourth Schedule of the Agra Tenancy Act (1926). 57 A. 852=1935 A.L.J. 112=155 I.C. 37=1935 A. 271. See also 1940 A.L.J. 906=1941 All. 61 (F.B.). Ss. 26-J and 188 of B. T. Act do not oust jurisdiction of Civil Court to entertain suit by landlord for recovery of the balance of the transfer fee. 63 G.L.J. 105=1936 C. 786. Suit by a statutory body (District Board) for damages for unauthorized use of public street is not barred. (1938) 1 M.L.J. 391=A.I.R. 1938 M. 227.

*SUITS RELATING TO ACTS OF STATE BARRED.*—A suit for damages against Government for acts done in the exercise of sovereign powers does not lie in a Civil Court. 1 C. 11. But where the act complained of is professedly done under the sanction of Municipal law, and in the exercise of powers conferred by that law, the fact that it is done by the sovereign power does not oust the jurisdiction of Civil Court. 4 M. 344; 5 M. 273. Publication in the Government Gazette, respecting the conduct of a public servant is an act of State in respect of which no action for libel lies. 27 B. 189. A resumption of an inam by Government is an act of State. 28 I.C. 934. But see 6 M. 361. So also presumption by Government of certain functions entrusted to non-feudatory



## NOTES.

Zamindars in Central Provinces. 39 C. 615 = 39 I.A. 31 (P.C.) ; 10 L. 338. Also appointment to the office of Ghatwal or Digwar. 23 I.C. 849 = 18 C.W.N. 1036.

**SUITS AGAINST MUNICIPALITIES.**—A suit lies for a declaration that plaintiff has a right to vote and to stand as a candidate at a Municipal election. 24 C. 107. *See also* 48 C. 378. As to power of Criminal Court to question action taken by Municipality, *see* 93 I.C. 827 = 1926 L. 461. A Municipality has direction to issue such orders as it thinks proper with reference to a proposed building. Civil Courts cannot interfere with that discretion unless it is exercised in a capricious, wanton and oppressive manner. 12 B. 490 = 1937 L. 252 = 39 P.L.R. 380. Where powers are given to a public body of acquiring property for purposes of an Act, misuse of the powers is actionable in a Civil Court. 47 C. 500 = 47 I.A. 45 = 38 M.L.J. 511 (P.C.). [Affirming 44 C.L.J. 219]. Civil Court has jurisdiction to entertain a suit for declaration that the owner of certain land sought to be acquired by the corporation is entitled to compensation. 44 C. 87 = 43 I.A. 243 = 32 M.L.J. 631 (P.C.). Refusal of licence by Municipality is not justified and a Civil Court can interfere. 20 Cr.L.J. 705 = 17 A.L.J. 976 = 52 I.C. 785. As to jurisdiction of a Civil Court to decide questions of franchise, *see* 52 C. 943. A suit for declaration that assessment of town-tax by a Panchayat is illegal and *ultra vires*, is one between a subject and a branch of the local Self-Government not dealing with rights but with a question of taxation, and as such is not of a civil nature, and Civil Court has no jurisdiction to entertain it. 1936 A.L.J. 33 = 159 I.C. 897 = 1936 A. 917.

**SUITS BARRED ON GROUNDS OF PUBLIC POLICY.**—Suit against a witness for defamatory statements, contained in the evidence given by him. 30 M. 222 ; 17 B. 172 ; 15 C. 264. *See also* 10 M. 87 ; 11 M. 477. Suit by a witness to recover money agreed to be paid to him in consideration of his giving evidence. 4 M.H.C.R. 7. Suits for damages against a judicial officer for acts done in good faith in the discharge of his judicial functions. 2 M.H.C.R. 396 ; 12 A. 115. (But when he acts illegally, without due care and attention, and beyond the limits of his jurisdiction, an action lies. 9 C. 341 ; 6 M.H.C.R. 423). Suits on agreements void on grounds of public policy, e.g., suit for rent of lodgings knowingly let to a prostitute. 18 W.R. 445. Suit to enforce an agreement to suppress a criminal prosecution. 8 C. 24.

**CASTE QUESTION.**—This term may be defined generally to be a question which relates to matters affecting the internal autonomy of the caste and its social relations. 56 B. 242 = 34 Bom.L.R. 343 = 1932 B. 122 (F.B.) ; 23 B. 122 ; 34 B. 467 = 4 I.C. 108. In the matter of caste customs over which the ecclesiastical chief has jurisdiction Civil Court cannot interfere. 17 M. 222. *See also* 157 I.C. 302 = 1935 N. 156. *See also* 1939 M. 757 (dispute as to placing jewel with particular Namam on the deity). Refusal to invite a member of caste on auspicious occasions does not give rise to a cause of action in a Civil Court. 17 I.C. 527 = 1912 M.W.N. 1220. *See also* 15 B. 599 ; 10 B. 661 ; 18 B. 115. "Neota" is not a legal but social obligation and

is therefore not recoverable by means of a suit. 34 P.L.R. 218 = 1933 L. 317 (1). *See also* 20 B. 190 which relates to a sum of money which, by a resolution of the caste, every casteman was to pay on the occasion of any marriage in his family. The power of a Civil Court to decide questions relating to caste disputes is fully considered by Chandavarkar, J., in 26 B. 174. *See also* 27 Bom.L.R. 1503. The right of conscience, i.e., the right of individual members of a community to hold certain religious beliefs and opinions is not a matter within the cognizance of Civil Court. But the right to remain in the community or to exercise the rights and privileges of the members of the community is a civil one and must be decided by the Civil Court when called in question. 157 I.C. 302 = 1935 N. 156. *Temporary exclusion* of some members of a caste from social intercourse with other families on account of infringement of caste rules at the instance of the *panchayat* is not for the Civil Court. 23 I.C. 801 = 12 A.L.J. 522. *See also* 15 B. 599 ; 18 B. 115. But where plaintiff is *expelled* from the caste, suit will lie to determine whether plaintiff's expulsion is valid or not because it is not a matter of *social privilege* but of *legal right* which forms part of his status. 15 B. 599 ; 10 M. 133. *See also* 21 C. 463 ; 23 B. 122 ; 24 B. 13 ; 12 M. 495 ; 17 M. 222. A properly assembled caste *Panchayat* or meeting have jurisdiction to outcaste members of its community who have committed caste offences ; and when the *Panchayats'* proceedings are in order and in consonance with natural justice Civil Courts cannot interfere. 37 Bom.L.R. 417 = 158 I.C. 414 = 1935 B. 361. The general principles applicable to expulsion of members from a club apply to cases of expulsion from caste, while it is open to doubt whether there is an inherent power in the caste not dependent on proof of usage within the caste. 37 Bom.L.R. 603 = 159 I.C. 650 = 1935 B. 367. In order to justify such expulsion, there must be a caste offence, the rules of procedure of the caste, if any, must be complied with, and notice of the charge and of the meeting should be given to the accused and other members of the caste. (*Ibid.*) Where the requirements of natural justice are complied with, the Civil Court will not act as a Court of appeal in reference to the decision of the domestic tribunal. 37 Bom.L.R. 261 = 157 I.C. 127 = 1935 B. 268. Nor is it necessary that there should be before the domestic tribunal evidence of the character which would be required in a Court of law. (*Ibid.*) Civil Courts may deal with a caste question where the character of a member has been unjustly injured. 28 M.L.J. 58 = 2 L.W. 446 as to whether suits in respect of caste property are maintainable in Civil Courts. So also suits for inspection of accounts of caste property. 5 B. 83 ; 34 B. 467. *See also* 50 B. 124 = 1926 B. 69 ; 19 B. 507. Suit by caste members to inspect caste documents is maintainable. 56 B. 242. A claim by five of the members of a caste to use the *Wadi* and the vessels is one of a civil nature. 1924 B. 522. Where membership of a caste involves rights to property, Court has jurisdiction to entertain a suit by a member in respect of expulsion of caste which has been carried out in complete disregard of the rules of the caste. If a caste



## NOTES.

chooses to make a rule as to the procedure and methods to be adopted in respect of a caste offence, the caste must comply with the rule; and when that rule is disregarded by the caste, Civil Court will interfere and give relief to the aggrieved member. 36 Bom.L.R. 901=1934 B. 431.

**RIGHT TO RELIGIOUS HONOUR.**—A right to religious honour is not cognizable, unless it is an emolument attached to an office. 45 I.C. 959=7 L.W. 614; 12 L.W. 480=53 I.C. 483; 10 I.C. 110=(1911) 1 M.W.N. 353; 16 I.C. 338=14 Bom.L.R. 543; 156 I.C. 460=8 R.M. 3=1935 M.W.N. 615=41 L.W. 384=1935 M. 621=69 M.L.J. 14. See also 32 M. 291. A suit does not lie for a mere honour or dignity unconnected with fees, profits or emoluments. 2 B. 476; 51 I.C. 905; 7 M. 91; 10 B. 233; 19 M. 62; 41 M.L.J. 287; 44 L.W. 752=158 I.C. 375=1935 M.W.N. 520=1935 M. 679. So also in case of right to obtain *theertham* or honours in a particular order of precedence in a temple. 44 L.W. 539=1936 M.W.N. 954=1936 M. 973=71 M.L.J. 588. See also 1939 M. 102=(1939) 1 M.L.J. 124; 173 I.C. 986=1938 M. 334=(1938) 1 M.L.J. 174. Suit for declaration and injunction in respect of a right to be carried in a palanquin on certain days through public streets is not maintainable. 45 B. 590. See also 3 M.I.A. 198. Courts will not decide disputes as to precedence or privilege between purely religious functionaries. 45 B. 590; 1933 M. 264=143 I.C. 104.

**RIGHT TO WORSHIP, ETC.**—A suit to establish the right to worship in a temple according to the worshipper's belief is a suit of a civil nature. 44 B. 410. See also 145 I.C. 1014=38 L.W. 333=1933 M. 726; 76 I.C. 629; 1939 M.W.N. 418=1939 M. 757. A right to worship in a particular manner and with particular incidents attached to it is a civil right. The right of a person to exclusively conduct a *mandahappadi* on the first day of a festival, paying all the expenses himself and receiving all honours and emoluments of that right, is a civil right. 31 M.L.J. 758. See also 35 I.C. 88=3 L.W. 512. A suit to establish a person's right to enter a religious place is entertainable. 21 C. 463. Also a suit to restrain the defendant from entering a place of worship. 7 B. 323; 23 B. 122; 13 M. 293. See also 44 C.W.N. 177 (P.C.). (Removal of Mahant from religious duty).

**SUITS IN RESPECT OF TEMPLE PROPERTY.**—Hindu idols being property, the right to deal with them is cognizable in a Civil Court. 4 M. 315. See also 3 C. 390. Removal or alteration of *namams* or sacred marks in a temple amounts to an interference with property and will afford a ground of action in a Civil Court. 30 M. 158=17 M.L.J. 1. Dispute as to mode of placing jewel with a particular mark (*namam*) on the deity, is trivial and not of civil nature. 1939 M.W.N. 418=1939 M. 757. A suit between two Buddhist priests to recover possession of certain lands and religious manuscripts is one of a civil nature. 8 Bur.L.T. 62=27 I.C. 112. A worshipper who is not prevented from worshipping an idol cannot sue its custodians to locate in a particular temple instead

of another. 32 C. 1072.

**SUITS TO RECOVER FEES AND EMOLUMENTS ATTACHED TO OFFICES.**—Payments made to a *vatandar* barber for officiating at some ceremonies are customary fees and therefore can be recovered from another who, without any right, performs them. 22 Bom.L.R. 410=44 B. 733. Where, however, a donor makes a gift personally to the defendant Maha Brahmin on a day which belonged to the turn of the plaintiff, the plaintiff could not recover the same, as it was made to the defendant in his individual capacity. 35 A. 412. See also 26 C. 356.

**SUITS FOR A SHARE IN OFFERINGS.**—Right to share in temple offerings is a civil right. 45 A. 437=1923 A. 426; 17 C. 906; 27 C. 30; 13 B. 548. A suit for definite amount due to a plaintiff as a co-sharer of the voluntary offerings in a temple realised by the defendant is maintainable in Civil Court. 26 P.R. 1919=51 I.C. 236 (26 C. 356, Dist.); 17 M.L.J. 493. But see 1931 B. 297=33 Bom.L.R. 490.

**RIGHT TO OFFICE (SECULAR).**—The existence of an office involves the existence of some duties to be performed by the holder of the office. 28 I.C. 459. Where the plaintiff's services are voluntary and gratuitous, and there is no question of any contract Civil Court has no jurisdiction. 37 A. 313. Though an honorary lecturership in a University is an office of consequence, yet there is no injury to the personal right of the lecturer on account of no arrangements being made by the University for the delivery of lectures. 41 C. 518. A suit by one director against the other directors of a limited company to restrain the latter from preventing him from acting as such, is maintainable. 51 C. 916.

**RIGHT TO OFFICE (RELIGIOUS).**—Suit by a body of Brahmins that they have a right to recite vedas, etc., in a temple is maintainable. 98 I.C. 229=1927 M. 131. See also 54 C. 614; 1939 M.W.N. 418=1939 M. 757. Right to the office of hereditary priest to which fees are attached is property and a suit is maintainable in respect thereof. 36 B. 94. See also 22 Bom.L.R. 1202=45 B. 234; 54 C. 614. Also a suit for exclusive right to officiate as a purohit to pilgrims to Rameswaram. 9 M.I.A. 348. It is not necessary that any emoluments should attach to the office. 15 C. 159 (162); 45 L.W. 384=171 I.C. 684=1937 M. 403. A suit lies for the enforcement of a right to officiate as priest at a certain sacred spot though no fixed fees are attached to it. 27 C. 30. See also 13 B. 429; 13 B. 548; 16 B. 281. Where claim is confined to rights in religious ceremonies as a right to recite sacred texts, the same is not cognizable. 28 M. 23; 19 M. 62. See also 32 A. 527 (right to perform Ramlila). 49 L.W. 295=1939 M. 494=(1939) 1 M.L.J. 199 (Claim relating to certain ritual observances by members of a community in a communal festival). The right to hold a certain office in a certain place at a certain season of the year confers upon the holder thereof a legal character so as to enable him to bring a suit to maintain such right. 1 Pat.L.J. 381=35 I.C. 345. The gains made by officiating as priest at the bath, etc., to the pilgrims at chaukis on the banks of a sacred river are property in law and a suit for a share in such business is one of a civil nature. 27 O.C. 114=1924 O. 252 (43 A.



10. No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the Stay of suit.

#### NOTES.

581, Ref.). A Gayawal priest can sue for declaration and possession in respect of his gaddi whether it is an office or a business. 42 I.C. 478=2 Pat.L.J. 705. Where there is a specific duty of being present at the performance of religious ceremonies, with emoluments attached to it, it must be regarded as an office, in respect of which suit will lie in a Civil Court. 1928 M. 397. Test of right to office is whether there is a compellable duty on the part of the claimant. 50 L.W. 206=1939 M. 886=(1939) 2 M.L.J. 420.

OTHER RIGHTS OF A CIVIL NATURE.—Right to go in procession in a public street is a civil right. 29 M.L.J. 91=29 I.C. 248; 44 B. 410=22 Bom.L.R. 307. See also 24 C. 524; 18 B. 693. A Mahomedan's right to slaughter cattle is a common law right. 17 O.C. 354=25 I.C. 908. So also a suit to establish a claim to perform *urus* ceremony and to manage the offerings thereat. 50 B. 148. Suit to declare the election of a candidate as void being contrary to law is one of a civil nature. 39 A. 308. See also 52 C. 943. Suit to set aside award is maintainable. 3 L. 296. Suit for recovery of carcases of dead animals by Mahars is not maintainable in a Civil Court. 47 B. 95. See also 15 I.C. 108. Suit for declaration of validity of election as municipal commissioner is maintainable. 37 C.W.N. 122. So also a suit by minor plaintiff *re* order of Revenue Court in partition proceedings. 1932 A. 293=54 A. 646 (F.B.).

FRANCHISE AND ELECTION.—Question relating to. See 1926 C. 279. A suit for a declaration that plaintiff's election as commissioner of the Municipality is valid, is one of civil nature and cognizable by Civil Courts. 60 C. 438=37 C.W.N. 122=1933 C. 492.

MARRIAGE.—Declaring a *pat* marriage invalid. 22 N.L.R. 134=1926 N. 488.

RITUAL.—Where questions of ritual are involved in the civil rights of persons they ought not to be investigated by the Court. 1926 M.W.N. 226; 1929 M. 520.

ELECTRICITY ACT.—Suit against licensee for damages for failure to supply electrical energy. 97 I.C. 537=1926 L. 349.

CO-OPERATIVE SOCIETIES ACT.—Civil Courts have no jurisdiction to set aside an award made under the Bombay Co-operative Societies Act. (*Vide* S. 57 of the Bombay Co-operative Societies Act.) 154 I.C. 583=36 Bom.L.R. 1245=1935 B. 91.

INSOLVENCY.—Suit on debt incurred after adjudication not barred. 22 N.L.R. 118.

SEC. 10: SCOPE OF THE SECTION.—Section is mandatory, and no discretion is left to the Courts. 36 C.W.N. 667=1932 C. 751=140 I.C. 155. See also 61 C. 670. S. 10 does not bar the institution of a suit but only the trial of it under certain circumstances. A Court cannot dismiss a suit under the section but only postpone its trial. 27 M.L.J. 405; 11 A. 148

(154) (F.B.). This section lays down only a rule of procedure, and hence the provision may be waived with the consent of the parties. 1937 N. 132=I.L.R. (1937) N. 6. There is no necessity for stay where there is no possibility of conflict of decrees. 106 I.C. 661. See also on this section. 1925 P. 201; 23 A.L.J. 529=1925 A. 615. Nor does the section dispense with the institution of a suit within the proper time when the law expressly requires such institution. 22 B. 640; 77 I.C. 157; 1925 P. 201. Notwithstanding stay of suit, interlocutory orders such as orders for receiver, for an injunction or for attachment before judgment could be passed. 46 B. 431. Under S. 10 a Court has no jurisdiction to decide the question of *res judicata*. It can only stay the new suit if it finds sufficient reasons. 42 C. 926. See also 47 A. 904; 1926 P. 171. Failure of Court to apply section and to stay suit—Effect of. 7 Lah.L.T. 4.

OBJECT OF THE SECTION.—The object of S. 10 is to prevent Courts of concurrent jurisdiction from trying two parallel suits in respect of same matter in issue. 36 I.C. 641=24 C.L.J. 514. See also 75 I.C. 231; 48 M.L.J. 251; 23 A.L.J. 585; 1925 A. 677; 157 I.C. 796. And avoid conflict of decisions. 29 Bom.L.R. 382=1927 B. 245; 1935 S. 225; 1935 L. 76.

OPERATION OF THE SECTION.—An appeal is a continuation of the suit for the purposes of the section. 82 I.C. 539; 24 C.L.J. 514; 30 I.C. 753=1915 M.W.N. 844; 36 C.W.N. 1=61 M.L.J. 420 (P.C.); 1931 C. 779 (1); 1932 C. 751; 1939 Sind 329; I.L.R. (1940) Kar. 15. Pendency of an appeal before Privy Council is a bar to the trial of a subsequent suit where the same issue is raised, though the relief claimed is different. 23 O.C. 214=58 I.C. 629; 1939 Sind 329. The pendency of an application for leave to appeal to the Privy Council is no bar. 21 M. 18; 1931 L. 50. A proceeding under S. 47 is not a suit within the meaning of the section. 22 M. 256. So also are proceedings under S. 295, Succession Act, 1640 O.W.N. 1=1940 O. 113. Interlocutory orders under S. 10 occur in suits and not in execution proceedings. The section is not exhaustive and its application has been extended only to proceedings under certain Acts and miscellaneous proceedings by virtue of S. 141 and this latter section does not cover proceedings in execution of a decree. 119 I.C. 488=1929 L. 694. Where in the absence of a prayer in the plaint the Courts give a direction in the preliminary decree for ascertainment of future mesne profits, a subsequent suit for the same future mesne profits is not barred by S. 10. 57 M.L.J. 515.

APPLICABILITY OF SECTION.—One test of applicability of section to a particular case is whether on the final decisions being reached in the previous suit, such judgment would operate as *res judicata* in the subsequent suit.



same title where such suit is pending in the same or any other Court in British India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of British India established or continued by <sup>1</sup>[the Central Government or the Crown Representative] and having like jurisdiction, or before His Majesty in Council.

*Explanation.*—The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action.

#### LEG. REF.

<sup>1</sup>Substituted for "the Governor-General in Council" by para. 3 and Sch. I of A.O., 1937.

#### NOTES.

61 C. 670=38 C.W.N. 818=1935 C. 1; 36 C.W.N. 667=140 I.C. 155=1932 C. 751; 1941 O.A. (Supp.) 605=1941 R.D. 688. It is not necessary for applicability of the section that the subject-matter and the causes of action should be the same. 61 C. 670. Where the matters in issue in one are directly and substantially in issue in another, the mere addition in the second suit of a prayer for declaration of illegality of an interim order of attachment in the first suit, and of a prayer for an injunction against the first suit being proceeded with, will not affect the identity of the two suits. 61 C. 670. (noted *supra*). The three essential conditions that are necessary to bring in operation S. 10 are (1) that the matter in issue in the second suit is directly and substantially in issue in the previously instituted suit, (2) that the parties in the two suits are the same, and (3) that the Court in which the first suit is instituted is a Court of competent jurisdiction to grant the relief claimed in the subsequently instituted suit. Where the Court deciding the earlier suit based on title was shown to have no jurisdiction to grant relief as to valuation and apportionment which formed the subject-matter of the later suit, *held*, that the later suit could not be stayed. 60 C. 1096=1933 C. 887. See also 47 L.W. 525=177 I.C. 102=1938 M. 603=(1938) 1 M.L.J. 873; 1940 O.W.N. 802=1940 O. 440. S. 10 is not applicable to the stay of a suit connected with a pending appeal. But the Court has inherent jurisdiction to stay the suit if that is in the interest of both parties. 144 I.C. 107=1933 L. 50. It is mandatory upon the Court, under S. 10, not to proceed with the trial of any suit in which the matter raised is also raised in a previously instituted suit. But it is discretionary with the Court to stop the proceedings at an earlier stage. As a matter of common sense and convenience, if the second suit is parallel to the first, then the best course for everybody concerned is to put a stay upon or arrest altogether the second suit at the earliest possible moment; and in a proper case the Court has power to stay a suit generally at any stage it thinks expedient to do so. 61 C. 670=38 C.W.N. 818. It is hardly open to a party to blow hot and cold and ask the Court not to inquire into an application filed by such party until a previous suit in respect of the same subject-matter filed by him is decided by another Court. 149 I.C. 1169=1934 S. 38. As to effect of Government of Burma Adaptation of Indian Laws Order, 1937, on suits pending on same cause of action in British India, see 175 I.C. 275=1938 R. 130 (F.B.).

A suit was referred to arbitration and the arbitrators submitted an award. The Court directed that the award would be made part of the decree. No decree, however, was drawn up as the necessary stamps were not filed. *Held*, that the suit was still pending. 71 C.L.J. 190.

#### CONDITIONS FOR OPERATION OF THE SECTION.

—There must be substantial identity between the matters in dispute and parties in the earlier and later suits. 44 B. 283; 9 I.C. 929=13 Bom.L.R. 109; 48 M.L.J. 251=88 I.C. 421. An application under S. 20, Sch. II, is not a plaint and the hearing of such an application is not a suit though under sub-Cl. (2), S. 20, it has to be numbered and registered as a suit. S. 10 is applicable only to suits. 1929 L. 533. Where objections to an award are preferred in a Court no application under S. 10 for stay of proceedings lies on the ground that a suit in respect of the same subject-matter has been instituted in another Court by the applicant. (1928 S. 169 and 1934 S. 38, Rel. on.) 1935 S. 228.

**EFFECT OF CONTRAVENTION OF SECTION.**—A decree passed in contravention of S. 10 is not a nullity and cannot be disregarded in execution proceedings. 22 P.R. 1919=46 I.C. 419. See also 7 Lah.L.T. 4.

**'THE MATTER IN ISSUE.'**—The expression denotes the entire subject in controversy, and the section is not applicable when there is only 'a matter in issue' common to both the suits. 40 L.W. 715=1935 M. 24=67 M.L.J. 748; 41 L.W. 449=155 I.C. 1002=1935 M. 112; 160 I.C. 805=1935 L. 816; 1929 A. 805; 82 I.C. 539; 36 I.C. 641=24 C.L.J. 514; 4 Pat.L.J. 557; 48 M.L.J. 251; 103 I.C. 274=26 L.W. 241; 26 P.L.R. 185=1926 L. 304; 47 A. 915; 51 A. 1017; 6 R. 775; 1929 O. 341; 1927 B. 245; 1935 M. 112; 15 L.W. 646=1922 M. 304; 1925 M. 574; 1929 A. 805; 4 Luck. 573; 1931 O. 313. See also 61 C. 670=38 C.W.N. 818; 1932 C. 751; 1938 L. 502; 50 L.W. 334=(1939) 2 M.L.J. 290.

**"PREVIOUSLY INSTITUTED SUIT."**—The date of presentation of plaint and not date of admission is the date of institution for the purpose of this section. 62 C. 1115. Suit first instituted in wrong Court and subsequently in proper Court—Suit instituted by opponent in another Court in the meantime—Which suit is previous. See 144 I.C. 56=1933 Sind 177. A plaint in a suit in *forma pauperis* should be deemed to have been filed when the application for leave to sue as a pauper was presented and not when the Court-fee on rejection of the application was paid. Same considerations would apply in deciding the question of priority for purposes of S. 10, C. P. Code, as between two suits, one of which is filed in *forma pauperis*. 1940 O.W.N. 784=1940 O. 441. In order to



11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same *Res judicata*.

#### NOTES.

arrive at a correct decision as to whether a subsequent suit is "parallel" to a previous suit, so as to attract the application of S. 10, regard must be had to the position of affairs at the time when each of the suits is respectively instituted and what would be the position of affairs when both the suits have been tried and finally determined. The real criterion to apply is, supposing the first suit was determined, would the position then be that when the second suit was instituted, the matters raised in the second suit were *res judicata* by reason of the decision in the prior suit. 61 C. 670 = 38 C.W.N. 818. Where stay of prior criminal proceedings was asked because of the institution of a civil suit subsequently, *held*, that the principle of S. 10 might be applied and stay refused. 151 I.C. 897 = 1934 A.L.J. 342 = 1934 A. 131. Where in respect of the same will two applications for probate were made by different persons to different Courts on different dates and caveats were also filed in both Courts on different dates and an application was made by one of the applicants for probate to one of the Courts for stay of the proceedings in that Court. Under S. 10, C. P. Code, it was held that S. 10, C. P. Code, was not in terms applicable to proceedings under S. 295, Succession Act, for they were not 'suits' and that even assuming it applied in principle, it would not be possible as between rival applications for probate, to treat as the date of the institution, the date on which the caveat might have chosen to allow the proceedings to become contentious. It was further held that the only date which could be regarded as the date of institution for the purpose of deciding which of the two rival 'suits' was 'previously instituted' must be the date on which the petition was filed. The principle governing such cases was stated by his Lordship to be that any application which is subsequently converted into a plaint or is to be treated as a plaint and the foundation of a suit must be considered to date back as a plaint to the date on which it was filed as an application. 15 Luck. 290 = 1940 O. 113.

**SUIT IN NATIVE STATE.**—High Court can order party before it not to proceed with suit in Native State. 1927 B. 135 = 29 Bom.L.R. 138.

**SAME PARTIES, ETC.**—See 15 L.W. 667 = 68 I.C. 167; 31 I.C. 25; 1939 A.W.R. (B.R.) 60. See also notes under S. 11.

**LITIGATING UNDER THE SAME TITLE.**—See also notes under S. 11.

**INHERENT POWERS.**—Stay of suit under inherent powers. See S. 151, C. P. Code. 123 I.C. 50 = 1930 L. 527; 1933 L. 50; 141 I.C. 186 = 1933 L. 605.

**POWERS OF THE HIGH COURT.**—High Court on its Original Side can order a party to a suit before it not to proceed with a suit instituted by him in a mufassil Court in such a way as to delay or embarrass the trial of the suit in the High Court. 44 B. 283. The

power of the High Court on its original side to issue an injunction restraining the defendant in a suit before it from proceeding with a suit in another Court, is not restricted by the provisions of C. P. Code. It has jurisdiction to restrain a defendant from litigating in another Court on the ground of convenience. I.L.R. (1941) 1 Cal. 373. The High Court in its original jurisdiction has inherent power to grant an injunction restraining the defendant in a suit before it from proceeding with a previously instituted suit in another Court on grounds of convenience alone and in spite of the provision of S. 10. I.L.R. (1941) 1 C. 490. An application under S. 10, C. P. Code, asking the Court not to proceed with the trial of a suit should normally be made to the Court which is actually seized of the case. An application for stay of a suit pending on the Original Side of the High Court until the decision of a previously instituted suit in a mofussil Court has to be made on the Original Side to the Judge trying the suit and not on the Appellate Side of the High Court. 43 Bom.L.R. 236.

**BURDEN OF PROOF.**—The onus is on the defendant to show that the case comes under S. 10. 39 I.C. 908 = 3 Pat.L.W. 327.

**APPEAL.**—An order by a single Judge of the High Court refusing to stay a suit under S. 10 is a judgment within Cl. 15 of the Letters Patent and is appealable. 61 C. 670 = 38 C.W.N. 818 = 1935 C. 1.

**REVISION.**—High Court can entertain an application for revision from an order under this section, if suitable grounds are disclosed. 33 P.L.R. 787 = 139 I.C. 48 = 1933 L. 34. An order under S. 10 is not a decision of a case within S. 115 and not liable to revision. 67 I.C. 870 = 1922 L. 54. But see 139 I.C. 48. See also 141 I.C. 177 = 34 P.L.R. 86 = 1933 L. 191. An order staying a second suit under the inherent jurisdiction of the Court to avoid the risk of conflicting rulings may, if the risk be groundless, be revised under S. 107 of the Government of India Act, 141 I.C. 186 = 1933 L. 605.

**SEC. 11 : APPLICATION OF SECTION.**—Not exhaustive of the law of *res judicata*. 16 M. 141; 24 M.L.J. 469; 48 C. 499 = 40 M.L.J. 423 (P.C.); (1940) 2 M.L.J. 499 = 1940 M. 957; 45 M. 320 (P.C.); 26 M. 760; 79 I.C. 520 = 1924 C. 600; 94 I.C. 423 = 1926 S. 236; 27 P.L.R. 504 = 1926 L. 603 = 8 L. 15; 56 C. 639; 117 I.C. 83 = 1929 L. 781; 1930 L. 487; 32 Bom.L.R. 389; 58 I.A. 158 = 53 A. 103 = 61 M.L.J. 196 (P.C.); 61 C. 1 = 151 I.C. 743 = 1934 C. 430; 146 I.C. 138 = 1933 O. 507 (F.B.); 158 I.C. 1074 = 1935 C. 596; 1935 L. 826. So, English decisions may be referred to ascertain the general principles governing the doctrine. 59 I.A. 247 = 10 R. 322 = 63 M.L.J. 64 (P.C.). Except in cases which are within S. 11. 96 I.C. 910 = 1926 L. 670; 56 M.L.J. 52; 152 I.C. 894 = 1934 S. 112; 1935 C. 792 = 40 C.W.N. 174; 14 L. 437 = 1933 L. 646. See also 145 I.C. 334 = 1933 L. 614; 14 L. 369 = 1933 L.



title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

*Explanation I.*—The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

*Explanation II.*—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

*Explanation III.*—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

#### NOTES.

551. or where the application of doctrine is expressly forbidden by S. 11. 1934 N. 178. The principle of *res judicata* is mutual; and even a successful party may in some cases be bound by an adverse finding. 38 Bom.L.R. 853=165 I.C. 987=1936 B. 402. Where several issues have been framed, the decision on each issue which supports the ultimate decision in the case must be regarded as *res judicata* between the parties to the suit. But if a decision on an issue does not support the ultimate decree, such decision can not operate as *res judicata*. 73 C.L.J. 475. See also 45 C.W.N. 854. Per Bhide, J.—S. 11, C. P. Code, applies not only to the final decision but also to issues. 40 P.L.R. 319=1938 L. 369 (F.B.). A judgment against which a party has no right of appeal because the decree was in his favour though some of the findings were against him, cannot operate against him as *res judicata*. 1940 R.D. 355=1940 A.W.R. (B.R.) 170. See also 1938 A.L.J. 739=1938 A. 497. Where an adverse finding is expressly challenged in appeal by the defendant, but the appellate Court allows the appeal on another ground and dismisses the suit in consequence, that finding will not stand as the dismissal of the suit involves a reversal of the judgment in which it is contained. But if it could be shown that in disposing of the appeal, the Court, while dismissing the suit on another ground still intended to maintain the finding of the lower Court against the defendant, the finding may operate as *res judicata*, notwithstanding the dismissal of the suit, as being embodied in a judgment which is subsisting and in force. 45 C.W.N. 220. Foundation of rule is there should be an end to litigation as to any issue which has been determined between the parties by a Court of competent jurisdiction. 1 P. 174. See also 36 B. 283; 1929 M. 404; 61 C. 1=1934 C. 430; 1935 C. 256. S. 11 is not exhaustive and the bar of *res judicata* operates as much on general principles as on the wording of the section. The *raison d'être* of the rule is to confer finality on decisions arrived at by competent Courts between interested parties after genuine contest and to allow persons who had deliberately chosen a position to reprobate it and to blow hot now when they were blowing cold before would be completely to ignore the whole foundation of the rule. 40 P.L.R. 591=1938 L. 571. S. 11 does not, no doubt, codify or crystallize the entire law regarding the doctrine of *res judicata* and where circumstances other than those provided for in that section exist, the principle

underlying the rule of *res judicata* may be invoked in a proper case without recourse to the provisions of that section. But where the section is applicable, its provisions cannot be overridden by reference to general principles of *res judicata*. Such principles cannot, therefore, be invoked in a case where the Court which tried the first suit had not the jurisdiction to try the second suit. 44 C.W.N. 1099=1941 C. 104=72 C.L.J. 99. There can be no doubt that S. 11 is not exhaustive regarding the principle of *res judicata* and that the plea of *res judicata* may successfully be raised in circumstances which do not fall within the purview of the section. Such a plea can be supported on the general principle of law that there must be an end to litigation. But an elemental essential to the success of such a plea is that the matter must have been in controversy between the same parties or between parties under which the present parties claim. 1940 C. 225. S. 11 is not exhaustive of the principle of *res judicata*. When an issue in a proceeding has been made the subject of a final order by a Court, that order cannot be impugned by a succeeding judge, nor has the Court jurisdiction to alter its decision except on grounds which would justify a review. 52 L.W. 462=1940 M. 957=(1940) 2 M.L.J. 499. See also 1940 C. 225. A Court which declines jurisdiction cannot bind the parties by its reasons for declining jurisdiction. Such reasons are not decisions and are certainly not decisions by a Court of competent jurisdiction. It would indeed be strange if on a dispute as to the jurisdiction of a Civil Court to try an issue, that Court by its reasons for holding that it had no jurisdiction, could, upon the principle of *res judicata*, decide and bind the parties upon the very issue which it was incompetent to try. 21 P.L.T. 935=45 C.W.N. 204=43 Bom.L.R. 381=I.L.R. (1940) Kar. 460 (P.C.). If the circumstances of the earlier litigation entitle the defendant to raise the plea of *res judicata*, the observations contained in the judgment of the Court in that litigation that the defendant was prevented from raising any plea of *res judicata* in any subsequent suit would not preclude another Court from considering that plea and examining the circumstances upon which it rests. 42 C.W.N. 560. Where the decision of the Court in a previous suit determined that S. 12-A, Chota Nagpur Encumbered Estates Act, did not apply to a transaction, a Court, in a new suit between the same parties with regard to the same transaction, cannot try anew the issue as to its applicability. 63 I.A. 53=15 P. 203=



## NOTES.

1936 P.C. 46=70 M.L.J. 122 (P.C.). See also 159 I.C. 462=1935 C. 725. The doctrine of *lis pendens* does not prevail over the rule of *res judicata* if the latter is applicable. 61 C. 494=38 C.W.N. 492=1934 C. 552. The principle of *res judicata* cannot be pleaded against a statute except where the decision in the prior suit was not a pure question of law but was a mixed question of law and fact. 1935 A.L.J. 490=156 I.C. 810=1935 A. 588. Certainty is essential for the application of the rule. 1930 M.W.N. 729. Plea of *res judicata* not a matter of jurisdiction but mixed question of law and fact—Decision on—Final. 9 P. 674. *Res judicata* differs from estoppel. One ousts the jurisdiction of the Court, while the other shuts the mouth of a party. 36 B. 283; 29 S.L.R. 455=164 I.C. 43=1936 S. 99. Does not cover all cases of *estoppel by judgment*. 36 M. 141=24 M.L.J. 469; 40 A. 593 (P.C.). Allowing a decree to become barred will bar a suit again on the same cause of action. 33 C. 679; 41 M. 641=34 M.L.J. 167 (23 M. 629, Diss.; 25 M. 300, Appr.); 99 I.C. 478=1927 O. 60. Dismissal of suit, if contention not established, bars a subsequent suit on the same contention in another form. 37 B. 224. A matter, which is *res judicata*, cannot be agitated afresh merely by reason of a suggestion, made in a judgment which was unnecessary to the decision of the case, that the party may bring another suit. 158 I.C. 995=1935 Pesh. 150. The rule could not be invoked by the plaintiff whose contentions in the two suits were mutually contradictory. 1936 M. 988. Where an application was held by the Court as not being maintainable under S. 47, C. P. Code and the same was confirmed in appeal, a party to it cannot raise the question in a subsequent suit as to applicability of S. 47. 42 L.W. 442=1935 M. 615=69 M.L.J. 139. An order striking out a person's name from the list of defendants is in effect an order dismissing the suit as against him and it is final unless and until it is set aside in appeal, and a subsequent suit seeking the same relief against such person does not lie. 152 I.C. 1079=1934 R. 154. Where causes of action are distinct as many actions as there are causes of action can be brought. 27 C. 142; 1930 A.L.J. 913; 1940 B. 311=42 Bom.L.R. 470; 43 Bom.L.R. 293; 1938 N. 401=1 L.L.R. 1938 N. 496; 1938 M. 221=(1938) 1 M.L.J. 92; 40 P.L.R. 794=1938 L. 492; 1940 R.D. 471. A decree in an administration suit does not bar a suit for distribution of the shares declared by the decree. 64 I.C. 813. Where, in a suit for accounts of a dissolved partnership, there was found due to a defendant a certain amount, but he remained *ex parte* and did not choose to ask for a decree for that amount, there is nothing to prevent that party from claiming the amount due in the prior suit by a fresh suit. 1934 M. 665=67 M.L.J. 413. Dismissal of a prior suit for declaration of title by adverse possession no bar to a subsequent suit provided 12 years' adverse possession after the date of prior suit is proved. 33 A. 463; 1926 L. 668. The dismissal of a suit by reversioner for declaration that he was the next reversioner is no bar to a subsequent suit for possession of the property. 70 I.C. 685=20 A.L.J. 672; 1931 A. 21. Dismissal of suit

for partition under a *compromise* not carried out does not bar a *second suit for partition*. 37 A. 155; 36 M. 46; 35 M. 75; 20 C.L.J. 583. So also where the first decree, declaring the right of parties to partition, has not been given effect to. 37 B. 307=56 I.C. 610; 31 I.C. 205. But see 40 I.C. 820=1917 M.W.N. 327. Decree deciding a question in dispute not given effect to by agreement of parties, effect of. See 1938 M. 287. Rule has no application to a case where a suit is withdrawn with *liberty for another suit*. 11 I.C. 831. Withdrawal of suit in appeal—Findings in judgment permitting withdrawal of suit after allowing appeal—Not *res judicata*. 39 C.W.N. 586. Where there are two *inconsistent decisions*, later decision operates as *res judicata*. 44 A. 319; 65 I.C. 877; 37 A. 531; 31 M.L.J. 219; 46 A. 220. See also 1937 A.L.J. 979=1937 A. 481. 18 R.D. 414; 155 I.C. 726=1935 N. 122; 155 I.C. 571=1935 A. 645. Where there are two decrees operating as *res judicata*, the earlier decree must prevail. 49 A. 606. The plea of *res judicata* is available not only as regards *final conclusions*, but also regarding the findings necessary for arriving at conclusions. 39 M. 1202=27 M.L.J. 529; 39 C.L.J. 40=79 I.C. 520. See also 1933 L. 534; 185 I.C. 232=1939 L. 540=41 P.L.R. 596; 1937 O.W.N. 429; 1937 O.W.N. 1127; 1938 O.W.N. 242=1938 O.A. 164; A finding of the trial Court which was not questioned before the Appellate Court, is not open to question in the execution proceedings under the decree. 40 Bom.L.R. 760=1938 A.L.J. 200=42 C.W.N. 385=1938 P.C. 98 (P.C.). The finding must be material and necessary. 61 C. 1=1934 C. 430. As to applicability to foreign judgment, see 40 Bom.L.R. 77 and S. 13, *infra*. There is no distinction, regarding *res judicata*, between questions of fact and questions of law. 1635 R.D. 242. A judgment can operate as *res judicata* only in so far as it finally determines a controversy which is directly and substantially in issue in the case. 18 N.L.J. 32. The plea may be waived by the party. 31 M.L.J. 219; 155 I.C. 571=1935 A. 645. The party omitting to plead *res judicata* intentionally invites the Court to decide the case on the merits and having failed to secure a decision in his favour he cannot go behind it. 1935 A. 645; 48 C.L.J. 577=114 I.C. 129=1929 C. 163. Rule applies though the value of the property on a former occasion was higher. 1931 L. 217=134 I.C. 524. APPLICATION.—Prior decision on a point of jurisdiction is *res judicata* in subsequent suit relating to same subject-matter as on any other point. 1937 L. 649. See also 11 B. 488; 12 P. 117. It cannot be said that in every case where two connected appeals are disposed of by a common judgment and an appeal is preferred against only one of the decrees, the other becomes final and operates as *res judicata*. 1939 O.W.N. 955=1940 O. 45.

VOID DECREES OR DECREES OBTAINED BY FRAUD.

—A void decree cannot operate as *res judicata*. 7 B. 408. A decree obtained by fraud or collusion, is nullity. 26 A. 272; 24 A. 242; 144 I.C. 524=1933 L. 573. So also a judgment of a Court not competent to decide it. 28 M. 42; 1930 A. 681; or an order without jurisdiction for the execution of a decree, 1928 M. 746=114 I.C. 545; or decision on an issue which



## NOTES.

Court was not competent to decide. 107 I.C. 895=1928 O. 298. It is open to any party to show that the judgment was obtained by fraud or collusion or that there was want of jurisdiction. 1936 A. L.J. 1162=1937 A. 28.

**ERRONEOUS DECISIONS.**—A Court empowered by law to try a suit has power to try it either rightly or wrongly. A judgment of a Court having jurisdiction, however erroneous, cannot be a nullity and will operate as *res judicata*. 157 I.C. 917=1935 M. 835=69 M.L.J. 196. A *wrong decision* operates as *res judicata*. 60 I.C. 404; 1918 M.W.N. 580=49 I.C. 369; 10 P.L.T. 630; I.L.R. (1904) Nag. 181; 43 P.L.R. 479; 18 P. 378=1939 P. 230; 1930 R. 294; 1931 A. 425; 1932 B. 257; 1 R. 1933 M. 46; 18 R.D. 414; 1933 R. 383; 16 P.L.T. 448=158 I.C. 734=1935 P. 526. As to *wrong decision* on question of law, see 38 Bom.L.R. 853=165 I.C. 987=1936 B. 402; 162 I.C. 709=40 C.W.N. 627=1936 C. 200; 42 L.W. 446=1935 M. 835=69 M.L.J. 196; 14 P. 633=159 I.C. 173=16 P.L.T. 819. Even an issue of law wrongly decided does operate as *res judicata* as S. 11 makes no distinction between an issue of fact and an issue of law, specially when there is identity of the matter in issue and also the identity of the causes of action. 14 L. 442=1933 L. 325. As to *wrong decision* on mixed questions of law and fact, see 1926 O. 417; 65 M.L.J. 684=1933 M. 925. The principle of *res judicata* on a question of law should, however, be confined to matters which actually existed at the time of the former decision, and therefore areas and trees to which it was not applied at the time of the former decision would be governed by the correct principle of law as laid down in later decisions. I.L.R. 1937 M. 364=1937 M. 254=(1937) 1 M.L.J. 233 (F.B.). Though the construction of a document may for certain purposes be regarded as involving a question of law, a construction once placed on a document by a competent Court before which the question was directly and substantially in issue is conclusive between the parties, and it is immaterial that the property involved in the subsequent suit is not the same as that which formed the subject-matter of the first suit. This principle of finality of construction is equally applicable to decrees, and the interpretation placed by a Court on a decree is conclusive between the parties in a subsequent litigation even if that interpretation be erroneous in law. 1937 M.W.N. 465 (2). An erroneous decision on the question of the construction of a deed of transfer operates as a bar. 29 B. 339 (347) (P.C.); 10 C. 697; 41 C. 778; 31 M.L.J. 97; 59 I.A. 74=54 A. 93=62 M.L.J. 371 (P.C.); 1932 B. 257. An erroneous decision as to when the cause of action for a particular claim arises would be *res judicata*. 38 Bom.L.R. 853=165 I.C. 987=1936 B. 402. So also where a decision between the parties was considered by the Court and declared not to be *res judicata* the latter decision, even if erroneous in law, operates as *res judicata*. 39 P.L.R. 117. When a Court trying a rent suit decides a question of title, if the decision is necessary for the purposes of that suit and the question is directly and substantially in issue between the parties, the decision, though erroneous, must be treated as

constituting *res judicata*. 16 P.L.T. 448=1935 P. 526; 71 C.L.J. 232=1940 C. 347. The doctrine of *res judicata* is only a form of estoppel and there can be no estoppel against a statute. If a law prohibits the levy of a sum by a landlord from his tenant, a previous judgment entitling him to recover the same cannot stand in the way of the defence of the defendant denying liability. 20 P.L.T. 671=1939 P. 633. Whether distinction can be made between decisions on abstract questions of law and concrete questions such as construction of a particular document; see 45 B. 1260 in which 18 B. 525 is considered. Apparently no distinction can be made. 2 P. 771. A Court, before whom a cause is brought has always jurisdiction to decide for itself whether it has jurisdiction to try the suit and its decision thereon is as much *res judicata* in a subsequent suit relating to the same subject-matter as on any other point. 39 P.L.R. 117=1937 L. 649. See also 1937 A. 251; 1937 O. 322. Under certain circumstances a decision on an issue which mainly depends on an interpretation of law should be open to reconsideration on the question of law in a subsequent suit between the same parties. The question whether the cause of action is the same or different makes no difference in considering whether the previous decision on a point of law operates as *res judicata* or not. A reconsideration should be permissible in cases for instance where the law on the subject itself is changed by statute or what is almost equivalent to it, the authoritative interpretation of the section concerned as given by the binding rulings of the highest tribunal is changed. The question whether a plaintiff was entitled to sue alone or not is a mixed question of law and fact and a decision in respect of it must operate as *res judicata* in a subsequent suit between the same parties, if there has been no change in the relevant statutory law or in its authoritative interpretation. 1940 R.D. 535=1940 A.W.R. (B.R.) 256.

**CHANGE IN LAW WHETHER AFFECTS *res judicata*.**—A change in the law or a different interpretation of it by the appellate Court cannot operate to reopen matters which had previously become *res judicata*. 21 M. 18; 56 C. 728 (F.B.). See also 26 M. 104. But see 65 M.L.J. 305=1933 M. 745 (Decision on procedure). Similarly what is not *res judicata*, at the time a suit is filed cannot have that effect by the change in the law. 85 I.C. 574=1925 M. 1107.

**DECISION ON QUESTIONS OF LAW.**—An erroneous decision on a point of law may be *res judicata*. 24 A. 138; 29 M. 225; 28 C. 318; 19 I.C. 244; 21 I.C. 979=19 C.L.J. 34; 15 I.C. 911=15 C.L.J. 684; 45 I.C. 252; 39 C. 848; 9 N.L.J. 183=96 I.C. 963=1926 N. 476; 46 B. 1260; 28 Bom.L.R. 876=1925 B. 481; 99 I.C. 528=1927 A. 206. But see 5 O.W.N. 50. The correctness or otherwise of a judicial decision has no bearing upon the question whether it does or does not operate as *res judicata*. A party taking the plea of *res judicata* has to show that the matter directly and substantially in issue has also been directly and substantially in issue in a previous suit and has been heard and decided. The principle of *res judicata* is not to be ignored merely on the ground that the reasoning whether in law or otherwise of the previous decision can be attacked on a particular point. It is not correct to say that a previous decision on a ques-



## NOTES.

tion of law is not *res judicata* in a subsequent suit. 175 I.C. 693=1938 N. 195. An issue of law may be *res judicata* if the cause of action in the subsequent suit is the same as in the former suit. 9 I.C. 568=13 C.L.J. 119; 37 M.L.J. 554; 10 C. 1087; 15 A. 327; 26 M. 104; 31 B. 128; 28 M. 517. See also 1928 C. 777=56 C. 723=33 C.W.N. 126 (F.B.); 1930 P. 585=9 P. 674; 131 I.C. 878; 34 Bom.L.R. 198; 33 Bom.L.R. 1443. See also 14 L. 442=1933 L. 325. Where a decision lays down what the law is and it is found to be erroneous, it is not *res judicata* in a subsequent proceeding to recover a different relief. 39 C. 848; 32 M.L.J. 63; 32 C. 749; 22 B. 669; 1930 L. 907. A decision on a point of law which has ceased to be good law, will not operate as *res judicata* in a subsequent suit. 1941 O.W.N. 691=1941 R.D. 373. An erroneous decision that cocoanut garden did not constitute improvement under S. 3 (4) (f), Madras Estates Land Act, should be confined to matters which existed at time of the decision. Hence that decision would not be *res judicata* with reference to areas and trees not in existence then. 45 L.W. 15=1937 M. 254=(1937) 1 M.L.J. 233 (F.B.). The decision on a question of law in one proceeding does not bar later proceeding except that the right established in favour of one party in the former proceeding cannot be questioned in a subsequent proceeding. 40 M. 989=31 M.L.J. 513. See also 30 M. 461; 32 C. 729; 49 C.L.J. 357=1929 C. 445; 53 B. 676; 31 P.L.R. 123; 36 L.W. 664. Where in a prior suit for rent, the defendants did not contend that the suit must be dismissed as the plaintiff had failed to comply with S. 194 of the Agra Tenancy Act, they are not debarred from raising the plea in the subsequent suit. 49 A. 918. The existence of a custom is a question of fact and an erroneous decision on the point operates as *res judicata* even though the subsequent suit relates to different properties. 47 I.C. 373. See also 94 I.C. 463=1926 A. 410; 119 I.C. 768=1929 L. 769 (1). But see 22 I.C. 138. As to question whether a custom is or is not opposed to public policy, see 144 I.C. 669=1933 L. 606. A decision may be wrong and a decision may be on a pure point of law, but if the matter has been put into issue, then the decision will bind the parties and their privies in a representative suit. Where a suit as framed under Mahomedan law is barred by O. 22, R. 9 (1), the question whether the subsequent suit, which is based on customary law is barred, cannot be held to be *res judicata* by reason of the previous decision, whether that decision was right or wrong and whether it was on a pure point of law or on a mixed question of fact and law; for, in those circumstances, the question of customary law was neither heard nor decided and therefore there could not be any *res judicata* in the matter. 1941 L. 169. An issue of mixed law and fact stands on the same footing as an issue of fact for purposes of *res judicata*. 28 C. 318; 65 M.L.J. 684=1933 M. 925; 87 I.C. 811=1926 C. 80; 29 M. 225; 92 I.C. 769=1926 L. 251; 56 C. 728 (F.B.); 1932 P. 337 (construction of document); 14 L. 31=1933 L. 274 (question whether a document was an award or not); 14 L. 409=1933 L. 594 (question of executability of a decree). As to decision on a question of procedure,

see 65 M.L.J. 305=145 I.C. 397=1933 M. 745. A decision of Court that it has no jurisdiction to deal with the case without deciding anything regarding the rights of the parties, is not *res judicata*. 73 C.L.J. 410. Section does not apply where the decree is a nullity for want of jurisdiction. 1935 N. 28. The rule that *res judicata* does not apply to a question of law has no force in the case of *consent decree*. 35 M. 75=21 M.L.J. 709. Decision based on an admission made by a legal practitioner on an erroneous conception of law is not *res judicata*. 6 R. 691.

**RES JUDICATA IN SUITS FOR REDEMPTION.**—If a decree in a redemption suit does not extinguish the right to redeem, it does not operate as *res judicata* against a subsequent suit for redemption. 56 A. 561=61 I.A. 362=1934 P.C. 205=67 M.L.J. 813 (P.C.). The right of redemption could not be extinguished by the preliminary decree but only by a final decree. 75 I.C. 919=1923 L. 680; 18 I.C. 326 (All.); 24 A. 44. See also 44 A. 730; 1937 M.W.N. 759=1937 M. 213; 69 I.C. 167; 48 A. 17; 27 A.L.J. 761; 32 A. 215; 43 B. 334 (F.B.); 25 Bom.L.R. 211; 47 B. 692; 5 L. 371. As to cases in which the right of redemption was held to have been extinguished under the previous decree, see 46 B. 348; 39 M. 896=30 M.L.J. 13 following 25 M. 300 and 31 M. 354; 49 M. 691=50 M.L.J. 612; 18 C. 139; 85 I.C. 480=1925 A. 484. In the case of decree for sale obtained by a mortgagee who does not take further proceedings and bring the property to sale, the mortgagor can file a fresh suit for redemption though he fails to redeem under the original decree. 39 B. 41; 1930 B. 401. But in 39 M. 896=30 M.L.J. 13, it was held that whether the decree be in a suit for foreclosure or in a suit for sale or in a suit for redemption, there is in each case a conditional decree for redemption in favour of the mortgagor and a subsequent suit for redemption is barred. See also 49 M. 691=50 M.L.J. 612 reversing the decision cited in 1925 M. 1191. Where a decree provided payment of the mortgage-money in instalments, in default of which the mortgagee was to remain in possession and also reserved the right to redeem a subsequent suit to redeem not barred. 45 B. 1335. See also 23 A.L.J. 888=1926 A. 20; 1940 O.W.N. 604=15 Luck. 545. Second suit for redemption of mortgage—Maintainability—Decree in prior suit by *Melcharathdar*—Non-payment of mortgage-money—Second suit by *jenmi* not barred. 47 L. W. 236=(1938) 1 M.L.J. 313=1938 M. 581; 1937 M. 213; A.I.R. 1940 M. 577=51 L.W. 569.

**APPLICATION OF THE PRINCIPLE TO EXECUTION PROCEEDINGS.**—The principle of *res judicata* applies to proceedings in execution of a decree. 31 C. 22; 24 A. 138; 2 P. 772; 11 I.A. 181 (P.C.); 47 C. 446; 92 I.C. 254=1925 L. 640; 1926 N. 476; 102 I.C. 94=1926 O. 216; (1940) 1 M.L.J. 143=1940 M. 59; 43 C.W.N. 940; 5 Cut.L.T. 39; 1939 P. 19; 1938 P. 427; 1937 L. 772; (1937) 1 M.L.J. 296; 1937 A. 446; 1938 N. 273; 38 P.W.N. 776; 1939 M.W.N. 1145=50 L.W. 677; 100 I.C. 23=9 L.L.J. 173; 99 I.C. 1006=1927 L. 179; 1929 R. 182; 51 A. 346; 110 I.C. 337; 1930 O. 65=5 Luck. 456; 1930 O. 305; 123 I.C. 881; 10 P. 607; 33 Bom.L.R. 781; *ibid.*, 797; 36 C.W.N. 367; 15 L. 869=1934 L. 316;



## NOTES.

1934 R. 231; 64 M.L.J. 629=1933 M. 466; 1935 L. 949. It is not every order passed in execution, but only certain description of orders that have operation as *res judicata*, 17 C. 57. Apart from the general principle of *res judicata*, the special rules laid down in explanations to S. 11 ought not to be applied to execution cases. 3 P.L.T. 403=67 I.C. 656=1922 P. 289; 37 A. 589; 24 M. 681; 70 I.C. 530=1923 R. 119 (2). See also 64 M.L.J. 629; 1933 N. 287. If there is a previous order of the Court operating as *res judicata* which holds that the application under consideration was not made in accordance with law, then clearly that matter cannot be re-agitated at a subsequent stage of the execution. But before an order can operate as *res judicata*, it must clearly decide that the application in question was not in accordance with law. If it merely rejects or dismisses the application on some other ground then there is no decision on the merits and when there is no decision on the merits, there is of course no *res judicata*. If it is ambiguous, whether an order is on merits, then the ambiguity must be construed in favour of the person against whom the order is made. 1941 N. 152. Finding on an unnecessary point in previous execution application will not bar the same being questioned in subsequent application. 39 P.L.R. 189. Expl. 4, should not be extended to execution proceedings and the order made in execution proceedings would not be *res judicata* unless the point raised in subsequent proceedings was actually raised in former proceedings and decided. 1933 N. 287. See also 1937 L. 211; 144 I.C. 365=1933 M. 595. See also 43 C.W.N. 940. Either expressly or impliedly and on the merits. 1937 L. 211. Principles of constructive *res judicata* apply in execution proceedings. If a man with eyes open undertakes not to raise any objection of any kind to a certain position on the score of which he has secured a substantial advantage, he should not be allowed to reprobate it in the course of the same proceedings and to re-agitate the matter. 186 I.C. 881=1940 L. 7. See also 43 C.W.N. 374. The rule of constructive *res judicata* applies to execution proceedings. The circumstances that the omission to take the objection was not in a previous application for execution but only at an earlier stage of the same execution application makes no difference. 42 P.L.R. 189=1940 L. 161. The doctrine of constructive *res judicata* is applicable to execution proceedings to this extent, that where a judgment-debtor fails to raise all his objections to the application in execution made by the decree-holder which he might and ought to have raised and the application is ordered to proceed, all such objections will be deemed to have been impliedly decided against him and he will be precluded from raising the same objections in a later execution of the same decree. 188 I.C. 672=1940 Pat. 251; See also 52 L.W. 416=(1940) 2 M.L.J. 487; 42 P.L.R. 404=1940 L. 394; 42 P.L.R. 374. In the course of the same execution proceedings a different objection can be raised at a different stage thereof. 186 I.C. 653=1940 L. 27. Where execution application is dismissed as not maintainable in the form in which it was brought, and the liability of the judgment

debtor, was not considered, it was not *res judicata* as regards the liability of the judgment-debtor. 1937 C. 226; see also 44 C.W.N. 749. But it would be otherwise if the liability had been considered and decided. (*Ibid.*) A decision in one stage of an application is not *res judicata* in another stage of the same application. 40 M. 1016. As to the extent to which the rule applies to successive applications in execution, see 45 A. 735; 95 I.C. 31; 3 O.W.N. 241=1926 O. 291 and cases referred to therein; 1926 P. 478; 1926 N. 164; 48 A. 245; 48 A. 201; 1926 M. 177; 44 C.W.N. 749; 7 P.L.T. 353=1924 P. 628; 1926 M.W.N. 33=1926 M. 177; 1926 N. 164; 33 Bom.L.R. 797; 36 C.W.N. 367. An order *ultra vires* does not operate as *res judicata*. 4 P. 440=1925 P. 807. A decision in a previous application to execute a maintenance decree to the effect that the application is barred is no bar to a subsequent application to recover maintenance for a different period. 18 M. 482; 30 M. 504; 46 B. 467 (limitation); 34 A. 518 (where the order was made *ex parte*). But see 6 B. 54; 9 C. 65. When the decision on the prior application was one on a question of procedure as it then stood, it does not operate as *res judicata* when that procedure itself is changed by the statute law. 39 M. 923=30 M.L.J. 460. The decision as to whether the execution of a decree is time-barred or not, though erroneous, will operate as *res judicata* in a subsequent application for execution. 24 A. 282; 24 M. 669. See also 42 P.L.R. 404=1940 L. 394; 1939 P. 230; 1937 C. 581; 1927 O. 216; 102 I.C. 94; 1 Luck. 171. But it has been held that an order that a particular application for the recovery of mesne profits awarded by a decree is not barred by the 12 years' rule under S. 48, C. P. Code, is no bar to a plea by the judgment-debtor that a subsequent application for the same purpose is barred by that rule. 53 M.L.J. 440. Where a plea of limitation was raised by the judgment-debtor in a previous stage of an execution application, but was rejected, the same plea could not be raised again in a subsequent stage of the execution proceedings. 48 I.A. 45=40 M.L.J. 197 (P.C.); 191 I.C. 612. The judgment-debtor would be precluded from raising the contention, though the decision is arrived at *ex parte*, after notice to the judgment-debtor. 66 I.C. 751; 1927 M. 813; 45 B. 453; 44 B. 227; 1927 M. 149; 113 I.C. 92; 10 P. 607; 159 I.C. 641=1935 L. 844. But where attachment order was made *ex parte*, and there was no personal service nor declaration by Court that there was sufficient service of notice, the question of limitation can be raised in respect of a later execution petition. 1937 M. 84. In some extreme cases even when there is declaration as to sufficiency of service made by Court, judgment-debtor may be permitted to raise question of limitation 58 A. 313=1936 A. 21 (F.B.). Where the Court after examining the decree-holder and holding that the application for execution was in time ordered notice to the defendant and the latter though served did not appear, but the decree-holder also being absent and not taking steps the execution was dismissed, the judgment-debtor can in a subsequent application for execution raise the plea that the prior application was beyond the period of limitation,



## NOTES.

as there was no decision on the question of limitation in the prior execution case. 38 C.W.N. 1144-40 C.W.N. 510. But where the judgment debtor appeared and allowed an order of attachment to become final, he could not subsequently contend that the decree was barred by time. 151 I.C. 1015=30 C.W.N. 163=1934 C. 465. The *ex parte* order need not be written in *extenso* covering all objections raisable by judgment-debtor. The subsequent dismissal of execution petition for non-prosecution or other cause does not affect the bar of *res judicata*. 1928 M. 1052. Where notice is not served the rule has no application. 30 Bom.L.R. 38; 1929 L. 334; 36 Bom.L.R. 115=150 I.C. 866=1934 B. 113; 146 I.C. 317=1933 N. 844. But want of notice to the judgment-debtors will not make the dismissal of the execution petition put in by the judgment-creditor any the less *res judicata* against the latter. 145 I.C. 397=1933 M. 745=65 M.L.J. 305. Even in an *application for transfer of a decree*, it is open to the judgment-debtor to plead limitation and he ought to do so. 47 M. 641=47 M.L.J. 4. But see 131 I.C. 702=157 I.C. 971=1935 P. 485. If a judgment-debtor after receiving notice to show cause why the decree should not be transferred to another Court for execution does not raise all his objections to execution such as limitation, discharge, etc., it will not be open to him to raise such pleas in a later execution petition on the ground of constructive *res judicata*. 1929 M. 199. See also 92 I.C. 47=1926 N. 200; 1 Luck. 171; 1928 M.W.N. 152. But not where no notice on judgment-debtor was personally served and no declaration of due service was made by the Court. 44 L.W. 460=1936 M. 812=71 M.L.J. 317. An order for execution made after notice to the judgment-debtor who does not appear and offer any objection precludes him from raising the plea of limitation in subsequent proceedings even though the application on which the order is made does not fructify and is eventually struck off or dismissed. But the sons of the judgment-debtor who are proceeded against in execution under the doctrine of pious obligation of a Hindu son to pay his father's debts, are not precluded from pleading limitation as a bar to execution. 53 L.W. 181=(1941) 1 M.L.J. 270. A question of the liability of a judgment-debtor may be treated as *res judicata* in subsequent proceedings in execution of the same decree when it has been dealt with and disposed of at an earlier stage of those proceedings even by a necessary implication. 35 P.L.R. 692=1934 L. 637 (2). The non-appearance in a petition to transfer a decree with which defendant 4 had no connexion cannot create any constructive *res judicata* that the property of the testator in the hands of that defendant was liable to be proceeded against in execution. 144 I.C. 30=1933 M. 508. It cannot be said that the principle of constructive *res judicata* has no application to execution proceedings. Where the effect of the prior decision is that the application for execution is held as maintainable it has the effect of deciding that the person at whose instance the application is held maintainable has a right to maintain it. 151 I.C. 913 (2)=38 C.W.N. 141=1934 C. 472. See also 1933 L. 3=144 I.C. 259 (Objection as

to the power of an agent to file execution not raised in previous application). But the principle is not applicable to application for restitution or to application for execution of portion of a decree. 38 P.L.R. 723=1936 L. 246. An order in execution to the effect that the decree is not executable is *res judicata* in subsequent execution proceedings. 4 P.L.J. 330=47 I.C. 154. An objection that a decree could not be executed not raised at the first execution application, could not be raised in a subsequent stage. 44 A. 350; 4 Pat.L.J. 213; 80 I.C. 905. See also 31 C. 22; 99 I.C. 870; 1934 Pesh. 64=151 I.C. 235; 38 P.L.R. 580; 22 Pat. L. T. 809; 160 I.C. 448=1936 Pesh. 9. The principles of *res judicata* as laid down in S. 11, C. P. Code, constructively apply to execution proceedings. Where on the judgment-debtor failing to avail himself of an opportunity allowed to show cause why he is not liable to be arrested, an *ex parte* decision adverse to him is given by the executing Court, the matter of the liability of arrest is "heard and finally decided" within the meaning of S. 11, and a subsequent objection by the judgment-debtor is barred. 42 P.L.R. 374. But where notice of execution petition was affixed on the outer door of the defendant's house when he was absent and there was no declaration by Court that the notice was duly served, it was not due service for the purpose of constructive *res judicata* and the defendant can in subsequent proceedings show that the application was out of time. 142 I.C. 765=64 M.L.J. 637=1933 M. 406. See also 64 M.L.J. 629=1933 M. 466; 1937 M. 84. A decision as to limitation in an execution application filed by the attaching creditor is not *res judicata* in a subsequent execution proceedings between the decree-holder and the judgment-debtor. 143 I.C. 542=1933 P. 210. The fact that the subsequent application for execution relates to different items of property does not take the case out of the rule. 45 M.L.J. 71. Judgment-debtor not objecting to addition as supplemental judgment-debtor of purchaser of equity of redemption during pendency of execution of mortgage decree is precluded from objecting later on that the purchase was only benami for the decree-holder. 1929 M. 404. But an omission to raise the objection to a wrong claim in execution, is not *res judicata* in a later execution application. 44 A. 159; 1933 A. 922. But see 1934 C. 472 cited *supra*. Failure to raise a plea of payment or to dispute correctness of amount claimed in execution, will not bar judgment-debtor from raising the same at a later stage or in subsequent proceedings. 45 L.W. 291=(1937) 1 N.L.J. 296. Finding as to the value of property in an application to set aside execution sale is not binding on auction purchaser at a subsequent sale. 105 I.C. 153. Where a judgment-debtor omits to raise the objection that an application in execution is not made to the proper Court having jurisdiction, he is not precluded from contending that subsequent applications of which he has had no notice, are also not made to the proper Court. 42 L.W. 856=1935 M. 935=69 M.L.J. 466. See also (1941) 2 M.L.J. 792. The principle of constructive *res judicata* should not be applied to execution proceedings unless the decision of the question subsequently sought to be agitated



## NOTES.

was given expressly or by necessary implication or must be deemed to have been implied in the previous decision. 40 M. 780. See also 144 I.C. 365=1933 M. 595. Even if a point is decided by necessary implication, it operates as *res judicata* in subsequent proceedings in the course of the same execution. Where a declaratory decree for maintenance was executed from time to time, without protest by the judgment-debtor, he cannot be allowed subsequently to object on the ground that the decree, being merely declaratory, was not executable. 14 L. 409=141 I.C. 577=1933 L. 594. See *contra* 157 I.C. 865=1935 Pesh. 119. A judgment-debtor who does not object to the validity of an execution application as being not in accordance with law, is not precluded from raising the objection afterwards on discovery of the defect on the principle of constructive *res judicata*. There is no duty cast on the judgment-debtor, nor upon any party to the proceeding to ascertain by an examination of the records, or otherwise, whether the application is in proper form. It is the duty of the Court to see that it is made according to law. The judgment-debtor is entitled to assume that the Court has done its duty. 1937 M.W.N. 355=1937 M. 760. The question whether the decree is declaratory in nature and cannot be executed cannot be governed by the principle of *res judicata* as it involves a question of jurisdiction. 169 I.C. 942=1937 Pesh. 62. It was held by (F.B.) that (1) Where there has been an express adjudication by the Court in the presence of parties, then the question must be considered to have been finally decided, no matter whether it is raised again at a subsequent stage of the same proceeding, or in a subsequent execution proceeding. (2) Where an objection is taken but is dismissed or struck off, even though not on the merits, and the application for execution becomes fructuous, the judgment-debtor is debarred from raising the question of the invalidity of that application. (3) Where an objection to execution is taken, but it is not dismissed on the merits or is dismissed for default and the application for execution does not become fructuous, the judgment-debtor is not debarred from subsequently raising the question that that application was not within limitation. (4) Where no objection to the execution is taken but the application becomes partly or wholly fructuous and such fructification necessarily involves, the assumption that the application was made within limitation, then after such fructification the judgment-debtor is debarred by the principle of *res judicata* from raising the question that that application was not within limitation. (5) Where no objection is taken but the application for execution does not fructify, the judgment-debtor is not debarred by the principle of *res judicata* from raising the question of limitation later. Per Sulaiman, C.J. in 58 A. 313=1936 A. 21 (F.B.). See also 41 C.W.N. 887; 1937 L. 21; 68 C.L.J. 105; 1938 Pesh. 77; 1938 A. 89; Where the judgment-debtor in answer to a notice of sale proclamation objects to the proposed sale of a particular item of property on the ground that the property is not included in the decree under execution, but fails to substantiate his objection, he cannot afterwards raise the

same plea in another stage of the execution, although no sale was held under the prior proclamation and a fresh proclamation is taken out for a sale. The matter in issue, being *res judicata*, cannot be re-agitated. (1941) 2 M.L.J. 792. See also (1941) 1 M.L.J. 270. It is well established that the principle of constructive *res judicata* applies to execution proceedings. The failure of the judgment-debtor to object at the proper time to the proceedings for attachment and sale of his properties other than those mortgaged on the ground of the absence of a personal decree under O. 34, R. 6, C. P. Code, estops him from taking the objection at a later stage. 43 P.L.R. 60. Where no objection is taken, but the application for execution does not fructify being dismissed for default, the judgment-debtor is not debarred by the principle of *res judicata* from raising the objection in a later application. 1939 Rang.L.R. 152=1939 R. 245. See also 1939 R. 296. S. 11, Expl. IV does not extend to execution proceedings. An issue not raised in a claim proceeding can be subsequently raised in an application under O. 21, R. 50 (2). 44 A. 130. See also 90 I.C. 276; 1925 P. 588. But see 15 L. 869=1935 L. 200; 1936 L. 167., holding that the principle of constructive *res judicata* as embodied in Expl. IV applies to execution proceedings. While raising his objections in answer to a notice under O. 21, r. 12, the judgment-debtor is not bound to raise all other points than the maintainability of execution application. The dismissal of that objection does not operate as *res judicata* so as to preclude a subsequent objection by him as to the mode of execution. 146 I.C. 1024=1933 L. 826. See also 41 P.L.R. 821 (objection under O. 21, R. 58); 1939 R. 384 (Order under O. 21, R. 48). See also 1928 M. 203; 70 C.L.J. 11 (Order under O. 21, R. 100, C. P. Code; 44 C.W.N. 251=1940 C. 16. An objection of a judgment-debtor in execution proceedings which is dismissed for default does not operate as *res judicata* against the judgment-debtor to prevent him from making the same objection again. 1935 A.L.J. 403=1935 A. 502; 1935 A.L.J. 278=1935 A. 238. But see 1935 C. 816. So also where no order was passed by the Court on an application and where the proceeding itself was withdrawn without the Court considering the pleas raised by the party. 158 I.C. 891=1935 M. 786. See also 1939 L. 168=41 P.L.R. 635. Nor where the original decree-holder had ceased to prosecute his application and the assignees did not present a fresh execution application under O. 21, R. 16. 1935 L. 966. Where after the execution application has been registered a notice is issued to the judgment-debtor under O. 21, R. 22, but he is absent and fails to object to the execution on the ground of limitation, and the execution petition itself is dismissed for default, the judgment-debtor is not barred by constructive *res judicata* from raising the question of limitation in a subsequent application. 159 I.C. 637=39 C.W.N. 1206=1935 C. 664. See also 39 C.W.N. 583=156 I.C. 604=1935 C. 306. Judgment-debtor having waived proclamation is barred from objecting to absence of attachment after several adjournments. 139 I.C. 866; 1928 M. 203; 1930 M. 414=120 I.C. 863; 1930 M.W.N. 729. Omission to



## NOTES.

appear and settle terms does not bar a plea that property was not liable to attachment in execution. 46 M. 768=45 M.L.J. 346. See also 1939 L. 540 : (1939) 2 M.L.J. 782=1940 M. 54 ; an order of attachment before judgment maintained in spite of objections does not act as *res judicata* in execution proceedings as to attachability of property attached. 150 I.C. 213=1934 L. 153. See also 1939 A. 202 ; 1939 A.M.L.J. 51. Omission by judgment-debtor to object to the execution being taken out for an excessive amount does not bar the same objection in later petitions. 1929 M. 903. See also 1929 R. 172 ; 143 I.C. 783=1933 N. 182. But a decree-holder having recovered by execution from judgment-debtor the amount stated in his execution petition as being due under the decree is precluded from putting fresh execution petition for further sums as being due under decree. 119 I.C. 223 (2)=1929 R. 182. But an erroneous order recording adjustment passed without notice to parties does not bar a subsequent application for recovery of a larger sum as due. 142 I.C. 579=1933 S. 112. See also 1939 P.W.N. 716. A plea that an application for setting aside an execution sale is barred cannot be set up by the auction-purchaser at a late stage of the proceeding. 48 B. 638. Where no finding is given by a Court on an issue as to the jurisdiction of a Court to pass certain order which forms the basis of the execution proceedings, the question of the application of the doctrine of *res judicata* cannot arise in such a case. 159 I.C. 739=1935 N. 250 (F.B.). Where an objection petition in an execution proceeding is dismissed for non-prosecution, there is no adjudication on the merits and it cannot be *res judicata*. 67 I.C. 663=1923 C. 287. Also dismissal for default of an execution application. 1929 B. 217 ; 160 I.C. 835=44 L.W. 565=71 M.L.J. 490. But see 144 I.C. 488=1933 L. 697, where the controversy was between the legal representatives of the decree-holder and an alleged assignee of a portion of the decree regarding the right to execute the decree and where the previous application by the legal representatives was dismissed for default of appearance. See also 163 I.C. 38=1936 P. 616. An order passed by the Court *ex parte* after notice duly served, binds the defendant on general principle of *res judicata* as much as a contested order. 37 M. 462=26 M.L.J. 189 ; 26 M.L.J. 83. See also 45 B. 453 ; 44 B. 227 ; 1927 M. 149 ; 10 P. 607 ; 1927 M. 813. An omission to object to the execution application being not in accordance with law operates as *res judicata*. 1928 C. 861. But see 1935 A.L.J. 642=155 I.C. 673=1935 A. 727. An order overruling the objections raised by one judgment-debtor whose property is sought to be sold in execution does not operate as *res judicata* so as to preclude the other judgment-debtors from raising a similar objection in a subsequent execution application as against their property. 1939 Pat. 41=1938 P.W.N. 710. An order overruling the objections raised by one judgment-debtor whose property is sought to be sold in execution does not operate as *res judicata* so as to preclude the other judgment-debtors from raising a similar objection in a subsequent execution application as against their property. 1938 P.W.N. 710. A decision

by the Executing Court that a certain house belonging to the judgment-debtor is exempt from attachment under S. 60 (1) proviso Cl. (c), C. P. Code, operates as *res judicata* in a subsequent application by the decree holder for the attachment of that house in the hands of the legal representatives of the deceased judgment-debtor. 40 P.L.R. 409=1938 Lah. 608. Omission to object to assignment of decree by judgment-debtor after due notice and recognition of assignment by Court bars judgment-debtor from questioning assignment at later stage. 1937 C. 4=40 C.W.N. 1393. Even where judgment-debtor objects and Court proceeds with execution with intervening assignee substituted as decree-holder, the assignment, by implication, operates as *res judicata*. 1935 R. 174. The dismissal of an execution petition bars a fresh execution petition for a different relief if based on the same question of fact. 122 I.C. 579=1929 M. 404. As to effect of dismissal of an application for delivery after an order for delivery had been passed once, see 65 M.L.J. 305=145 I.C. 397=1933 M. 745. The issue of notice to legal representatives of deceased judgment-debtor under O. 21, R. 22 does not involve the question whether a particular property belongs or not to the deceased judgment-debtor and that question is not barred by *res judicata* in later proceedings. 1928 M. 746=114 I.C. 545 ; 60 M.L.J. 628=1931 M. 303. Where an application is made in a pending execution to bring on record a person as the legal representative of the judgment-debtor and such person's objection for his being impleaded is dismissed, he can subsequently raise the plea that the execution is barred by limitation as he is not bound to take this objection when he was sought to be impleaded. 150 I.C. 947=11 O.W.N. 814=1934 O. 289. Where an objection to sale on the ground that the land was service inam and was not liable to be sold was dismissed, the same objection cannot be raised in subsequent execution proceedings against some other items of the same survey number, even though a decision of the Collector, was obtained in the meantime under the Madras Hereditary Village Officers Act that the land was service inam land. 140 I.C. 779=1933 M. 130 ; 1938 N.L.J. 171 (Proceedings in respect of appointment of village Patel). Order in execution proceeding regarding nature of land to be sold is not final and cannot operate as *res judicata* to a later suit. 7 O.W.N. 1162=1931 O. 62. Where however judgment-debtor with full knowledge allows settlement of proclamation, and the sale, he cannot afterwards impeach the sale on the ground that the mortgagee has caused to be sold in execution proceedings properties which were not comprised in the suit mortgage and which could not therefore be lawfully sold. 40 C.W.N. 428 ; 41 P.L.R. 524=1939 L. 556 (Sameness of subject-matter not necessary.) See also 1938 R.D. 883. An order allowing claim to rateable distribution becomes final when not appealed against or set aside otherwise, and principles of *res judicata* would apply to it. 1936 L. 891. The principle of *res judicata* must be applied wherever it is relevant, and a decision between the parties in execution proceedings operates as *res judicata* in a subsequent suit between them. 158 I.C. 1059=37 Bom.L.R. 123=1935 B. 174. The



## NOTES.

judgment-debtor's omission to oppose the substitution of the assignee of a decree in place of the original decree-holder does not preclude the judgment-debtor from questioning the rights of such assignee to proceed to execution of the decree by reason of any bar imposed by law. 1939 R. 245=1939 Rang.L.R. 152; 60 C. 1181.

APPLICATION OF PRINCIPLE TO OTHER MISCELLANEOUS PROCEEDINGS.—Dismissal of an application to set aside an *ex parte* decree (not a suit within the meaning of the section) on the ground of non-service of summons would bar a subsequent suit to set aside the decree on the same ground. 1 R. 500; 14 P. 439; 16 Pat.L.T. 647=1935 P. 458. Where an application for setting aside an *ex parte* decree is withdrawn as being defective in certain formalities, a second application for the same purpose is not barred by *res judicata* by reason of the prior application having been dismissed. 152 I.C. 974=11 O.W.N. 1639=1935 O. 35. Where an application to amend a decree has once been refused on the merits, the decision is conclusive between the parties, and no further applications would lie. 27 I.C. 300; 39 C. 265. See also 107 I.C. 390=1928 L. 244. It has however been held that a suit lies. 40 C. 541. Where in a proceeding under O. 22, R. 5, a certain person is (or is not) held to be the legal representative of a deceased party the same question can be reagitated in a separate suit and is not barred by the rule of *res judicata*. 1924 L. 465; 1939 L. 580=186 I.C. 145; 43 P.L.R. 16; 1939 L. 580; 1937 O.W.N. 782; 1936 A.L.J. 622=163 I.C. 283=1936 A. 412 (28 A. 109, Foll. and 24 A.L.J. 546, Diss.). See also 1939 N.L.J. 577=1940 N. 99. A construction placed on particulars of decree by the trial Court is not *res judicata* in execution of the decree of appellate Court which confirmed the decree of the trial Court but did not discuss or refer to the meaning of those words. 14 L. 591=142 I.C. 408=1933 L. 352. Where an application under S. 151, to set aside a compromise decree was summarily dismissed on the ground that such relief could not be given under S. 151, a suit for setting aside the decree on the ground of fraud is not barred. So also the rejection of an application for review. 1930 O. 112; 5 P. 276. A question at issue between the parties once heard and finally decided, binds the parties at subsequent stages of the same suit, under general principles of law, though not under S. 11. 48 C. 499=40 M.L.J. 423; 94 I.C. 313=1926 O. 420; 122 I.C. 724; 1930 P. 260; 1930 O. 378 (F.B.). Dismissal of a petition owing to failure of petitioner to produce evidence in support of the facts alleged in the petition is a dismissal on the merits and so is binding on the Court as well as the parties. 1929 M. 404. Rejection of application for a rule does not bar Court from granting a rule on a subsequent occasion in interest of justice. 161 I.C. 26=1936 P. 119. A dismissal of an application, on the ground that it was not accompanied with a vakalatnama does not operate as *res judicata* in a subsequent application in respect of the same subject-matter. 152 I.C. 110=11 O.W.N. 1373=1934 O. 491. See also 152 I.C. 974 (Application withdrawn as defective

in certain formalities. Failure to raise the plea of non-transferability by the mortgagors in the suit before the passing of the decree does not prevent him from raising it in execution. 48 A. 385. The validity of an order made at one stage of litigation unless forthwith challenged by an appropriate proceeding in a superior tribunal is conclusive between the parties and cannot be questioned or collaterally attacked at a later stage. 70 I.C. 6=34 C.L.J. 415; 42 I.C. 392; 39 C.L.J. 251=81 I.C. 527; 138 I.C. 103; 150 I.C. 735=1934 L. 416. See also 1934 M. 202; 8 L. 477; 144 I.C. 978=1933 O. 207. The doctrine of *res judicata* cannot operate in respect of an assessment to tax made by an Income-tax Officer. The Income-tax Officer is not a Court, and therefore the doctrine has no application. His assessments are, however, final unless they can be re-opened under some provision of the Income-tax Act. I.L.R. 1938 M. 183=1938 M. 148=(1938) 1 M.L.J. 130 (S.B.). Question of title to property decided by Civil Court cannot be raised again under S. 4, Provincial Insolvency Act. 38 P. L.R. 757=163 I.C. 520; see also 1940 M. 564=(1940) 1 M.L.J. 647; 1938 A.L.J. 878; 1937 A.M.L.J. 77; finding of Court in insolvency proceedings that secured creditor has relinquished his security for benefit of creditors is *res judicata* and cannot be agitated afterwards. 14 R. 529=164 I.C. 1061=1936 R. 393. Where an application under S. 22 of the Insolvency Act is dismissed on the merits, the same issue cannot be once again raised in the ordinary Civil Courts. 39 A. 626; 41 A. 378; 63 M.L.J. 778 (under Ss. 4 and 54 of the Provincial Insolvency Act). 39 A. 626; 41 A. 378; 1933 N. 373. Insolvency proceedings are not suits within the meaning of S. 11. Where in an application in insolvency the Court decided that certain persons were not partners a subsequent suit for determining that those persons were partners, is not barred by *res judicata*. 37 C.W.N. 390=1933 C. 673. See also 190 I.C. 537=1940 C. 225. A finding of the Insolvency Court that a certain person is not a partner of the insolvent firm does not operate as *res judicata* against a creditor of that firm, when the decision was neither sought for nor opposed by him or by any one under whom he claims. The fact that the decision is binding upon the Official Assignee does not make it binding upon each and every creditor. The Official Assignee does not represent the creditors for all purposes in insolvency proceedings. In many respects his interest and that of a creditor may be in conflict. 1940 C. 225. But wherein a proceeding between Official Assignee and third person it was found by insolvency Court that a certain firm was a branch of the insolvent firm, and the decision was necessary for the question before it and was upheld by High Court on appeal, it was held that the decision operated as *res judicata* between the parties. 14 R. 652. But in a petition for adjudication, questions as to title to property as between the debtor and others cannot *propert*y arise for determination, and a decision at that stage cannot be regarded as a final determination. 156 I.C. 537=42 L.W. 7=1935 M. 634. As to partition proceedings in revenue Courts, see 130 I.C. 382. Where a revenue suit is instituted for ejecting the



## NOTES.

tenants and this is the only jurisdiction exclusively vested in the Revenue Courts, that Court cannot determine the question of title in that case and its decision therefore cannot operate so as to prevent the Civil Courts from entertaining the subsequent suit, which involves the question of title. 1935 L. 739. As to different application in Revenue Court regarding same subject-matter, see 15 L.R. 361 (Rev.)=18 R.D. 331. See also 195 I.C. 1101=1941 A.W.R. (Rev.) 879; 1941 Cal. 574. As to the effect of proceedings for the correction of revenue papers in a subsequent suit, see 14 L.R. 27 (Rev.)=17 R.D. 23. The principle of *res judicata* is applicable to proceedings taken under the U. P. Land Revenue Act. 14 L.R. 298 (Rev.)=17 R.D. 418. See also 14 L.R. 147 (Rev.)=17 R.D. 232. See also 1941 A.W.R. (Rev.) 723=1941 O.A. 625=1941 R.D. 723; 1938 O.W.N. 1267=1939 O. 17 (Decision of Settlement officer); 1939 O. 73=1939 O.W.N. 89 (Findings of Deputy Commissioner in an executive matter in proceedings under S. 30 A, Oudh Rent Act). 43 C.W.N. 1046 (Order under Bengal Tenancy Act, sec. 26—Effect on question of status of tenant). The decision in *qabiz ghair qabiz* proceedings cannot operate as *res judicata*, when the parties are not present and no issues are struck. 1936 R.D. 44. An order by the Assistant Record Officer passed in the course of revision of records declaring a particular person as an occupancy tenant, does not operate as *res judicata* in a subsequent suit to eject that person as a non-occupancy tenant. 1935 R.D. 407. In proceedings for demarcation of areas and fixing rent in the course of mutation, defendant claimed exproprietary rights, but they were disallowed. Subsequently when the landholder sued to eject him, held, that the disallowance of his claim in prior mutation proceedings did not operate as *res judicata* but that it was a distinctively relevant fact. 18 R.D. 580=15 L.R. 681 (Rev.). Where application for mutation has been dismissed, fresh application under S. 34, U. P. Land Revenue Act, on same grounds and in respect of same succession or transfer is not maintainable. 18 R.D. 711 (1)=16 L.R. 104 (Rev.). The decision on a question of title, in proceedings under the Land Acquisition Act, to apportion compensation payable, does not operate as *res judicata*. 20 M. 269. See also 12 C. 484 (P.C.); 66 I.A. 145=I.L.R. (1939) A. 460 (1939) 2 M.L.J. 98. (P.C.); 21 P. L.T. 277=1940 P. 438; 1939 S. 66; 34 C. 466; 45 M. 320=43 M.L.J. 78; 56 B. 50. An order in a claim case, on the validity of a wakf is not *res judicata* in a suit between the same parties, in which the property in dispute is not the same as that in the claim case though both were included in the wakf. 44 C. 698=37 I.C. 887. A decision in a previous proceeding for letters of administration, negating the claim of A as heir of the deceased, arrived at after hearing full evidence, bars a subsequent suit by A for declaration that she is the heir of the deceased. 1 R. 258; 36 C.W.N. 583=164 I.C. 743=1936 R. 401. The finding of a Court under the Succession Act with regard to the genuineness or otherwise of a will is conclusive and operates as *res judicata* against the parties affected. (1914 Bom. 8 (F.B.), Foll.). 161 I.C. 47=1936

Pesh. 39. See also (1937) 1 C. 400 (decision on construction of will). An order passed after contest in a probate proceeding is *res judicata* in any subsequent proceeding of any sort against the caveators who contested it as also those who had an opportunity of putting forward their objection. 46 M.L.J. 383. See also 57 I.A. 24=58 M.L.J. 171 (P.C.); 36 C.W.N. 583=1932 C. 634. But an order passed on compromise in such proceeding cannot operate as a bar to an application for probate of the same will. 51 C. 745. An order dismissing the application of a party to revoke the grant of probate is conclusive and operates as *res judicata* in subsequent proceedings. The unsuccessful party cannot therefore re-agitate the matter by entering caveat in a subsequent application for a fresh grant. The fact that the grant had been revoked in the meanwhile at the instance of another person does not remove the bar. The revocation of a grant is not a revocation for all persons, and the parties who have once unsuccessfully attempted to get it revoked cannot come in again., 39 C.W.N. 1071. A decision given in a case under S. 37 of the Agra Tenancy Act that certain land is ancestral land bars a subsequent suit by the defeated party for declaration that the land was separately acquired by his branch. 14 L.R. 141 (Rev.)=17 R.D. 239. See also 1936 R.D. 568; 1936 R.D. 457; 1937 R.D. 357. Proceedings taken under S. 77 of the Registration Act cannot operate as *res judicata* so as to bar a suit for specific performance. 54 A. 68. Word 'suit' in S. 11 includes also arbitration proceedings. 41 C.W.N. 193=I.L.R. (1937) 1 C. 193; 1937 L. 649. See also 42 P.L.R. 77 (effect of decree on award). 31 S.L.R. 55=1937 Sind 140; 1937 A. 289; 1937 N. 132. Objection raised before arbitration tribunal may also be *res judicata* in subsequent suit. 1932 L. 378; 1926 S. 42; 1928 S. 20; 1930 S. 195; 1936 L. 865. See also 21 P.L.T. 343 (Award under Co-operative Societies Act in respect of a debt due to it.) It is difficult to see why an award filed under the Arbitration Act should not have the same force with regard to the question of *res judicata* as a decree based on award under Sch. II, C. P. Code. 42 C.W.N. 367.

"FORMER SUIT."—For meaning of "suit," see 1930 P. 588; 13 P.L.T. 793. A decision in proceedings for dispaupering will not act as *res judicata* in the case when the issue is before the Court as an issue in the suit, as the proceedings for dispaupering is not a "former suit" within the meaning of S. 11. 149 I.C. 1004=1934 A. 323. An application to file an award under para. 20 of C. P. Code does not bar a subsequent suit for recovery of the properties covered by that award. 147 I.C. 684=1934 M. 68. The expression denotes a previously decided suit under Expl. I, and the same rule applies to appeals. 37 C.L.J. 184=74 I.C. 591; See also 1937 M.W.N. 299=1937 M. 544. 12 A. 678; 12 P. 139=141 I.C. 762=1933 P. 78; 32 A. 67; 8 P. 107. Judgments coming into existence during the pendency of proceedings by way of appeal or revision are not excluded from the operation of the rule of *res judicata* if such judgments are allowed to become final. 59 M. 777=43 L.W. 189=1936 M. 190=70 M.L.J. 223. Therefore if a suit is decided



## NOTES.

between the same parties by a Court establishing the title of one of them to the property in dispute and such decision has become final, the decision constitutes the question of title *res judicata*, even for the purpose of an appeal or revision, from a decree in another suit between the same parties in another Court, though the decision relied on as *res judicata* has been given only after the decision appealed against or sought to be revised. 70 M.L.J. 223=59 M. 777.

A finding based on evidence in appeal on a ground different from that given by the lower Court would operate as *res judicata*. 58 B. 544=36 Bom.L.R. 612=1934 B. 313. Where there were two suits in the primary Court, decided by a common judgment but concluded by separate decrees and an appeal is preferred only in the first suit, while none is preferred from the decree in the second suit, the decree made in the latter becomes final and operates as *res judicata* so as to bar the appeal. 37 C.L.J. 184=74 J.C. 591; 1924 P. 823; 74 I.C. 583. So also in two cross suits for damages involving the same issue and ending in two separate judgments, decreeing the one and dismissing the other. 34 C.L.J. 281=64 I.C. 574; 74 I.C. 583; 35 A. 187; 19 I.C. 76; 11 A.L.J. 214 (where one appeal abates by reason of the death of the appellant); 2 R. 623 (where appeal from one decree dismissed). But if there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he has brought succeeds the right of appeal is not barred by *res judicata*. 45 A. 506 (F.B.); 87 I.C. 804=1925 A. 488.

"MATTER DIRECTLY AND SUBSTANTIALLY IN ISSUE."—The decision of an issue is *res judicata* only when the issue arises directly and not incidentally having regard to the subject-matter of the particular suit or proceeding. 14 P. 70=157 I.C. 433=1935 P. 306. See also 65 C.L.J. 90=1937 C. 237. The expression "matter in issue" is distinct from the subject-matter and the object of the suit as well as from the relief that may be asked for in it, and the cause of action on which it is based and the rule of *res judicata* requiring the identity of the matter in issue will apply even when the subject-matter, the object, the relief and the cause of action are different. 33 C.W.N. 876. See also 1933 O. 535; 37 Bom.L.R. 62=1935 B. 131; 1937 M. 709; 45 C.W.N. 854. S. 11, does not say that the entire subject matter of both the suits, should be identical. It deals with suits as well as with particular issues in the suits. If the particular issue raised in both the suits concerns the same parties then the bar provided in S. 11 would apply to that particular issue even though there may be other issues raised in the subsequent suit and other parties, involved in those issues. Accordingly, an issue raised and decided in a previous suit between the plaintiff and some of the defendants would operate as *res judicata* in the subsequent suit so far as those defendants are concerned, although that issue is raised with respect to the other defendants as well. 45 C.W.N. 420. An earlier decision that a particular Hindu family was not joint at a particular point of time,

could not operate as *res judicata* in a later suit where the question is as to the jointness or otherwise of the same family, but at a point of time earlier than that to which the prior decision referred. 1941 A.W.R. (C.C.) 139=1941 O. W.N. 577. Before a matter can be said to operate as *res judicata* it is necessary, *inter alia*, to establish that the matter was directly and substantially in issue in the earlier suit, and that it was heard and finally disposed of by the Court in the earlier suit. It is, of course, not necessary that before a matter can be said to be *res judicata*, it should form the subject-matter of a definite issue. If the Court can gather from the materials before it namely, the pleadings, the judgment and the decree, that that matter was directly and substantially in issue, and formed the basis of the judgment arrived at in the earlier suit, either expressly or by necessary implication, then the principle of *res judicata* would apply. It is difficult to lay down a hard and fast rule as to what matters can be said to be arising directly and substantially. The Court can only look at the manner in which that particular matter is dealt with by the parties themselves, having regard to the course of the litigation, the conduct of the parties and the manner in which the Court itself has dealt with it. Where it is impossible to show for want of proper materials as to whether an issue was raised and heard and finally disposed of, or whether it formed the basis of the decree in the suit or that it was necessary for the Court to decide it, the plea of *res judicata* must fail. 40 Bom.L.R. 359=1938 B. 291. See also I.L.R. (1938) Nag. 496=1938 N. 401; 1938 O.W.N. 126=1938 O. 54; 17 P. 451=1938 P. 306 (S.B.); (1938) 2 M.L.J. 934. A matter constitutes a ground of defence only when it can be used for the purpose of resisting a claim. There must, therefore be a claim and a matter must be such as would defeat the claim either wholly or in part. A bare assertion in a plaint is not a claim. It becomes a claim when the plaintiff prays expressly or impliedly for the Court's decision upon it, or if the defendant treats it as such by denying it and inviting the Court's decision thereon. A.I.R. 1941 Cal. 574. The matter in dispute should have been put in issue and then decided. 62 M.L.J. 221=1932 P.C. 50=36 C.W.N. 365 (P.C.). See also 56 C.L.J. 369. It should have been put directly in issue. 60 C.L.J. 324=1935 C. 256. The word "directly" seems to be used in contradistinction to the words "incidentally" and "collaterally." The words "substantially" means "in effect though not in express terms." 25 C. 136; 1939 P. 519; 17 P. 180=1938 P. 444; 1937 C. 237; 45 L.W. 531=1937 M. 114 (Adverse finding on unnecessary issue); 39 P.L.R. 189. In a rent suit by a landlord against a tenant, there being no dispute as to the relationship of landlord and tenant, or as to the rate of rent or of the period in arrears, an issue as to whether the landlord has included in the suit all the plots of land covered by the *jamas* in question, is only an incidental or collateral issue. 62 C.L.J. 517=1936 C. 772. But the relationship of landlord and tenant is the very foundation of a decree in a suit for rent and therefore when such a suit



## NOTES.

has been decreed the Courts must proceed on the footing that it was a matter necessary to be determined and in fact determined in the earlier rent suit. 165 I.C. 623=17 P.L.T. 633=1936 P. 556. See also 1939 P. 519; 1939 P. 633; 1936 P. 511; 1937 M. 544; (1937) 1 M.L.J. 233; 41 C.W.N. 149. The dismissal of a suit which was primarily one between a landlord and tenant, does not bar a subsequent suit based on title, the plaintiff claiming the second rights, as against the defendants, which it was not possible to raise in the prior suit. 155 I.C. 7=37 Bom.L.R. 62=1935 B. 131. A decision on a point not substantially in issue in a suit cannot operate as *res judicata*. 17 I.C. 860. See also 1926 P.C. 63=30 C.W.N. 673; 96 I.C. 625; 1940 R.D. 471=1940 A.W.R. (B.R.) 254 (Cause of action different). 50 M.L.J. 136 (P.C.); 7 Pat.L.T. 150=1926 P. 87; 48 A. 17; 1926 C. 1228; *ibid.* 513; 1927 B. 145. (Case-law reviewed); 1933 L. 920. Under Expl. III, the matter must have been alleged by one party and either denied or admitted by the other. 6 A. 358; it does matter whether the cause of action is the same or different provided the matter directly and substantially in issue, has been directly in issue in a former suit between the same parties. 2 P. 772. But see 144 I.C. 734=1933 R. 106. (First suit for rent, second suit for damages for use and occupation); 58 C.L.J. 145=37 C.W.N. 1144 (Question of abandonment of holding in the second suit after the termination of the earlier suit). In order to see what was in issue in a suit, or what has been heard or decided, the pleadings and the judgment must be looked at and not merely the decree. 37 I.C. 674=14 A.L.J. 1171; 12 I.C. 9=14 C.L.J. 220; 51 I.C. 981=1919 P. 393; 21 A. 251; 16 C. 173; 24 I.A. 33; 29 M. 42; 33 C. 116. See also 1940 A.W.R. (B.R.) 249; 1940 A.W.R. (B.R.) 254; 150 I.C. 519=1934 O. 265. If a question was directly and substantially in issue in the previous case it will operate as *res judicata* though decided on other grounds as well. 41 I.C. 479; 15 Luck. 545=1940 O.W.N. 391=1940 O. 273. But where all issues framed in former suit were decided against plaintiff, yet eventually decision of suit was based on one issue only the bar of *res judicata* will not apply, as to other issues. 161 I.C. 63=1936 Pesh. 61. For a matter to be in issue under S. 11, it is not necessary that an express issue should be framed on it, but it is sufficient if a decision about it is necessary for the decree. 9 L.W. 84=52 I.C. 258; 53 C. 837=58 C.L.J. 196; 159 I.C. 45=1935 R. 118. But see 62 M.L.J. 221 (P.C.). Or if raised in the pleadings and decided after arguments. 113 I.C. 155. The decision in a previous case on an issue which did not arise at all cannot operate as *res judicata* in any subsequent suit. 43 I.C. 754; 13 L. 524. As to when a decision on an irrelevant issue, can operate as *res judicata*, see 102 I.C. 28 (2); 1927 M. 643=103 I.C. 90; 33 Bom.L.R. 1303; 1937 M. 114. Finding on question not necessary for decision of former suit, and not forming basis of decision would not be *res judicata*. 1936 C. 203; 1935 C. 733. Especially where appellate Court held that the question did not arise at all in the former suit. 165 I.C. 213=17

P.L.T. 677. It is the matter in issue and not the subject-matter of the suit that forms the essential test of *res judicata*. 13 B. 25; 1925 O. 444; 89 I.C. 282; 63 C. 550. Matter in issue in suit need not be in issue in appeal. 4 A.W.R. 1484=153 I.C. 497=1935 A. 268. A suit relating to a  $\frac{2}{3}$  share in property covered by a deed of gift is not barred by *res judicata* by reason of a previous litigation relating to  $\frac{1}{3}$  share retained by the donor, when the cause of action is distinctly different and the questions involved in the suit were not substantially and directly in issue in the previous suit. 1936 R.D. 275=1936 O.W.N. 582. Where the question whether a particular sale-deed was a valid document was directly and substantially in issue in the previous suit, the decision of the issue is *res judicata* though the property involved in the subsequent suit is different from the one which was the subject of the prior suit. 45 A. 515; 4 R. 8; 106 I.C. 861 (2)=1928 N. 112. So also where the question decided is as to the validity of an adoption. 8 M. 219; 2 I.A. 283; 13 A. 53; 13 B. 25; 24 A. 112; 30 A. 470; or as to the status of one party in relation to the other. 152 I.C. 894=1934 S. 112. Ejectment suit in respect of certain items—Defendant's plea that village is an unsettled jaghir and that they have occupancy rights—Court's decision negating the pleas without deciding whether the village is an estate is no bar to the plea of occupancy rights being raised in subsequent suit in respect of other items. 29 L.W. 760=119 I.C. 577=1929 M. 529. See also 13 R.D. 114. Where pending a suit for a certain share in an estate the estate is partitioned by Collector and six estates are formed before the suit is decreed, a fresh suit for distribution of decreed share to newly formed estates is not barred. 1934 P. 515. Landlord and tenant—Suits for ejectment and rent—Dismissal on ground of no relationship—Subsequent suit for possession of title—If barred. 159 I.C. 515=61 C.L.J. 366=1935 C. 607. Rent suit—Decree on basis of agreement as to amount—If *res judicata* as to rate of rent. 1935 C. 766. Dismissal of suit on promissory note by assignee against the promisor and the assignor bars a second suit for damages by assignee against the assignor. 4 Luck. 603=1929 O. 172 (F.B.). The bar of *res judicata* cannot be evaded by claiming some more reliefs in addition to those claimed in the first suit. 107 I.C. 674. Nor on the ground that the form of subsequent suit is different from that of prior suit. 157 I.C. 302=1935 N. 156. A premature decision in former suit is not *res judicata*. 62 M.L.J. 177=1932 M. 233. A passing remark by a judge does not amount to a finding. 1932 L. 232=137 I.C. 296; I.L.R. 1936 N. 138=164 I.C. 931=1936 N. 148. An unnecessary direction as to the remedy to be resorted to by the party with reference to a particular claim would not operate as *res judicata* and the party may have resort to any other remedy that may be open to him. 40 C.W.N. 341.

OTHER ILLUSTRATIVE CASES: Rent suits.—179 I.C. 828. A rent decree is *res judicata* on the question of the existence of the relationship of landlord and tenant. 54 I.C. 763; 25 I.C. 204; 10 I.C. 363; 60 C.L.J. 13 (Order of revenue officer under S. 105, B. T. Act, assessing



## NOTES.

fair and equitable rent). This is so even if the decree is passed *ex parte*. 49 A. 658. Where in a previous suit by A against B, it was held that B was a tenant of A, a subsequent suit by B against A and C, a *pro forma* defendant for a declaration that B is not a tenant of A but of C is barred. An incidental determination of an issue of title in a suit for rent is not a bar to any issue of title being raised subsequently. 34 I.C. 123; 63 I.C. 762; 51 I.C. 356; 20 C.L.J. 135; 50 I.C. 598; 15 I.A. 97; 25 C. 136; 25 C. 428. See also 30 C.W.N. 593=94 I.C. 837=1926 C. 650; 21 P.L.T. 277. Dismissal of previous suit under S. 77, Madras Estates Land Act, by Revenue Court, on ground that relationship of landlord and tenant did not exist will not be *res judicata* in subsequent suit in Civil Court for having relative rights of parties adjudged. 1937 M.W.N. 189=1937 M. 303. See also (1939) 2 M.L.J. 292 (Application under S. 20-A Madras Estates Land Act). The decision in a prior suit for rent does not operate as *res judicata* in a later suit for declaration of title as between the parties but the prior decision can be taken into account as evidence. 60 C. 1307=37 C.W.N. 924. See also 37 Bom.L.R. 62=1935 B. 131 (First suit as between landlord and tenant—Second suit on title.) But where the entire question of title to the property was directly and substantially in issue in the previous suit, as in the case where the tenant sets up his own ownership, denying that of the landlord, the decision will operate as *res judicata*. 12 I.C. 9; 42 I.C. 785 (2). See also 85 I.C. 804=1925 C. 1004; 21 P.L.T. 277; 1939 A.W.R. (B.R.) 43=1939 R.D. 174; 1938 N. 195; 40 Bom.L.R. 359=1938 B. 291; (1938) 2 M.L.J. 934; 1938 P. 359; 147 I.C. 1055=1934 P. 282. If the question of title thus substantially in issue in the former suit had been decided, the decision will operate as *res judicata* in a subsequent suit for rent for a subsequent period. 1 C. 202; also 24 A. 112. If an issue as to the nature of the tenure held by the defendants was directly raised in the previous suit for rent, the decision on the point will operate as *res judicata* in subsequent suits for rent. 25 C. 136; 14 M.L.J. 379; 13 M. 287; 26 B. 25; 30 M. 510; 30 A. 470; 1930 O. 335; see also 14 L.R. 867 (Rev.) Where a previous suit for enhancement of rent was decreed in spite of the defendant setting up a permanent tenancy the decree is not *res judicata* in a subsequent suit for ejectment in which the same claim is set up by the defendant. 8 L. 573=52 M.L.J. 663 (P.C.). When a recurring liability is the subject of a claim, a previous judgment dismissing the suit upon the findings which fall short of going to the very root of the title upon which the claim rests, cannot operate as *res judicata*. 11 A. 148. See also 54 B. 162; 27 A.L.J. 1257; 1930 P. 585. A decision in a suit for rent relating to a certain period will be *res judicata* in subsequent suit for rent for a later period unless the matter in dispute was peculiar to that particular year. 1934 M. 563=40 L.W. 656. See also 65 M.L.J. 684=1933 M. 925. A rent decree is not *res judicata* as to the rate of rent or as to the area for which the rent is payable but only as to the amount

due for the years for which the suit was brought. 68 I.C. 298; 1923 C. 282 (2); 3 O.W.N. 313 (Sup.)=98 I.C. 77=1927 O. 32. [It is, however, good evidence on these points. 47 I.C. 173; 1922 P. 213.] But if the Court determines them it is binding on the parties in a suit for rent for subsequent years. 43 C.L.J. 116=94 I.C. 844=1926 C. 672. The question of rate of rent is a necessary issue in a suit for enhancement of rent and the Court's decision thereon is *res judicata* in a subsequent suit for rent, in which the same question is at issue. 59 I.C. 752. See also 1941 O.A. 30=1941 O.W.N. 30. This is so even if the decree is passed *ex parte*. 91 I.C. 380=1926 C. 767. But the question whether defendant is occupancy or non-occupancy tenant is not a necessary issue in suit by landlord for enhancement of rent. 1935 R.D. 407. A decision in a suit by ryot to set aside a distraint on the ground that the tender of patta is not proper operates as *res judicata* on the point in a subsequent suit for rent. 45 M.L.J. 199. Where after the dismissal of a suit for rent, a subsequent suit by the tenant for a declaration of his rights was decreed and a suit was thereupon filed for the apportionment of rent, held, that the previous rent suit operated as *res judicata*. 35 C.W.N. 46. Order regarding rate of rent in one fasli is *res judicata* regarding a subsequent fasli. 1932 M.W.N. 639. See also 1941 O.A. 30=1941 O.W.N. 30. Dismissal of a suit for rent does not bar a subsequent suit for damages for use and occupation. 144 I.C. 734=1933 R. 116. A decision as to the nature of possession held by a party, in a prior suit, operates as *res judicata*. 46 M. 525=43 M.L.J. 737. See also 57 I.A. 208 (P.C.); 18 R.D. 449=15 L.R. 558 (Rev.); 18 R.D. 411=15 L.R. 537 (Rev.). Suit for rent by landlord against tenant—Plea of partial dis-possession and suspension of rent—Decision negating plea—Subsequent plea in later suit—When barred by *res judicata*. 40 C.W.N. 166. Where a claim of a third person based on a mortgage is disallowed, and also his suit for a declaration of his mortgage rights is dismissed, he cannot enforce by a regular suit his rights under the mortgage. 44 M. 268=40 M.L.J. 7. See also 1941 C. 512; suit by heirs against widow for possession dismissed for non-payment of dower debt ordered by Court to be paid by plaintiff to widow. Second suit for possession by the heirs is not barred. 47 A. 250. First suit by auction-purchaser to set aside order of redelivery under O. 21, R. 101, C. P. Code, dismissed. Subsequent suit for partition of the judgment-debtors' share not barred. 49 M. 596=50 M.L.J. 681. Where a reversioner brought a suit for a declaration that an adoption by a widow is not binding on him and got a decree, the question of relationship is *res judicata* in a subsequent suit for a declaration that a gift by her is not binding on him. 59 I.C. 808. Dismissal of a suit to declare an alienation by a widow was not binding on the reversioner is *res judicata* in a subsequent suit by the reversioner for possession after the death of the widow. 59 I.C. 946. See also 1925 M. 1270. But the decision in a suit against Hindu sons on a mortgage executed by their father upholding the mortgage cannot operate as *res judicata* in a



## NOTES.

suit by the sons of the defendants in the former suit (grandsons of the alienor) to set aside the mortgage. 43 L.W. 677=1936 M. 488=70 M.L.J. 627. The dismissal of a prior suit by the plaintiff's ancestor for *chur* right in a river on the ground that it formed part of his estate, bars the subsequent suit for establishing his right of fishery in the said river. 1927 C. 403. Where a suit for possession of certain parts of a permanent holding was dismissed on the ground that the plaintiff was not entitled to the tenure a subsequent suit for recovery of certain other plots alleged to form part of the same tenure is barred by *res judicata*. 37 C.W.N. 810=1933 C. 879=147 I.C. 719. A previous decision between the parties regarding the ownership of a wall in dispute is *res judicata* in a subsequent suit for injunction regarding the wall and for possession of the strip of land, and a decision of the survey officer with regard to the boundary given in the interval cannot prevail against the previous decision. 36 Bom.L.R. 502=1934 B. 248=152 I.C. 60. The decision in a suit based on a possessory right is no bar to a subsequent suit on title. 16 I.C. 431. But it has been held that the decision in proceedings under S. 9, Specific Relief Act, operates as *res judicata* so as to bar a subsequent suit between the parties on the question of possession. 60 C. 1171=37 C.W.N. 1148=1933 C. 923. See also 1938 M. 287. Where on the death of the previous holder of an estate an application was presented by the appellant for mutation of his name in place of the deceased and the application was based on a valid adoption of the applicant but the application was rejected and subsequently a suit was filed against the applicant challenging the validity of his adoption. Held, that the order rejecting the application did not operate as *res judicata* as the validity of adoption was not considered and decided by the Court during the proceeding on the application. 159 I.C. 437=1935 C. 716. In a previous suit the question of validity of wakf was raised and decided on the admission of parties to the suit and on other matters into which the question of the validity of wakf did not directly, but incidentally enter. In a subsequent suit the validity of wakf was in issue and it was held that the decision in the previous suit did not bar its decision in the subsequent suit. 1935 C. 792=40 C.W.N. 174.

"HEARD AND DECIDED."—To support a plea of *res judicata* there must be a point in issue. 1936 O.W.N. 717=164 I.C. 466; see also 1937 O. 246; (1937) 2 M.L.J. 666; 1937 R. 421. Where a decision between the parties was considered by the Court and declared not to be *res judicata*, the latter decision, even if erroneous in law, operates as *res judicata*. (19 C.W.N. 1280, Foll.) 39 P.L.R. 117=1937 Lah. 649. An award in respect of a certain transaction is barred under S. 11, by a decree passed in a suit in respect of the same transaction, even though the decree is of a subsequent date to the date of the award. 39 P.L.R. 117=1937 L. 649. See also 1937 S. 157; and the matter in issue must have been heard and finally decided. 45 C. 442; 21 M.L.J. 57; 1930 O. 465; 52 A. 901=1930 A.L.J. 1524=1931 A. 99; 36 Bom.L.R. 694=1934 B.

329; 1935 A.L.J. 279. See also 1938 M. 193=(1938) 2 M.L.J. 434; 1938 B. 291; 1939 L. 414. If an advocate for a plaintiff merely asks for an adjournment on behalf of his client, and; on an adjournment being refused, takes no further part in the proceedings, the plaintiff cannot be held to have appeared within the meaning of O. 9, C. P. Code, and the dismissal of the suit in such circumstances falls within the purview of O. 9, R. 8, C. P. Code, and does not operate as *res judicata*. 44 C.W.N. 576. An order is not final until the time of appeal has lapsed or till the appeal has been finally decided. (48 P.R. 1916, Appr.) 40 P.L.R. 128=1938 L. 232. Where the appellate Court has expressly refused to decide the case on the merits, there is no *res judicata*. 159 I.C. 419=37 P.L.R. 378=1935 L. 686. Nor where suit was rightly dismissed as being premature. 1935 L. 974. Previous judgment upon merits after hearing some evidence on both sides though in plaintiff's absence is *res judicata*. 1928 C. 271 (2). Where a transaction was incidentally referred to in a suit in the Court of Small Causes, and it was not finally decided, a subsequent suit raising the same is not barred. 5 R. 527. See also 44 C.W.N. 1099=72 C.L.J. 99. So also a matter expressly left open by the parties. 48 A. 34; 96 I.C. 302; 1931 P. 1=130 I.C. 785; 135 I.C. 843=1931 A.L.J. 1076. Also where the plaintiff is referred to a separate suit against one of the defendants on the ground that the claim against him cannot be enquired into in the same suit. 146 I.C. 487=1933 M. 868. See also 42 P.L.R. 707=1940 L. 1. So also where in previous suit the question to be considered in the subsequent suit was not raised or could not be raised and decided having regard to the form in which the parties to that case were arrayed; the judgment in that suit is not *res judicata*. 158 I.C. 656=1935 C. 641; 1941 C. 289; 1941 C. 449 (finding without issue being raised on the point); 1938 P. 444; 1937 C. 741 (issue raised but not decided). 1937 M. 709 (issue raised but not decided by appellate Court). It is sufficient if the decision in the previous suit impliedly decides the point. 40 B. 210; 23 M.L.J. 740; 54 I.C. 952=24 C.W.N. 223; 1928 L. 888=113 I.C. 120. In order to ascertain what matter was heard and finally decided, the pleadings and the judgment should be examined. 2 P.L.J. 159=38 I.C. 211; 37 I.C. 674=14 A.L.J. 1171. See also 1941 L. 169; 1938 B. 291; 1927 B. 145. (Case-law reviewed). 10 P.L.T. 630. The refusal of a Court to try extraneous issues in a case does not bar a subsequent suit. 36 I.C. 650. The party who is sought to be affected by the bar of *res judicata* should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contentions against such a decision. 46 M. 768=45 M.L.J. 346; 119 I.C. 829=1929 P. 338; 52 A. 1024=1930 A. 699; 1930 M.W.N. 729=128 I.C. 455. Where in a prior suit for possession and future mesne profits, the Court did not purport to decide the question of future mesne profits, a subsequent suit for mesne profits *pendenti lite* is not barred. 40 A. 292; 41 M. 188=33 M.L.J. 699 (F.B.). See also 30 M.L.J. 326; 1929 P. 678; 58 C. 1040; 46 L.W. 676=1937 M. 879. But it has been



## NOTES.

held by the Bombay High Court that where the decree is silent as to the claim of future mesne profits it will be taken to have been refused and a separate suit will be barred by Expl. V to S. 11. 44 B. 654. But see 58 C. 1040. Decision of a point on the ground of limitation only and not on the merits does not operate as *res judicata*. 73 I.C. 705=1923 L. 150 (2); 116 I.C. 142=1929 M. 687; 139 I.C. 375. Dismissal for technical defect does not operate as *res judicata*. 63 I.C. 344; 19 A.L.J. 706; 1929 L. 596; 1934 O. 491. Dismissal for default does not operate as *res judicata*. 24 I.C. 480=12 A.L.J. 911; 41 I.C. 905 (Cal.) 24 I.C. 17; 54 I.C. 789; 2 P. 739; 39 B. 41; 16 C. 98=15 I.A. 156; 24 B. 251; 1929 B. 217; 30 Bom. L.R. 1089; 187 I.C. 865; 51 L.W. 665=1940 M.W.N. 404; 134 I.C. 1171; 1932 L. 643. See also 12 P. 179=144 I.C. 59=1933 P. 208. (Dismissal of application for amendment of decree for failure to file process forms). Nor dismissal under O. 9, R. 3, 85 I.C. 509=1925 O. 337; See also 44 C.W.N. 576. Nor rejection of plaint for non-payment of deficit Court-fee, after remand. 40 C.W.N. 1390. Nor dismissal for misdescription of suit property. 1925 L. 193. See also 1937 A.L.J. 280=1937 A. 401. Nor dismissal for non-joinder or misjoinder of parties, or multifariousness. 43 M.L.J. 572; 24 I.A. 50; 8 A. 282; 1927 C. 794. See also 146 I.C. 487=1933 M. 868; 1939 Sind 367; 37 Bom.L.R. 62=1935 B. 131=155 I.C. 7; 167 I.C. 274=1937 O.W.N. 239; 1935 M. 696. Also dismissal for want of jurisdiction. 5 B. 48=7 I.A. 18 (P.C.); 1934 O. 449. Also dismissal for want of cause of action. 118 I.C. 711=1929 A. 844; 59 C.L.J. 328=1934 C. 799. See also 1937 N. 146; 937 R. 324; nor withdrawal of claim suit. 1928 A. 689; 110 I.C. 818 (2). See also 1939 L. 414 (Abandonment of claim by plaintiff); 1939 O.A. 425 (Decision not on merits). Also dismissal for non-prosecution under R. 36 of Ch. X of the Calcutta High Court Original Side Rules. 38 C.W.N. 1132. A matter must be regarded as *res judicata* if it is actually heard and finally decided in a suit even though the decree is passed *ex parte*. A.I.R. 1941 Cal. 574. Dismissal of suit on ground that plaintiff was not entitled to raise the plea on which suit was founded, without any inquiry into his title cannot be taken to be a decision that for all time and in all proceedings between the parties it must be taken that the plaintiff had no title. 43 L.W. 116=160 I.C. 753=1936 M. 165. A dismissal of a suit under O. 17, R. 3, for want of prosecution operates as *res judicata* in respect of the rights of the plaintiff to recover in a subsequent suit the property sued for in the first suit. 10 M. 272; 13 M. 510; 40 A. 590. Even in case of representative suit when conducted without any negligence. 38 P.L.R. 809=165 I.C. 808=1936 L. 385. Suit by a Hindu reversioner for declaration that a mortgage executed by a widow is invalid dismissed on the ground that plaintiff was not the reversionary heir—Subsequent suit by him after widow's death for possession is barred. 49 M.L.J. 142. See also 40 P.L.R. 591=1938 L. 571. But see 1931 A. 21. Decision in prior redemption suit about the amount due to the mortgagees

is *res judicata* in subsequent suit by one of the mortgagees for the amount due to him. 27 A.L.J. 908=119 I.C. 97=1929 A. 814. Decision on issue not necessary for disposal of former suit cannot be considered to be *res judicata* in a later suit, where the point involved arises for decision. 1935 M. 551=68 M.L.J. 625. A statement by the judge in the judgment which is merely obiter and without which the suit has already been decided does not operate as *res judicata*. 1935 L. 96=157 I.C. 816; 38 P.L.R. 790=1936 L. 18. But see 17 P.L.T. 356. Award in respect of a certain transaction is barred under S. 11 by a decree passed in respect of the same transaction, even though the decree is of a subsequent date to the date of the award. 39 P.L.R. 117.

HEARD AND FINALLY DECIDED.—Where a question is already decided by a Judge, and the same Judge subsequently arrives at a contrary decision on the same question in the same proceeding, the reopening of the question is barred by *res judicata*. 17 P.L.T. 756=164 I.C. 282=1936 P. 447. Dismissal of suit filed under O. 21, R. 63 (which was really unnecessary as the attachment was withdrawn) on the ground that the matter came under S. 47, and without considering the merits, will not be *res judicata*. 160 I.C. 835=1936 Pesh. 41. A subsequent suit for the same relief and on the same cause of action and between the same parties as a former suit is barred, being affected by the prohibition contained in Ss. 11 and 47. 41 Bom.L.R. 497=1939 B. 261. In cases where a will is in question, no decree or decision in proceedings to which the executors are not parties can be binding on any question or can obliterate the will. 1936 C. 585.

Explanation V.—The legal effect of this explanation is that of treating the omission to grant the relief asked for in the plaint as equivalent to an express refusal and the claim thereto in a fresh suit as *res judicata*. 14 M. 328; 21 C. 265; 21 A. 425. Expl. V to S. 11, C. P. Code, can be invoked only in respect of any adjudication, made by the Court. The fact that the plaintiff who, in the first instance, asks for a decree against the joint family property so far as the interests of the minor sons therein are concerned, subsequently withdraws his claim as against them, can only bring the case under O. 23, R. 1, C. P. Code. The result of such a withdrawal is not to bring in the operation of the rule of *res judicata* embodied in S. 11 but only to entail the statutory penalty enacted in O. 23, R. 1, *itself*, viz., that no fresh suit can be instituted against those defendants on the same cause of action. 1937 M. 718. Relief claimed but not expressly granted—Decree in prior suit substantially in favour of plaintiffs but the findings being against them—Appeal not preferred—Effect in subsequent suit; see 38 M.L.J. 374; 1927 M.W.N. 116=101 I.C. 648. It refers to the case where several heads of relief independent of each other are claimed, put in issue, and duly controverted, and one of them is neither granted nor refused. 12 B. 454. The granting of future mesne profits which the Court has a right to give or refuse is not such a relief. 15 M.L.J. 462; 32 C. 118; 21 A. 425 (F.B.); 25 B. 115; 24 M. 681; 80 I.C. 710. Where the mortgagee claims a money decree



## NOTES.

and in default of payment for sale of the mortgaged property, but is content to take a money decree, only, he could not sue again to have the amount paid by sale of the mortgaged property. 33 C. 849. See also 145 I.C. 373 = 1933 R. 158; 1939 Sind 367; 1938 B. 231.

ILLUSTRATIVE CASES.—The words "relief claimed" refer to a relief which the Court is bound to grant and not one which it is discretionary with the Court to grant. (21 A. 425; 41 M. 188, Ref.) 1931 P. 1. Previous suit for certain properties—Statement by plaintiff that he would pay additional Court-fee if it was found that he was entitled to further properties—Subsequent suit for further properties not barred. 1926 M.W.N. 94=93 I.C. 1=23 L.W. 415. Redemption suit—Claim for mesne profits—Withdrawal of claim for mesne profits—Separate suit, if lies. 1926 C. 178; 25 A.L.J. 425. In ejectment suit prayer for use and occupation referred—Subsequent suit after notice—Question of damages cannot be gone into. 104 I.C. 190=1927 P. 395. Mortgage suit—Personal remedy asked for in plaint—Decree silent regarding same—Effect—Party not barred from subsequently asking for the same. 53 M.L.J. 489; 157 I.C. 533=1935 A.L.J. 279 = 1935 A. 411. But where a definite application under O. 34, R. 6 was made and not granted, it would operate as *res judicata*. 38 P.L.R. 700=163 I.C. 119=1936 L. 388.

EX PARTE DECREE.—An *ex parte* decree can operate as *res judicata*. 16 C. 300; 40 C.L.J. 507; 26 A.L.J. 185; 85 I.C. 562=1925 M. 1025; 50 A. 394; 116 I.C. 567=1929 A. 346; 1937 A. 251; 1929 A. 761 (2); 144 I.C. 669=1933 L. 606. But the only matter that can be *res judicata* is matter in respect of which relief has been claimed by the plaintiff in the plaint. 16 C. 300; 27 I.C. 999; 9 L.R. 345 (1) (Rev.). On this point, see also 6 Bur.L.J. 148. Where a previous suit for arrears of rent was decreed *ex parte*, the defendant cannot contend in a later suit for arrears of rent that the relationship of landlord and tenant did not exist. 49 A. 658. See also 1941 R.D. 321. Two constructions possible regarding *ex parte* decision—*Res judicata* not to be inferred. 1929 A. 29=113 I.C. 758. Rent—*Ex parte* decree for arrears of—If *res judicata* as to rate of rent—Test. 118 I.C. 497 = 1929 M. 673.

CONSENT AND COMPROMISE DECREES.—S. 11 is not strictly applicable to consent or compromise decrees as it applies in terms only to what has been heard and finally decided by Court. 35 M. 75=21 M.L.J. 709; 14 Luck. 763; 1938 R.D. 917; 41 C.W.N. 298. 1935 P. 59=16 P.L.T. 12; 153 I.C. 515=1935 O. 121; 30 B. 395; 116 I.C. 116=1929 M. 96; 1933 S. 53. It cannot be said that a consent decree can never operate as *res judicata* in a subsequent suit. It is binding upon the parties and would operate as *res judicata* in a subsequent suit unless there are some special reasons for holding that the compromise and decree were void. 1939 O.W.N. 809=1939 O. 269. Where a suit ultimately ends in a compromise, a party to the suit who is not a party to such compromise is not bound by it, and the decree passed thereon, based as it is on the compromise cannot operate

as *res judicata* against him in a subsequent suit. 1939 P.W.N. 41=20 P.L.T. 346=1939 P. 225. Where a suit was brought by two daughters of a Hindu father in their personal capacity and for a personal relief, any compromise of that suit cannot operate as *res judicata* against reversioners. 1939 A.L.J. 199=1939 A. 197. Expl. V has reference to what has been adjudicated by the Court and not to the result arrived at by a compromise, in which the parties may have omitted to settle a part of their dispute, even though a decree may have been passed in accordance therewith. 149 I.C. 244=11 O.W.N. 528=1934 O. 293. The plea of estoppel by *res judicata* may prevail even when the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute. If the legality of an act is a point substantially in dispute, it may be a fair subject of compromise in Court like any other disputed matter; and a decree passed on such compromise is valid and binding until it is set aside, and will operate as *res judicata*. 164 I.C. 703 (2)=38 Bom.L.R. 593=1936 B. 301. But not in case where the legality of transaction was not in dispute and it depended on facts not disclosed in the case. 153 I.C. 585=11 O.W.N. 1571=1935 O. 121. A compromise decree cannot be taken to decide every point that ought to have been pleaded, as a decree on the merits must. 51 A. 575. A consent decree however raises an estoppel. 24 C. 216; 24 B. 77; 43 C.L.J. 116=94 I.C. 844=1926 C. 672; 4 Luck. 181. See also 1938 R.D. 917. A consent decree operates as *res judicata* if the question agitated between the parties in the subsequent suit had been put in issue in the prior proceedings though ultimately it was decided against the contesting party by his consent. 1929 M. 694=117 I.C. 295; 111 I.C. 1=1928 C. 852; 121 I.C. 164=1930 S. 195. A consent decree cannot, merely because it is a consent decree, prevent the application of the doctrine of *res judicata*. If, as is very often the case, the parties in consenting to the decree do not really intend that the decree should be the final decision of their disputes, it would not operate as *res judicata*. Where the plaintiff in the prior suit asserted a right to recover certain taxes from the defendant, but the latter did not deny it and did not put the matter in issue, and consented to a decree being passed against him, the defendant must be taken to have admitted the claim of the plaintiff, and it would not be said that he did not intend the decree to decide that dispute once for all in favour of the plaintiff. The admission of a fact fundamental to the decision arrived at cannot be withdrawn, and the defendant in a subsequent suit cannot be permitted to plead his non-liability to pay the taxes. Such a plea is barred by *res judicata* by reason of the prior decision and by virtue of his pleading in the prior suit. 1937 M.W.N. 1281=1938 M. 225. The Court, if the matter is in any way challenged, should be careful to see that the decree, if by consent, is not vitiated by fraud or otherwise. 63 C. 454. A consent decree or order is as effective as a decree or order passed on contest, not only with reference to the conclusions arrived at in the suit in which it is passed, but with regard to every step in



## NOTES.

the process of reasoning on which the conclusion is founded, i.e., the findings on the essential facts on which the judgment on the ultimate conclusion is founded. 63 C. 550. A consent decree passed between the predecessor-in-interest of the parties, touching matters now substantially and directly in issue, between them, is *res judicata*. 36 B. 283; 46 A. 820. See also 145 I.C. 352 = 1933 O. 322. But see 148 I.C. 548 = 1934 L. 758. To have such effect, the consent decree should have the effect of deciding finally the question raised. 151 I.C. 964 = 1934 M. 454 = 67 M.L.J. 198. A consent decree relating to matters outside suit does not operate as *res judicata*. 48 C. 1059. The decision by oath of any matter in issue in a former suit between the parties is *res judicata* in a subsequent litigation between them. 36 M. 287 = 24 M.L.J. 321; 24 M. 444. A decree or order passed on a razinamah would constitute the matters contained in it *res judicata* between the parties to suit. 36 M. 46 = 21 M.L.J. 820; 21 B. 465; 36 L.W. 414. But a compromise in a suit between the predecessors of the parties in which the issue in question in the later suit was neither raised nor decided, does not operate as *res judicata* in a later suit between the parties. 150 I.C. 1005 = 1934 A. 1038. A deed of compromise entered into in the course of a revenue proceeding and making a purely temporary arrangement for the purpose of the Revenue Courts does not operate as *res judicata* in subsequent suit in a Civil Court. 147 I.C. 715 = 1934 A. 75. Where parties fail to present to the Court a compromise arrived at between them but proceed with the suit, they are debarred from pleading the compromise in a subsequent suit in view of Expl. (iv) to S. 11, C. P. Code. The compromise must be held to be superseded by the decree in that suit. 18 L. 209 = 39 P.L.R. 29 = 1937 L. 537.

THE DECISION MUST BE NECESSARY FOR THE DETERMINATION OF THE SUIT.—Matter which was not necessary for the decree passed in the suit is not matter directly and substantially in issue in the suit which was heard and finally decided. 5 C.W.N. 445; 26 M. 104. See also 101 I.C. 522 = 4 O.W.N. 307; 102 I.C. 22 (1); 30 Bom.L.R. 902 = 1928 B. 349; 31 Punj.L.R. 406; 1930 A.L.J. 1309. If in the mortgage suit it is necessary for the Court to decide whether the trees were included in the mortgaged property, and, on the pleadings the Court does decide that the trees were not in the mortgaged property, the decision must operate as *res judicata* between the parties if the issue is raised again between them in a subsequent suit. 9 Luck. 291 = 147 I.C. 984 = 1934 O. 50. If a finding arrived at on a certain issue is sufficient to completely dispose of the case other findings on other issues not necessary for the disposal of the case are not a final decision of the matter covered by them and do not operate as *res judicata*. 36 I.C. 643; 70 I.C. 666; 44 B. 321; 7 I.C. 317 = 1923 L. 523; 73 I.C. 854 = 1923 L. 248; 43 C.L.J. 501 = 95 I.C. 1011 = 1926 C. 1003. See also 1934 R. 375; 41 Bom.L.R. 422 = 1939 B. 303; 1937 M. 804 (Impossibility of raising issue in prior suit) 1937 S. 155. Where there are two findings, either of which would in law be sufficient to dispose of the case that one

which in the logical sequence should have been first found rendering the determination of the other issue unnecessary, is the finding which operates as *res judicata*. 9 I.C. 983 = 8 A.L.J. 409; 28 I.C. 580 = 21 C.L.J. 296; 17 A. 174. But it has been held by the Madras High Court that the decision on both the issues would be *res judicata* and the rule of logical priority is inapplicable. 38 M. 158. See also 113 I.C. 155. If a decision is based on two grounds, both of them operate as *res judicata*. 31 M.L.J. 97. Where a judgment is based on findings on more than one issue but it is doubtful as to on which issue the final conclusion is based, the decision on all issues is *res judicata*. 34 M.L.J. 431. A question raised at the instance of a party and decided by the Court as necessary operates as *res judicata*, even though the issue in the previous suit was in fact not necessary. 63 I.C. 161 = 33 C.L.J. 317; 10 P.L.T. 630; 118 I.C. 168; 57 C. 672. When a Court decides a case upon a preliminary point as well as on merits, it cannot be said that the decision on the merits does not operate as *res judicata*. 1930 L. 487; 1930 A. 619; 24 C. 900. But see 40 C. 29. Where an ejectment suit is dismissed on the ground of absence of notice, a finding recorded, that the permanent tenancy alleged by the defendant, is not proved, cannot operate as *res judicata*. 47 M. 453 = 46 M.L.J. 198; 43 B. 568; see also 18 C. 647. But where first Court decreed the suit for ejectment negating the claim of permanent occupancy, but the appellate Court reversed it for want of proper notice to quit, though upholding the finding as to the nature of the tenancy, the decision on the point is *res judicata*. 46 M.L.J. 515. But see 40 B. 662 (a suit of a declaratory nature); 1929 C. 449. Where an appellate Court confirms the decision of the trial Court by deciding on one point only without giving its decision on another point which was also decided by the trial Court, the decision on this point is not *res judicata* in subsequent suit. 42 C.L.J. 560 = 92 I.C. 981 = 1926 C. 163; 4 Luck. 404; 37 C.W.N. 892. An *obiter dictum* not necessary for the decision of the case is not a decision on a point directly and substantially in issue and does not constitute *res judicata*. 45 A. 466; 4 P.L.J. 682 = 52 I.C. 338 = 1919 P.H.C.C. 343; 142 I.C. 606 = 1933 L. 412; 1933 L. 404; 14 L.R. 457 (Rev.) = 17 R.D. 591. Where a suit was dismissed on grounds of limitation, but a finding was also recorded against the plaintiff to avoid a remand in case the appellate Court took a different view, the finding will not operate as *res judicata*. 47 M.L.J. 532. Where a suit is decided in favour of the defendants, but there is a finding adverse to them that finding is not *res judicata* against them. 48 C. 460; 47 M.L.J. 487; 11 C. 301; 18 B. 597; 17 A. 174; 18 C. 647; 55 M. 483; 18 R.D. 509; 141 I.C. 399 = 34 P.L.R. 225 = 1933 L. 218. See also 146 I.C. 710 = 1933 O. 439. Finding on an issue adverse to the plaintiffs successful in the earlier suit will not operate as *res judicata* against them in a later suit. 56 C. 639; 27 A.L.J. 1100 = 1929 A. 910; 1930 L. 149; 1933 M. 770. It is not the law that where a plaintiff's suit is dismissed, there is generally no *res judicata* on the findings in his favour. 34 M.L.J. 641; 12 L.W. 277; 1 C.



*Explanation IV.*—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

## NOTES.

144; 10 M. 102. The defendant is entitled to appeal against such findings. 47 M. 633; 47 M.L.J. 487. When a decree was based on independent grounds and the adverse finding was not implied in the decree, it would not operate as *res judicata*. 37 M. 25=21 M.L.J. 947. But where the decision on an issue is necessary but the party against whom the finding is made could not appeal, as the final decree is in his favour the decision on that issue is *res judicata*. 34 M.L.J. 431; 24 C. 900; 36 L.W. 388. Such a finding may be appealed against and constitutes *res judicata*. 40 I.C. 771. The fact that a party against whom an issue is found has no right of appeal does not affect the rule of *res judicata*. 34 M.L.J. 431=29 M.L.J. 535. Ejectment suit—Decree for rent in—Question of title need not be decided. 30 Bom.L.R. 1602=1929 B. 32.

SEC. 11, EXPL. IV: (See also notes under heading 'Constructive Res Judicata'.)—The correct principle as to constructive *res judicata* is that if the decree made in the earlier suit is such that it would be inconsistent with the plea which might and ought to have been raised, but not actually raised, it must be taken that there has been, for the purpose of *res judicata*, a final decision by necessary implication. 157 I.C. 381=39 C.W.N. 692=61 C.L.J. 301. The 'matters that ought to be taken' referred to in the Expl. IV, to S. 11, must be matters connected with the cause of action and the issues in issue between the parties at the time. 1941 R.D. 678. S. 11, Expl. IV, relates to any matter which might and ought to have been made a ground of attack in a former suit. The words are not "might or ought" but "might and ought". The mere fact that the plaintiff might have included his claim in the previous suit is no ground for saying that he ought to have done so. 43 P.L.R. 44. If litigants desire to win by such a technical plea as constructive *res judicata* they must found their plea firmly by proving the facts from which a Court can infer that at the critical time the person, sought to be barred, might and ought to have raised the plea. 1940 N.L.J. 562. Pre-decree compromise not presented to court in previous suit and a decree was passed on merits, the compromise cannot be pleaded in subsequent suit. 39 P.L.R. 29. Expl. IV can be applied only if it could be shown that the Court had passed an order in the earlier proceedings adverse to such party. 158 I.C. 891=1935 M. 786. Also the parties should be litigating under the same title. 156 I.C. 543=1935 L. 753. Expl. IV, embodying the rule of constructive *res judicata* applies to execution proceedings as well. I.L.R. 1936 N. 30=165 I.C. 948=19 N.L.J. 129=1936 N. 123; 163 I.C. 671=1936 R. 218; 1938 P.W.N. 400=1938 P. 427. As regards application of this Explanation, there is no distinction between consent decree and decree on contest. 37 P.L.R. 65=157 I.C. 749=1935 L. 487. See also 1937 R.D. 917. The rule will apply even with reference to questions of law, e.g., the legality of any particular act forming

the subject of a compromise decree. 29 S.L.R. 455=164 I.C. 43=1936 S. 99. Omission to raise plea of *res judicata* in earlier stages will not entitle party to raise it after appellate Court remanded the case to be tried on merits. 1936 C. 454. So also as to plea of want of jurisdiction, see 161 I.C. 324=1936 S. 34. Where a decree is a nullity for want of jurisdiction, Expl. IV to S. 11 would not apply. 157 I.C. 90=1935 N. 28. Adverse finding against successful party cannot operate as *res judicata*. 1935 M.W.N. 871=1935 M. 701. See also 1940 A.W.R. (B.R.) 170=1940 R.D. 355; 185 I.C. 232. This explanation does not apply to the case of an application for restitution under S. 144; 153 I.C. 572=1935 A. 195. A defendant who has applied under O. 9, R. 13, C. P. Code, for setting aside a decree on the ground that proper service has not been carried out and has failed, is barred from agitating the same point later on in an appeal from that decree or in a petition for revision against the order passing the decree. The order of the Court will stand in his way. Conversely a defendant who has failed in an appeal or revision on that point cannot subsequently have recourse to proceedings under O. 9, R. 13, C. P. Code, for decision on it. 160 I.C. 462=1936 Pesh. 1. A Court is empowered to entertain an objection to attachment under S. 60 (1) (c) at any time, and decide it on the merits even though it was not raised at a preliminary stage. It would not be barred by principle of *res judicata* (1930 N. 11 and 1930 A. 727, Foll.) 1935 L. 942. So also where it was raised but not decided. 38 P.L.R. 691=1936 L. 930. A holder of two separate mortgages is not prevented from suing separately on each of such mortgages either by O. 2, R. 1, or by S. 11. See now T. P. Act, S. 67. The two separate mortgages give rise to two independent causes of action; hence O. 2, R. 1, does not bar the second suit. (1921 C. 321; 20 A. 322 (F.B.); 1924 P. 77, Foll.; 1915 B. 54, Not Foll.) 159 I.C. 758=1935 N. 226 (F.B.); 63 C.L.J. 110=1936 C. 698. The question whether an *alternative plea* ought to have been made a ground of attack depends on the facts of each case. If the *alternative plea* is inconsistent with the main plea and would thus create confusion it cannot be said that the *alternative plea* ought to have been raised in the previous suit or application. 1940 L. 27. Successive suits for redemption would not be barred when no final decree had been passed in the former suits and the mortgage was extinguished. 15 P. 607=163 I.C. 908=17 P.L.T. 564=1936 P. 420. Where in execution of a decree the decree-holder gets declaration that only half interest in certain property is liable to attachment, he cannot in execution of another decree against same judgment-debtor claim to attach the whole interest in the same property. 159 I.C. 465=1935 R. 399. A suit was brought on the basis of a mortgage deed impleading therein besides the Hindu mortgagor, his sons and grandsons also, who are the appellants. The Court dismissed the claim against the appellants and gave the



## NOTES.

plaintiff a money-decree only against the mortgagor. In execution plaintiff could not be allowed to attach and sell the entire joint family property. 1936 O. 139=11 Luck. 523. Where in a previous suit decided on an award, the entire property including the house in dispute was treated as jointly owned by the brothers, and neither before the Court nor before the arbitrator did the plaintiff set up the plea that he was the exclusive owner of this house under his father's will, he is barred from relying on the will under Expl. IV, in a subsequent suit by him for a declaration that the house was his exclusive property. 157 I.C. 368 (Lah.). Where a person who had a subsequent mortgage over a property had also in addition to this redeemed a prior mortgage and a puisne mortgagee sued on his mortgage impleading the former only as a subsequent mortgagee but not as an assignee of the prior mortgagee and in execution of the decree so obtained by which it was ordered that the claim of the plaintiff puisne mortgagee was to be satisfied first, the subsequent mortgagee claimed that he was entitled to be paid first his money due as assignee of prior mortgagee. *Held*, that the rule of *res judicata* did not apply and that to make the rule applicable it was necessary for the plaintiff puisne mortgagee to attack his rights as assignee of the prior mortgage. 1935 L. 218. *See also* 1936 A.W.R. 653=1936 A.L.J. 774=165 I.C. 7=1936 A. 578 (F.B.); 43 C.W.N. 1126=1939 C. 692; 1937 M.W.N. 60; 1937 A. 251; 19 N.L.J. 290. But *see* 18 N.L.J. 274. Plaintiff who was prior mortgagee in his suit for sale failed to claim benefit of S. 101, T. P. Act, as against puisne mortgagee in respect of portions of mortgaged property already purchased by him. It was held that he would not be debarred by *res judicata* from making the claim in defence to suit by puisne mortgagee on his mortgage. 43 L.W. 478=1936 M. 473=70 M.L.J. 506. It cannot be said that a person petitioning the Court for a divorce as a husband or wife ought to add an alternative plea asking for a declaration that he or she is not a husband or wife at all, because the marriage has long ago ceased to exist. These matters are so dissimilar that their union not only might but must certainly lead to confusion. Hence the failure of a wife in earlier suit for divorce to raise alternative plea for a declaration that her marriage has ceased to exist will not bar a subsequent suit for such declaration. 1941 R. 118. In a previous suit as regards a claim to the Mahantship of an Asthal, the defendant had to defend himself against that claim, but he was not put forward any claim of his own to the Mahantship. Hence a later suit by the defendant for declaration of his own title to the office of Mahant and for possession of the properties of the Asthal was not barred by *res judicata*. 62 C.L.J. 153. *See also* 1941 P.W.N. 75=22 P.L.T. 239. A mortgage decree passed against a former Mahanth does not operate as *res judicata* against a succeeding Mahanth when there is nothing to show that the former Mahanth was impleaded in the suit as representing the deity, and no issue on the question of legal necessity was raised or decided in that suit. 192 I.C. 789. A woman defended a certain

suit under the plea that she was heir to certain property in dispute under the customary law. The suit was decided against her. Subsequently she filed a declaratory suit basing her title to same property as heir under Mahomedan law. *Held*, her suit was barred by *res judicata*. 158 I.C. 995=1935 Pesh. 150. *See also* 1940 N.L.J. 499=1940 N. 396. In a pre-emption suit, the minor sons of the vendor were impleaded and were represented by their step-brother as their guardian *ad litem*. The pre-emptor paid the amount and got possession; subsequently the minor sued to set aside the sale by his father as not being valid. It was contended that this plea ought to have been raised in the pre-emption suit and as such the doctrine of constructive *res judicata* applied. This contention was held not tenable. 159 I.C. 693=1935 L. 489. A suit against two defendants was decreed as against defendant 2 and plaintiff was asked to pay costs of defendant 1. In an appeal by the plaintiff against costs, defendant 2 was impleaded but he made no contest and he was asked to pay costs of defendant 1. Subsequently defendant 2 filed an appeal against the main decree passed against him. It was contended by the plaintiff that the points in dispute in the appeal ought to have been raised in the appeal as to costs by plaintiff and hence this appeal was barred by *res judicata*. *Held*, that these points were not such as ought to have been raised (though they might have been raised) in the appeal by the plaintiff and that the present appeal was not barred by the constructive rule of *res judicata*. 1935 L. 825.

CONSTRUCTIVE RES JUDICATA.—*Expl. IV.*—As to the application of the principle of constructive *res judicata*, *see* 49 A. 592; 59 C. 636; 50 M.L.J. 1 (P.C.); 1929 A. 400; 107 I.C. 110; 1930 M. 539; 1930 L. 487; 1930 C. 588; 15 L. 869=1934 L. 316; 68 C.L.J. 305; 1937 L. 404. The rule of constructive *res judicata* can only apply to matters actually decided and to all matters which are necessarily deemed to have been decided by the judgment. But where the relief prayed for is not dependant on the adjudication of a particular matter in issue, by no conceivable reason can it be said that the matter must be deemed to have been also decided by the judgment. 1941 Mad. 573. There is no difference in this matter between consent decree and decree passed *per invitum*. 29 S.L.R. 455=164 I.C. 43=1936 S. 99. As to applicability of doctrine to land acquisition proceedings *see* 160 I.C. 1010=1936 Pesh. 29. In order successfully to establish a plea of *res judicata* or estoppel by record it is necessary to show that in a previous case a Court having jurisdiction to try the question came to a decision necessarily and substantially involving the determination of the matter in issue in the later case. Where a dispute as to the title to receive the compensation under the Land Acquisition Act has been referred to a Court, and it has been determined, the matter is *res judicata* and binds the parties in any later suit involving that issue. 66 I.A. 145=I.L.R. (1939) A. 460=(1939) 2 M.L.J. 98=1939 P.C. 133. The rejection of a plea as having been raised too late operates as *res judicata*. 91 I.C. 683=1926 C. 511. Question of jurisdiction wrongly



## NOTES.

decided in previous suit, no objection being raised—Decision operates as *res judicata*. 28 Bom.L.R. 879=98 I.C. 341=1926 B. 481. Omission by judgment-debtor to challenge liability where it does not affect decree-holder's position creates no estoppel. 71 I.C. 772. It is not only necessary that the matter might have been a ground of attack or defence but also it ought to have been so made. 60 I.C. 393; 2 P.L.T. 285; 1 A.L.J. 498; 1930 R. 197; 1930 M. 539; 146 I.C. 395=34 P.L.R. 925=1933 L. 279; 37 P.L.R. 65; 1938 Lah. 443; 1939 C. 1; 1938 All. 542; 48 L. W. 485; 42 C.W.N. 110; 1938 Pat. 41=18 P.L.T. 896. A person is not bound to sue on an alternative cause of action and failure to sue in the former suit does not bar a subsequent suit. 103 I.C. 888=1927 N. 322; 1929 L. 872 (2); see also 1940 L. 27; 174 I.C. 777; (1938) 1 M.L.J. 249. But see 1931 M. 268. Plea which might hurt need not necessarily be raised in prior suit—No bar. 8 Luck. 602. The question whether any matter ought to have been made a ground of attack or defence in a former suit depends upon the particular facts of each case. 20 C. 79=19 I.A. 234 (P.C.); 60 C. 1158=37 C.W.N. 1001=1933 C. 900; 1938 A.W.R. 16 (B.R.)=1938 R.D. 4. The plea sought to be raised in the second suit must also be directly relevant to the issue in the first suit. 1925 M. 226=1924 M.W.N. 666. See also 46 I.C. 929; 40 C.L.J. 507. In a pre-emption suit, the pre-emptor is not bound to set up his own title in that alternative. 96 I.C. 71=1926 O. 545. A suit for recovery of possession of immovable property need not be resisted on the ground of right of maintenance. 143 I.C. 657=1933 Pesh. 61. Decree on mortgage—Subsequent suit by heirs questioning the right of mortgagor to alienate, not barred. 4 P. 510. See also 1938 L. 139 (Suit in different capacity not barred). The Explanation in authorising a fiction that the matter contemplated by it was in issue, implies necessarily the further fiction that it was adjudicated upon. 8 M.L.J. 28; 26 M. 760; 117 I.C. 805. The matter would be deemed to have been decided against the party omitting to allege it. 2 A. 100; 25 B. 189. But see 2 C. 171. See also 35 C. 975. (Where the correctness of the previous decision has been doubted). Where in an interpleader suit as among several widows of the last male-holder the factum or validity of the adoption of a son by one of the widows was not challenged, the question must be heard to have been raised and decided. 1928 O. 155=108 I.C. 817. It is only where the subject-matter of the two suits is the same that the matter can be said to have been heard and decided. 24 C. 711. See also 42 Bom.L.R. 470=1940 B. 311. Such a question cannot be treated as *res judicata* unless there is a judicial determination expressed or implied on the matter not put directly in issue. 28 C. 17; 1 R. 363. Validity of the will as a whole in dispute in earlier suit—Specific plea against the provision for 'election' under certain conditions contained in the plea was not necessary for the decision of the suit—Question about the 'election' in later suit not barred by *res judicata*. 10 L. 389; 30 Bom.L.R. 562=113 I.C. 298. Where plaintiff claims

title to certain property, he ought to put forward all means of attack in his armoury. 72 I.C. 14; 20 C. 79=19 I.A. 234 (P.C.); 25 B. 189. See also 37 I.C. 119; 20 I.C. 890; 26 M. 645; 3 B. 537. But see 1931 B. 187. Former suit for rectification of sale-deed and for possession of property wrongly shown as exempted from sale—Subsequent suit for possession of property shown as sold in the sale deed—No bar of *res judicata* as causes of action are distinct. 167 I.C. 414=1937 O.W.N. 252. Where a suit by the widow of the last male-holder against the purchasers in execution sale on the ground that the properties had been gifted to her by her husband was dismissed, she cannot in a subsequent suit by the daughter of the last male-holder in which she was added as a party, claim a right to share in the properties as the new claim ought to have been made a ground of attack in the former suit itself. 67 M.L.J. 709=152 I.C. 1049. Suit by adopted son to set aside alienations—Decree in respect of one item against one defendant—Failure to include all reliefs—Subsequent suit in respect of same item against the other defendants—Barred by S. 11, Expl. IV, O. 2, Rr. 1 and 2. 32 Bom. L.R. 1473. Where the prior suit failed on account of omission to plead a family custom, a subsequent suit based on such custom is barred. 47 A. 158. Where the right to recover possession would accrue only on the sale being set aside the plaintiff suing for cancellation of the sale need not pray for possession and a fresh suit for the latter relief will not be barred by S. 11 or O. 2, R. 2. 57 B. 456=35 Bom. L.R. 630=1933 B. 398. Where the plaintiff had on a former occasion sued for a certain relief on the strength of one title, he cannot afterwards claim the same relief on the ground of another title of which on the former occasion he might have availed himself. 24 C. 83; 31 M. 385; 2 C. 252; 49 M.L.J. 701; 25 A.L.J. 1035. But see 58 B. 119 cited under "LITIGATING UNDER THE SAME TITLE." It is not necessary to put forward a claim and also an inconsistent claim in the alternative in the same suit. 24 M.L.J. 418; 29 A. 331=34 I.A. 72 (P.C.); 52 I.C. 813; 1919 M.W.N. 287; 72 I.C. 14=1923 R. 122; 35 B. 507; 47 A. 561; 107 I.C. 110. A subsequent suit based on a claim of title, which the plaintiff owing to want of knowledge of it could not put forth as a ground of attack in a prior suit, is not barred under Expl. IV. 37 I.C. 119; 10 I.C. 991. Where a suit for money on the basis of a contract for supply of boats at an agreed rate, is decided against the plaintiff, he cannot bring a subsequent suit to recover the same money as compensation for services rendered. 15 I.C. 374. Sub-mortgagee—Suit by, as assignee of mortgage dismissed—Subsequent suit as sub-mortgagee—Barred. 116 I.C. 738=1929 A. 400. But see 1930 A.L.J. 1572; 35 L.W. 429. Suit to enforce charge—Claim in plaint for personal remedy also—Grant of decree for sale—No decision on question of personal remedy—Subsequent claim for such relief not *res judicata*. 1935 A.W.R. 344=1935 A.L.J. 279. A suit by a Hindu son to avoid a sale in execution of a decree against his father on the ground that the sale was tainted with immorality, is barred by a similar previous suit on the ground that



## NOTES.

the property was joint family property. 65 I.C. 511=1923 A. 231. See also 46 M. 135. Where a plaintiff sued to eject a trespasser basing his claim on an ancestral right and failed therein, he could not bring another suit against the same defendant claiming to be the heir of a certain person. 34 I.C. 456=(1916) 1 M.W.N. 286; 11 Beng.L.R. 158 (P.C.); 31 M. 385. But see 58 B. 119 cited *infra*. Omission to plead available ground of defence would bar the defendant from raising the same plea again in a subsequent suit. 72 I.C. 91=1924 L. 83; 1933 P. 526; 1933 M.W.N. 1289; 24 I.C. 212; 31 C. 79; 20 A. 81; 7 B. 272; 59 M.L.J. 262=52 A. 272 (P.C.); 1930 A.L.J. 601; 1930 A.L.J. 1569; 152 I.C. 426=11 O.W.N. 1368 (Omission to plead right to trees in a suit for possession in treating the defendant as a trespasser). Prior suit on *mutual account*—*Ex parte* decree—Subsequent suit by the defendant in earlier suit for sum of money due for the same period—Barred by constructive *res judicata*. 1927 A. 799 (1)=25 A.L.J. 711. Where a prior suit for possession is decreed on the basis of a gift, a subsequent suit questioning the title of the donor to make a gift is barred. 1 Luck. 78. A person brought in to defend his rights in respect of one property in a suit, ought to set up his rights, if any, to the other properties in the suit as well. 1917 M.W.N. 336=38 I.C. 184. A defendant in a suit is under no obligation to avail himself of the right to claim a set off. 28 M.L.J. 513; 49 M.L.J. 14; or counter-claim, see 24 L.W. 282=97 I.C. 488=1926 M. 1020. Where in a simple suit for rent the tenant puts forward a plea of dispossession and allows a decree to be passed for the entire rent it cannot be held that he was bound to take a plea as to dispossession of part of the holding so as to bar the plea being raised in a later suit for rent for a subsequent term. 146 I.C. 878=57 C.L.J. 306=1933 C. 793. Where a suit for possession of property based on a lease alleged to have expired is dismissed on the ground that the lease is not proved, a subsequent suit for possession based on ownership is not barred by *res judicata*. 22 M. 323; 23 M. 629; 9 M. 251. See also 23 L.W. 58=92 I.C. 245=1926 M. 849; 63 I.C. 717=3 L.L.J. 215. Where a suit for possession of certain property by the plaintiff treating the defendant as his tenant, is dismissed on the finding that the relationship of landlord and tenant did not subsist, a second suit by the plaintiff alleging that he was a reversioner entitled to the properties, is not barred by *res judicata*. 1919 M.W.N. 287; 1927 O. 341; 1926 M. 234. So also where A sues B for redemption of an alleged mortgage but fails to prove the mortgage and the suit is dismissed, he can sue again as owner. 35 B. 507. Separate suits for possession and mesne profits against same defendants are maintainable though the claim for mesne profits might have been joined in the previous suit. 26 Bom.L.R. 288=80 I.C. 259. See also 25 A.L.J. 425; 6 R. 691; 1929 R. 55; 1929 C. 566. So also where the first suit for declaration of title to property purchased by plaintiff and subsequently pre-empted by another person was dismissed, a subsequent suit for

refund of purchase-money is not barred. 1933 L. 1017=147 I.C. 651. Where one suit for partition of some of the joint family properties was brought and disposed of, another suit for partition of the remaining properties is barred. 44 M.L.J. 652. But see 31 Bom.L.R. 640=1929 B. 323; 32 C.W.N. 1023=1928 C. 459. The plea of *res judicata* cannot be raised to bar a suit for partition of certain property which had been by mistake omitted to be included in the former suit for partition. 149 I.C. 244=11 O.W.N. 528=1934 O. 293 relying on 1921 B. 323. First suit as *kittima adopted son*—Second suit as *apathitha son* barred. 5 R. 565. First suit barred on exclusive title—Joint possession with certain relatives ordered—Second suit on the ground that those relations had already released their rights barred. 1927 M. 120=99 I.C. 525. Widow impleaded as legal representative in mortgage suit—Widow's individual rights not raised—Subsequent suit for declaration of widow's rights barred. But see 112 I.C. 266=1928 O. 411; 5 Bur.L.J. 114=1926 R. 191. Prior suit for specific land based on exclusive title—Subsequent suit for partition and possession of share—Not barred. 24 L.W. 453=1926 M. 1128. Ejectment suit—Dismissal of —Redemption—Subsequent suit for—Not barred by *res judicata*. 120 I.C. 420=1929 L. 833. In all litigation there are innumerable matters that might be made ground of defence or attack but whether they ought to be so made would depend largely upon the circumstances of each case. The question whether a party had at the time of the previous suit knowledge of the matter relied on in the subsequent suit is of great importance. If he had at the date of the former suit neither knowledge nor means of knowledge of the right relied on in the second suit, the second suit is not barred by the rule of constructive *res judicata* embodied in S. 11, Expl. IV, C. P. Code. 42 C.W.N. 560.

PRINCIPLE OF CONSTRUCTIVE RES JUDICATA APPLIES TO SUITS ON MORTGAGES.—See 1937 A. 251; 1937 A.W.R. 648. In a mortgage suit, all claims relating to the mortgage right up to the end of the proceedings, must be determined and a defendant who omits to put forward a counter-claim cannot bring a subsequent suit for recovery thereof. 12 L.W. 173; 26 B. 661. In a suit for redemption of usufructuary mortgage must be included the entire accounts between the parties in relation to the mortgage; the claim of the mortgagor for overpayments to the mortgagee or excess profits received by the latter must also be included, and if they are not included, a subsequent suit in respect of such claims would be barred by reason of S. 11, Expl. IV, and O. 2, R. 2, C. P. Code. 162 I.C. 709=40 C.W.N. 627=1936 C. 200. The mortgagor obtaining possession in a redemption suit by him cannot subsequently sue for profits realised by the mortgagee for a period prior to the date of delivery of possession. 30 A. 36. Where mortgagee has failed in a suit for redemption to obtain an order for sale of a mortgaged property on failure of payment by the mortgagor of the mortgage amount within the time fixed for payment, he cannot afterwards bring a separate suit for sale upon his mortgage. 13 B. 567. See also 7 L. 40; 1940 M. 950.



## NOTES.

= 1 (1940) M.L.J. 779; 1940 M. 577 = 51 L.W. 569. As to *res judicata* in SUITS FOR REDEMPTION, see under a separate heading.) Where in a suit by a prior mortgagee the puisne mortgagee is also impleaded as a party and a decree is passed directing the sale of the property, the persons claiming under the parties to a previously puisne mortgagee is not debarred from enforcing his mortgage in a subsequent suit. 41 M. 90 = 35 M.L.J. 639. See also 1 Luck. 25. A prior mortgagee who is impleaded in a suit on a subsequent mortgage, but whose mortgage is not impugned has a paramount title outside the controversy of the suit and is not bound to set up his mortgage as a defence. 47 C. 662 = 38 M.L.J. 424 (P.C.); 35 A. 111; 18 C.W.N. 1013; 58 I.C. 33; 1930 A. 163; 36 C.W.N. 1138; 144 I.C. 716 = 1933 N. 190. But where it is sought to displace his prior title and to postpone it to the title of the plaintiff, it is the duty of the prior mortgagee to prove his title and if he fails to do so, the decision in the suit will operate as *res judicata* against him. 2 P. 435 = 4 P.L.T. 108. Where in consequence of the failure of the prior mortgagee to claim priority under his mortgage, a decree for sale follows, in pursuance of which the properties are sold, he could not thereafter enforce the claim under his prior mortgage. 39 C. 527; 34 A. 599 = 19 C.W.N. 947; 4 Luck. 25 = 115 I.C. 833 = 1929 O. 463. But see 10 P. 234. Where the issue in respect of prior mortgage was struck off on the prior mortgagee not desiring to press for an enquiry in respect of his mortgage his claims are not barred by *res judicata*. 110 I.C. 79 = 5 O.W.N. 210 = 1929 O. 88. Where in a suit on a mortgage executed by two brothers, a third brother also was impleaded as a *pro forma* defendant, and there was no assessment in the plaint that the mortgage had been in respect of the share of the third brother as well, the question that this share was not liable to the mortgage would have been a question of title paramount outside the scope of the suit, and his sons are not precluded by the rule of *res judicata* from bringing another suit after his death, that the previous decree is not binding so far as it related to their share. 150 I.C. 529 = 58 C.L.J. 294 = 1934 C. 384. See also 61 C. 294 = 150 I.C. 321 = 38 C.W.N. 492 = 1934 C. 552 (Where the prior mortgagee who had purchased the property in execution of his decree was impleaded in a suit by a subsequent mortgagee). Suit to redeem invalid mortgage dismissed—Suit for redeeming a different mortgage not barred. 1930 M. 264. Suit for redemption—Sub-mortgagee made a party—Decision of his rights in his absence—No *res judicata*. 6 O.W.N. 851 = 1929 O. 455. If being a party to a suit on a mortgage prior to his own, he omits to claim his right to redeem such prior mortgage, he cannot afterwards sue for that purpose on the mortgage he has omitted to plead. 24 A. 429 (P.C.). See also 20 A. 110 (F.B.); 26 M. 776; I.L.R. (1940) 1 C. 544. A subsequent mortgagee claiming title as owner of a portion in a prior mortgage suit may set up his title in a separate suit as the question cannot be raised in the former suit. 16 A.L.J. 639 = 40 A. 584. On this point, see also 52 M.L.J. 52. Redemption suit by part owner or equity

of redemption—Omission to pray for possession of other mortgage items does not bar suit for contribution. 27 A.L.J. 1162 = 1929 A. 696. Mortgage suit—Defendant impleaded as person interested in equity of redemption—Plea as to paramount title can be raised in later suit. 1929 C. 672; I.L.R. (1939) 2 C. 551 = 43 C.W.N. 1126 = 1939 C. 692; 1940 S. 103. But see 58 C. 1222. Usufructuary mortgagee purchasing entire property from one of the heirs—Omitting to plead the mortgage in defence to a suit for possession of their shares by other heirs—Is debarred from suing on his mortgage, if he fails in former suit. 50 A. 306 = 1928 A. 714. See also 1937 A. 251.

SUIT ON MORTGAGE.—Preliminary and final decrees passed without any objection by mortgagors—Sale of properties—Suit by mortgagors for declaration that preliminary and final decrees were void for want of jurisdiction, dismissed—Application for personal decree against mortgagors—Question as to jurisdiction. *Held*, that the effect of the dismissal of the mortgagor's suit was that the question of jurisdiction became *res judicata* between the parties. 14 R. 94 = 161 I.C. 989 = 1936 R. 87 (S.B.). Mortgage suit—Preliminary decree—Omission to reserve and provide for personal liability—Subsequent application for personal decree not barred by *res judicata*. 48 L.W. 758 = (1938) 2 M.L.J. 999. "SAME PARTIES, ETC."—A judgment not *inter partes* or *in rem* is not *res judicata* in a subsequent suit though it may be received as evidence. 8 P. 122. See also 1934 O. 449; 1935 All. 255; 18 R.D. 700; 11 O.W.N. 1608. The matter decided in a previous suit is *res judicata* only as against those who had been parties to the previous suit. 33 A. 493; 26 C. 428; 54 C. 770 = 53 M.L.J. 123 (P.C.). Person party to suit but omitted in formal order by oversight is affected. 57 I.A. 24 = 1930 P.C. 22 = 58 M.L.J. 171 (P.C.). When different people are interested in the decision of an issue, and only some care to come forward to contest, the decision when once given is binding on the others interested, as well, who merely watched the result of the litigation. Such persons cannot come forward again to reagitate the whole matter. 1938 A.W.R. (B.R.) 332 = 1938 R.D. 615. Where some of the defendants in a previous suit do not appear and are exempted from plaintiff's claim the decision in it does not operate as *res judicata*. 1 A.L.J. 363; 12 C. 580. S. 11 does not apply when the plaintiffs in the later suit were not parties to the previous suit, and only the defendants were parties. The decision in the prior suit does not therefore operate as *res judicata*, and the defendants who were parties to the previous proceedings are also not in any way bound by the decision in the prior proceedings. 59 C.L.J. 320 = 1934 C. 788. See also 18 R.D. 339. Appeal by several parties—Death of one pending appeal—Legal representative not brought on record—Common decision—Binding nature of on legal representative. 53 M.L.J. 226 = 103 I.C. 618. Where in a previous appeal in which the issue was decided the plaintiff and the defendant were arranged on the same side as respondents, it was *held*, that the decision was *res judicata* in a subsequent suit. 151 I.C. 70 = 1934 P. 270. A decision arrived at in a prior suit is not *res judicata* against



*Explanation V.*—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

## NOTES.

a person who was merely a nominal defendant in the previous suit. 35 I.C. 543; 12 C. 580; 25 B. 589; 27 A. 59; 1938 L. 842. *Res judicata* operates against a person who took an active part in the litigation in contesting the claim of the plaintiff notwithstanding the fact that he was described as a *pro forma* defendant. 21 C.L.J. 157=27 I.C. 954=19 C.W.N. 1280 (14 B. 176; 14 B. 408, Dist.); 85 I.C. 953=1925 C. 985. But see 40 C.W.N. 1205=165 I.C. 662. As to the application of the principle to *pro forma* defendants, see 23 I.C. 381; 45 I.C. 318; 73 C.L.J. 475; 1939 Mad. 830=(1939) 2 M.L.J. 236. A *pro forma* defendant in a suit would be as much bound by the decision therein as any other defendant. 1917 M.W.N. 336=38 I.C. 184; 44 I.C. 546. But see 39 B. 29. But where in the former suit, no relief was claimed against the *pro forma* defendants and the nature of the two suits is wholly dissimilar and the cause of action arose only in consequence of the decision in the first suit, the second suit is not barred. 14 L. 380=141 I.C. 435=1933 L. 109. See also 40 C.W.N. 1208=64 C.L.J. 3; 1935 L. 942; 62 C. 642=39 C.W.N. 938=61 C.L.J. 193; 40 C.W.N. 1205=165 I.C. 662. A party unnecessarily impleaded in the previous suit is not bound by a decree therein. 44 A. 428. See also 5 O.W.N. 510. See also 1935 N. 61. Where a suit for declaration of title to an office is dismissed, a subsequent suit against another party for recovery of money alleged to be due to the person entitled to the office is not barred by *res judicata*. 44 M. 778=41 M.L.J. 223. A decree for partition in a suit instituted by one member of a joint family impleading the others as parties is *res judicata* between all the sharers who are parties to the suit. 27 M.L.J. 76=24 I.C. 294. See also 1939 A. 203. As to *res judicata* in the case of minors, see 1935 L. 44. The bar of *res judicata* cannot be evaded by addition of unnecessary and non-contesting parties in the subsequent suit. 1929 A. 500. Decision in a prior suit between B and A that certain wakf is void is *res judicata* in later suit by B against A and C for declaration that the property was wakf. 1928 L. 888=113 I.C. 120. See also 45 C.W.N. 854. A decision against a mortgagor is not binding on a mortgagee whose title under the mortgage arose prior to the suit against mortgagor. 40 B. 679; 10 P. 234; 140 I.C. 796. See also 150 I.C. 868=1934 A.L.J. 597; 140 I.C. 796=1933 L. 66; 41 L.W. 600=1935 M. 414. The same rule holds good in the case of purchaser, lessee or donee also. See 1933 L. 66; 35 B. 297. A lessor cannot be considered as a party claiming under his own lessee and the dismissal of the latter's suit for ejectment does not bar the present suit for ejectment by the lessor. 1927 B. 270; 1935 O.W.N. 674=155 I.C. 1087=1935 O. 394. So also in the case of creditor and debtor. 105 I.C. 647=32 C.W.N. 248. As to whether attaching decree-holder and auction-purchaser are representatives of judgment-debtor, see 1935 A.L.J. 1001=156

I.C. 387=1935 A. 888; 1936 A.L.J. 295=163 I.C. 239=1936 A. 722. In a suit under O. 21, R. 63, the decree-holder claims under his judgment-debtor within S. 11, and a decision in previous litigation between the claimant and the judgment-debtor recognizing the latter's title to the property is *res judicata* in a subsequent suit by the claimant under O. 21, R. 63, impleading the attaching decree-holder and judgment-debtor as parties. 151 I.C. 417=1934 R. 206. An auction-purchaser is a representative of the judgment-debtor for the purpose of S. 11, though he may not be one under S. 47, C. P. Code. 141 I.C. 448=1933 L. 171. A pre-emptor only stands in the shoes of the original vendee, a decision in whose favour operates as *res judicata* in a subsequent suit by the vendor for setting aside the sale. 143 I.C. 883=1933 L. 529. Party who is privy to a decree is bound by the decree whether he has notice thereof or not. 1929 R. 183. Decision against a reversioner is not *res judicata* against another. 43 A. 558. As to how far, the decision in a suit by one reversioner for a declaration that an adoption or alienation by a Hindu widow is invalid, is binding on other reversioners see 29 M. 390 (F.B.); 27 M. 588; 27 A.L.J. 741=121 I.C. 387. The dismissal of a suit by a Hindu father to set aside an alienation of a joint family properties on the ground of undue influence and fraud is no bar to a suit by the sons to set aside the alienation on the ground, that it is not for a binding family purpose. 35 M.L.J. 451. See also 34 L.W. 598=1931 M. 559; 1933 N. 44 (2); (1940) 1 M.L.J. 363; 1937 A.L.J. 1095=1937 A. 731. When both parties to a subsequent litigation claim through the same part in the prior suit, there is no bar of *res judicata*. 78 I.C. 65; 30 C. 556; 55 M. 40. A decree for ejectment by the landlord against one of several joint tenants of a holding does not bind the other tenants. 16 I.C. 698=24 M.L.J. 79. Decision in a suit, in substance on behalf of a trust though in form between private parties is *res judicata* between the trust and the defendants therein. 116 I.C. 142=1929 M. 687. Decision between the insolvent and creditor that the debt is time barred is not *res judicata* between the insolvent and the surety, when the latter was no party to the prior proceedings. 1932 A. 610. Suit on mortgage by five brothers. Plea by another brother that the mortgage amount belonged to others on record. Finding that amount belonged to joint family is not *res judicata*. 55 M. 483. Land acquisition proceedings with Collector as party. Subsequent suit by Secretary of State. No bar of *res judicata*. 56 B. 501. Where a Municipality has been delegated by Government with an authority to manage certain tanks, a decision in a former suit against the Municipality cannot bind the Government as the Municipality were not the owner of the tanks; and the Government cannot be said to claim under the same title as the Municipality nor the Municipality were litigating under the same title. 1935 N. 61 (2).



*Explanation VI.*—Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

## NOTES.

SEC. 11, EXPL. VI.—See 28 M. 457 (F.B.) ; 13 C. 352 ; 33 A. 493. For cases where the explanation cannot apply, see 30 M. 185 ; 33 A. 493. As to applicability of the explanation, see 14 L. 442=143 I.C. 90=1933 L. 325 ; 52 M.L.J. 641. Explanation VI applies to those suits only which are instituted in a representative capacity. 157 I.C. 1006=1935 L. 537. See also 1939 M.L.R. 1 ; 192 I.C. 789. Where the parties are different in two suits, the findings in the previous suit cannot be *res judicata* in the subsequent suit unless it is shown that the plaintiffs in the subsequent suit are claiming under the plaintiffs in the previous suit and the plaintiffs in the previous suit had claimed the right in common for themselves and for the plaintiffs in the subsequent suit. 1935 L. 391. The expression "*private right claimed in common*" in Explanation VI, extends also to village communal rights. 31 M.L.J. 26 ; 6 C. 49. But see *contra* 52 M.L.J. 641 ; 1937 L. 70. To attract the operation of Expl. VI, the former suit need not have been instituted with leave of Court. 31 M.L.J. 26 ; 54 M.L.J. 8 (F.B.) ; but see 43 M. 427=38 M.L.J. 493 ; 49 I.C. 796 ; 8 M. 496. Where the litigation is *bona fide* and the non-compliance with the conditions of O. 1, R. 8 has been inadvertent and no injury has been caused the prior decision may come within the explanation but the onus is on the party relying on the plea to prove the exception. *Held*, on the facts that the non-compliance with the conditions of O. 1, R. 8, rendered the prior adjudication of no effect against non-parties and that the doctrine of *res judicata* was inapplicable. 60 I.A. 278=56 M. 657=1933 P.C. 183=65 M.L.J. 87 (P.C.) ; 163 I.C. 817=1936 L. 965. There is no bar if the prior suit is compromised. 55 I.A. 96=54 M.L.J. 609=55 C. 519=1928 P. C. 16 (P.C.). Or withdrawn. 14 L.R. 64 (Rev.)=17 R.D. 60. In a representative suit under O. 1, R. 8, the representees are not parties to the suit unless they apply to be made and are made parties. Where a representor plaintiff abandons the suit and it is dismissed without a decision on the merits, it cannot operate as *res judicata* to prevent a representee who is not made a party to the suit from re-agitating the matter by a separate suit. Although the representee is bound by a final decision, it is only by the result of litigation that he becomes bound, and, 'the decision' means a decision by a Judge who is trying the case and not a decision by one of the parties to pursue the matter no further. 1941 Rang.L.R. 643=1941 R. 24. Decree against Municipality in respect of Government land transferred in trust and vested in it under S. 74, Punjab Municipal Act, 1884, operates as *res judicata* in subsequent suit by Government. 1936 L. 998. Prior suit by joint family manager acting on behalf of minor members—Decree therein bind members. See 54 I.A. 122=51 B. 450=52 M.L.J. 472 (P.C.) ; 89 I.C. 120=1926 A. 201. Where the father omitted

to take part in the previous suit, and declined to redeem doing thereby a great injury to the family property, the right of the son to bring a suit for redemption is not barred. 144 I.C. 521=1933 N. 44. Where the interests of a member of joint Hindu family in respect of the matters raised in the suit are represented by the manager of his branch, the decision in the suit would be binding on that member. 189 I.C. 770=1940 L. 120. Where the effect of a compromise entered into by a karta of a family is to the advantage of the family and major members have assented to it either expressly or impliedly these majors should not be allowed to litigate the same point again. 1934 P. 617 (1). A decree obtained by a trustee on behalf of the trust is binding also on all persons interested in the trust. 46 A. 657. A suit for setting the amount of Kattubadi from an Agraharam is one in which all the agraharamdars are necessarily interested and the decision is binding on all agraharamdars. 43 M. 427=38 M.L.J. 493. Where a suit instituted *bona fide* in respect of a public right claimed in common was dismissed, a subsequent suit by two others in respect of the same right is barred. 36 A. 424. Where a collateral files a suit for a declaration of title and for possession claiming the whole property for himself thereby excluding the title of any other collateral, it cannot be said that he must be deemed to have been litigating on behalf of any other reversioner or collateral. The decision in that suit does not operate as *res judicata*, but it is of great evidentiary value. 1935 L. 505. Where a suit by a reversioner brought in a representative capacity that an alienation made by a Hindu widow in possession is without legal necessity is decided after a fair contest in the absence of fraud and collusion the decree will be binding on the whole body of the reversioners. 44 A. 19. See also 103 I.C. 454=28 Punj.L.R. 369 ; 145 I.C. 352=1933 O. 322. 42 P.L.R. 14=1940 L. 172. But see 95 I.C. 178=1926 A. 573, which holds that one reversioner does not represent the whole reversionary body and so a finding against one does not bind another. 51 I.A. 381, Ref. Where in a previous suit against the adoptive mother, a decision is given that she possessed no authority to adopt, it is binding on the adopted son, though he may have been adopted by her subsequent to the decision and could have been no party to the previous litigation. 108 I.C. 817 (855).

REPRESENTATIVE SUIT.—As to what is a representative suit and how to decide whether it is one or not, see 54 M.L.J. 587=109 I.C. 199. The expression "claimed in common for themselves and others" in Expl. VI to S. 11 does not also govern a claim in respect of a public right. A public right always implies that it is enjoyed by the plaintiff in common with others. With regard to such public right if the litigation is *bona fide* on the part of the plaintiff the decision would be *res judicata* against others who claim to be entitled to the right. 171 I.C. 866=1937



## NOTES.

L. 70. See also 18 L. 629=1937 L. 425. A judgment *benamidar* operates as *res judicata* against the real owner. 15 M. 267; 4 A.L.J. 689; 18 A. 69; 22 B. 679. See also 42 Bom.L.R. 470=1940 B. 311. A decree against a *shebait* as representing the idol is binding on his successor in the absence of fraud or collusion. 42 C. 440. See also 157 I.C. 1092=1935 A. 255. Also decrees against holders of similar offices as *trustees*, *karnam*, etc. 11 M. 191; 12 M. 235; 9 B. 198; 29 B. 96; 39 C. 887; 1935 A. 255; 43 C.W.N. 437 (mahants); 45 C.W.N. 854 (shebait). So also a decision against a *Karnavan* of a *Tarwad* is *res judicata* against the junior members of the *Tarwad*. 44 M.L.J. 443; 17 M. 214; 30 M. 215. See also in the case of a father and son in a joint Hindu family. 1929 M.W.N. 776=120 I.C. 375; 7 P. 840; 53 B. 444; 1929 A. 775=52 A. 71; 40 Bom.L.R. 1005; (1940) 1 M.L.J. 363. Where a suit for possession by a monk as representative of the Sanghas of Kyaungdaik is dismissed, a subsequent suit by him for possession in the capacity of presiding monk is not *res judicata*. 1941 Rang.L.R. 204=1941 R. 159. Objection by Hindu father in execution dismissed for default—Son's suit not barred. 1930 A. 727=127 I.C. 447. Dismissal of a suit brought by the managing member of joint family is a bar to a subsequent suit by a junior member who had been a *pro forma* defendant in the former suit, in respect of the same property and on the same cause of action. 42 A. 359. See also 34 L.W. 598; 1940 L. 120; 1939 A. 203; 1933 N. 44 (2). A decision in a former suit, which affects the interests of a *pro forma* defendant against whom no relief had been claimed, can operate as *res judicata* in a subsequent suit between the same parties. It is immaterial that no express issue was framed in that suit with regard to his rights, when it is clear from the pleadings that his interest was identical with that of the plaintiff. The onus would lie on the party who asserts to show that he was colluding with the plaintiff. 73 C.L.J. 475. Where a member of a joint family acting in the interest of all the members and claiming a relief for the benefit of the entire family institutes a suit which is dismissed, the decree operates as *res judicata* even against a minor member of the family, whether or not he is impleaded in the suit. 1936 A.W.R. 1191=1937 A. 108. An action by or on behalf of a family may result in *res judicata* as against absent or future members of the family, only when the action was so constituted according to the local rules of procedure or by a representative order or in some other way that all such members can be regarded as represented before the Court. 44 L.W. 73=162 I.C. 461=1936 P.C. 147 (P.C.). A creditor is bound by an adjudication against his debtor on his title to property in the absence of fraud, collusion, etc. 38 M.L.J. 266. But not so a debtor by dismissal of the creditor's suit under O. 21, R. 63. 55 C. 448. Decision against Official Liquidator in the winding up is conclusive on all parties represented by him. 43 M. 550=32 M.L.J. 444. A decree fairly and properly obtained against a Hindu widow

(limited owner) in the absence of fraud or collusion, is binding on the reversionary heir. 40 A. 593; 36 M.L.J. 597; 43 B. 249; 49 C. 45; 1929 L. 586; 27 A.L.J. 518=119 I.C. 446; 108 I.C. 817. A suit brought by a reversioner is for the benefit of all the reversioners entitled to sue and just as any finding given in favour of a reversioner benefits all members of the reversionary body, a finding arrived at against him injures everybody concerned. 40 P.L.R. 591=1938 L. 571. The principle does not apply to compromise or an award decree. 45 C. 590; 34 M.L.J. 298=43 B. 249 (365); 38 C. 369; 29 A. 239. Where the compromise is due to collusion on the part of the widow a suit by the reversioner is not barred. 21 I.C. 605=11 A.L.J. 574. Where an alienee, from a widow of the last owner, gets a declaration of the validity of his alienation against the mother who is the next reversioner, the decision is binding on the male reversioners. 34 M.L.J. 319. Adjudication about B's title subsequent to A's deriving title from B does not bind A as *res judicata*. 110 I.C. 548=1928 M. 635. In order that the decision obtained against a Hindu widow might operate as *res judicata*, the widow must represent the estate so that there is trial of the rights of the reversioners and a decree fairly and properly obtained. 14 P. 518=155 I.C. 213=16 P.L.T. 713. See also 1938 N. 401; (1937) 1 M.L.J. 575=1937 M. 651. The mere fact that the widow has been impleaded as a party in a suit by rival claimants to the property is not sufficient to confer on her the representative capacity so as to bar a fresh claim by reversioners. 144 I.C. 442=35 Bom. L.R. 118=1933 B. 126. A Hindu widow cannot be deemed to represent her husband's estate so as to bind the reversionary heirs of her husband in relation to anything which she may have done herself to the prejudice of these reversionary heirs. 23 I.C. 761. But the decision in a suit by a widow or a limited owner, in respect of and for the protection of her own rights in certain property, bars a subsequent suit by reversioners in respect of that property even though such a suit may not be of a representative character. (42 I.A. 125 and 1924 P.C. 247, Foll.) 1936 A. 422. A decree given against a Hindu widow on a ground personal to herself and on her admission in the prior litigation is not binding on the reversioner. 21 Bom.L.R. 837=43 B. 869. In a litigation which is personal to a widow, the widow does not represent the estate fully so as to bind reversioners. 42 B. 69. As to when a litigation can be said personal to the widow, see 73 I.C. 284=18 L.W. 491. Successor of shebait when bound by decree against predecessor in shebaitship barred. 42 C. 244=27 M.L.J. 100 (P.C.). Under Mahomedan Law one heir does not represent his co-heirs, and so decree against one heir does not bind the rest. 11 O.W.N. 1608=153 I.C. 42=1935 O.W.N. 62. A decision against a Municipality operates against the chairman suing subsequently for the same relief. 36 L.W. 664. A decision in a representative suit binds all persons other than the plaintiffs expressly named in the plaint only when (a) if the suit relates to a private right,



## NOTES.

the formalities as laid down in O. 1, R. 8 are observed, and (b) if the suit relates to a public right, the formalities laid down in S. 91, C. P. Code, are observed. 1933 P.C. 183, Rel. on. 18 L. 629=1937 L. 425. See also 1937 B. 238. Where the procedure prescribed by O. 1, R. 8, C. P. Code, has not been taken in a suit, the decision therein cannot be binding on persons who are not actually parties thereto, and cannot therefore operate as *res judicata*, in a suit claiming a similar relief. 1937 A.L.J. 293=1937 A. 289. See also 18 L. 629=1937 L. 425. Suit may still be a representative suit within the meaning of S. 11, Expl. VI, though it need not come under O. 1, R. 8. The decree in such a suit will bind not only the plaintiff, but those persons who are absent but are held by the Court to be represented by the person or persons on record. Where a plaintiff allows the defendant to proceed with the suit on the footing that he is suing in a representative capacity, assuming that position and taking the chance of a decree in his favour, clear estoppel arises against the plaintiff to prevent him from afterwards contending in a later suit that he was not suing in a representative capacity in the former litigation. There can be no stronger case of an absolute waiver, or election or conduct rendering it wholly inequitable to permit him to resile from the position adopted by him. I.L.R. 1937 B. 326=39 Bom.L.R. 130=1937 B. 238. The fact that the relief claimed by a body of persons in the subsequent suit is similar to the relief claimed in a former suit cannot make the former suit a representative suit for purposes of *res judicata*. It is only if the relief claimed in the prior suit as so comprehensive that, if granted, it will confer a benefit on a class of persons, including the parties in the subsequent suit that the decision in the former can operate as *res judicata* in the later suit against those not actually impleaded in the former suit. 1937 A.L.J. 293=1937 A. 289. Where certain persons brought a representative suit on behalf of a community for establishing their rights connected with a temple and where it was contended that the suit was barred by reason of the decision in an earlier suit brought by certain persons of the same community with reference to similar rights in the same temple it was held that the mere fact that the persons who filed the prior suit belonged to the same community, could not make it a representative suit, and they were only asserting their personal claim and the omission to follow the provisions of S. 30 of the old Code, deprived the decision in that suit of all binding force, so far as people who were not parties to that were concerned. 1938 A.L.J. 680=1938 A. 523. The provisions of S. 11 of the Code are mandatory and the ordinary litigant, who claims under one of the parties to the former suit, can only avoid its provisions by taking advantage of S. 44, Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion. It is not for the Court to treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from facts. Other factors in Expl. VI to S. 11 being present, the section lays down a condition that the

persons must be litigating *bona fide* and the fulfilment of this condition is necessary for the applicability of the section. 64 I.A. 17=1937 P.C. 1=(1937) 1 M.L.J. 113 (P.C.).

DECREES AGAINST MINORS.—S. 11 does not bar a suit if plaintiffs who were minors were not adequately represented in a prior suit. 39 B. 29. See also 6 P. 388; 16 P.L.T. 484. A compromise involving a minor without the Court's sanction does not operate as *res judicata*. 36 B. 53. Compromise by minor's guardian set aside—No bar to fresh suit on the same allegations. 110 I.C. 550. Where the guardian *ad litem* is guilty of negligence, the decree will not operate as *res judicata* against the minor. 53 I.C. 412; 27 M.L.J. 486; 25 M.L.J. 379; 19 B. 571; 22 C. 8; 65 M.L.J. 548=1933 M. 806. An omission to rely upon a judgment in support of a plea of *res judicata* is not such negligence as would get rid of the bar of *res judicata*. 47 M.L.J. 700. Nor an omission to produce some evidence which existed and which might have been produced. 4 O.W.N. 748=105 I.C. 59=1927 O. 354. An omission on the part of the guardian to produce the document supporting the minor's title to the property in dispute, which it was plainly her duty to do, is gross negligence and the decree in the prior suit would be of no effect and would not operate as *res judicata* so as to bar a subsequent suit by the minor to enforce his rights. 67 M.L.J. 927=40 L.W. 823. A guardian is not bound to contest a suit to which there is no good defence. 47 M. 476=46 M.L.J. 291. Where guardian is not guilty of fraud nor his interests adverse. 9 L.W. 479=51 I.C. 724. The minority of the defendants at the time of prior decision does not preclude the operation of *res judicata* against them provided that some of the defendants had identical interests with theirs. [25 A.L.J. 319 (P.C.), Rel. on.] 119 I.C. 567=1929 A. 346. Where on an alienation by the minor's father, a pre-emption suit is filed and the minor's step-brother on his own behalf and as guardian of the minor defends the suit and admits the validity of the sale, the minor cannot subsequently reopen the matter and challenge the validity of sale. 157 I.C. 801=1935 L. 44.

RES JUDICATA AS BETWEEN CO-DEFENDANTS.—The doctrine should be applied to co-defendants with great caution. 25 C.L.J. 322=21 C.W.N. 639; 51 I.C. 997. To constitute *res judicata* between co-defendants it is necessary there should be (1) conflict of interest, (2) adjudication should be necessary to give appropriate relief to plaintiff, and (3) the question must have been finally decided between the defendants. 164 I.C. 468=1936 R. 308; 159 I.C. 340=37 P.L.R. 89=1935 L. 605; 33 M.L.J. 740; 17 A.L.J. 225; 1938 L. 227=40 P.L.R. 600; I.L.R. 1938 L. 75=40 P.L.R. 1030; 190 I.C. 609=1940 R. 136; 19 P. 669; 1941 P. 83; 50 L.W. 166=(1939) 2 M.L.J. 236; 1939 Pesh. 1; 43 C.W.N. 1214; 1937 P. 27; 20 N.L.J. 159; 7 L.W. 104; 4 Bur.L.J. 250=1926 R. 75; 97 I.C. 205=1926 P. 478; 96 I.C. 406=1926 S. 282; 30 C.W.N. 415=94 I.C. 235=1926 C. 568; 1927 A. 365; 103 I.C. 701; 1927 M. 50; 119 I.C. 167=1929 M. 638; 117 I.C. 100; 13 R.D. 831; 6 R. 575; 110 I.C. 596=1928 M.



## NOTES.

630; 1930 P. 355; 148 I.C. 441=1934 L. 688; 151 I.C. 1013=1934 O. 437; 36 Bom. L.R. 694=1934 B. 329; 1935 L. 102; 37 P.L.R. 89; 1936 O.W.N. 982. See 58 I.A. 158=53 A. 103 (P.C.); 61 M.L.J. 415 (P.C.); 59 C. 636; 59 I.A. 247=10 R. 322 (P.C.); 55 M. 601; 1933 A. 206; 1933 R. 255; 14 L.R. 496 (Rev.)=17 R.D. 655. Where in a civil suit the co-defendants were all members of one family and they had conflicting interests a decision as to the relationship of one of them is *res judicata* in subsequent revenue proceedings as between the members of that family in regard to that question of relationship. 1939 A.W.R. (B.R.) 9=1939 R.D. 82. Where in a suit by the mortgagee the question as to whether there was a partition between the two defendants in that suit was specifically raised and decided and it was not necessary for the adjudication of the claim of the mortgagee. Held, that the decision did not operate as *res judicata* in a subsequent suit between the defendants. 157 I.C. 1047=1935 M.W.N. 801=1935 M. 649. Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* as between the defendants, if there is a conflict of interest amongst them, and a judgment defining the real rights and obligations of the defendants *inter se*. 11 B. 216; 26 A. at p. 442 (F.B.); 22 B. 245; 25 B. 74; 18 A. 65; 22 A. 386; 47 B. 534; 46 A. 220; 38 B. 438; 14 L. 442=1933 L. 325; 1933 A. 206; 1933 R. 255; 14 L. 31=1933 L. 274; 1933 P. 146. See also 2 L. 88; 1941 P. 211; 1927 L. 112; 1935 L. 57=37 P.L.R. 89. If the conditions above-mentioned are satisfied, it is immaterial that no distinct issue on the point was struck for trial or that there was no active contest between the co-defendants. 14 L. 31=142 I.C. 724=1933 L. 274. [21 C. 430; 61 M.L.J. 196 and 63 M.L.J. 64 (P.C.), Foll.] In order to see whether the doctrine of *res judicata* may be invoked in a subsequent suit by persons whose predecessors had been impleaded as co-defendants in a previous suit or who were themselves co-defendants in such previous suit, it is necessary to consider the following points:—(1) What was the relief claimed by the plaintiff in the previous suit? (2) Were the co-defendants proper parties to the suit? (3) Was there a conflict of interest between them? (4) Was it necessary to decide that conflict in order to give the plaintiff the relief that he claimed? (5) Was the question in issue between the co-defendants actually decided? 73 C.L.J. 475. It is open to co-defendants putting up a joint defence to resist the claim of a rival on any ground which they may be able to prove; and it is open to them to raise alternative and even inconsistent pleas in defence to the suit of the rival claimant. And when there is no point in controversy between the co-defendants *inter se*, and no difference between them on any point, a finding by the Court on a point in favour of one of them and adverse to the other, cannot operate as *res judicata* in a subsequent suit between them. If all that the co-defendants in the prior suit are anxious about is to defeat the claim of the plaintiff, it does not matter to them whether the claim of

any one of them is defeated on any ground. The decree which in any way non-suits the plaintiff is for the benefit of both of them, and the mere mention in the judgment that the claim of one of them is dismissed, does not affect his rights as against the other, and cannot operate as *res judicata*. 1937 A.L.J. 1141. Where in a suit brought against A and B and another on the footing that A was principal or B was surety, the question as to which of the defendants was the principal and who was the surety was neither agitated between A and B nor decided, a plea by A in a subsequent suit, brought by B against him for contribution, that he (A) was not the principal, is not barred by *res judicata*. 1941 P. 211. One of two mortgagees brought a suit for his half share of the mortgage money to which he had become entitled by partition. Besides the mortgagor he also impleaded the other mortgagee as a party defendant and alleged that the latter's share of the mortgage money had been paid off. The mortgagor defendant pleaded that he had discharged the whole debt by payment to the other defendant-mortgagee. The latter remained *ex parte*. The Court found that the mortgage had not been discharged so far as the plaintiff was concerned and gave him a decree. The other mortgagee then brought a suit for his share of the amount impleading also the plaintiff in the former suit as a party defendant. Held, the claim was barred by *res judicata* by reason of the decision in the prior suit. 42 L.W. 298=1935 M. 821=69 M.L.J. 527. Where in a previous suit there had been a conflict of interests between the defendants *inter se*, which it was necessary for the Court to decide in order to dismiss the suit, and the Court did in fact decide that conflict against the plaintiff in that suit, the decision would operate as *res judicata* in a subsequent suit by one of the defendants. 40 L.W. 823=67 M.L.J. 927. See also 58 B. 544=36 Bom.L.R. 612=1934 B. 313. Even if the plea of the plaintiff and one of the defendants be identical, a decision between the co-defendants would be *res judicata*. 1935 L. 102=157 I.C. 771. See also 157 I.C. 776=1935 L. 544. Where there is no finding or only a vague finding there is no *res judicata*. 1929 M. 291; 7 R. 80. Where in a suit brought against the mortgagor and mortgagee by a third party, a finding is given that the mortgagee is entitled to add the amount spent by him in defending his title, to his mortgage money and recover it when the mortgagor seeks to redeem the property, the finding constitutes *res judicata* in a subsequent suit for redemption. 1 Luck. 367. A finding against a defendant who is not a necessary party is not *res judicata*. 25 B. 589. Where a defendant is *ex parte*, it cannot be said that there has been an active contest between him and another defendant who is not *ex parte*. 14 M. 324; 57 I.C. 252. See also 157 I.C. 511=1935 A. 678. Where in a partition suit none of the parties claimed or resisted partition except the plaintiff, any questions regarding partition which might thereafter arise between defendants remains open to be decided. 47 B. 534. See also 96 I.C. 406=1926 S. 282; 146 I.C. 131=1933 O. 415; 1938 M. 959=(1938) 2 M.L.J. 775; 47 L.W. 374=1938 M.W.N.



## NOTES.

224. In partition suits decision of issues between co-defendants *inter se* is *res judicata*. 27 A.L.J. 883=118 I.C. 175; 4 Luck. 713=1929 O. 275. Where in a previous partition suit, the plaintiffs in the subsequent suit were not mere *pro forma* defendants, but actively supported the plaintiffs in the former suit, and claimed their share, the decision in that suit would be *res judicata*. 58 B. 544=36 Bom.L.R. 612=1934 B. 312. A sued B, B-1 and C for partition of joint family estate held by B. The estate was in the name of B-1 who was the son of B. B at first denied any joint estate but later on entered into a compromise with A admitting the jointness of the estate. The compromise was admitted to Court and a decree was passed on it. In a suit by C against B and B-1 to get his share of property, *held*, that the former decision was *res judicata* as to the jointness of the property. 1936 M. 252. In a former suit it was necessary to decide the dispute between the plaintiffs and defendants as to the validity of certain sale for the purpose of giving the plaintiff appropriate relief. In the subsequent suit, the same question as to the validity of the sale was again in issue between the same defendant, who were ranged as plaintiff and defendant 1, though the subject-matter of this suit was different. *Held*, the decision in the former suit was binding upon them and that issue was *res judicata*. 62 I. A. 224=14 P. 611=39 C.W.N. 1124=1935 P.C. 139 (P.C.).

RES JUDICATA AS BETWEEN THE CO-PLAINTIFFS.—A finding to become *res judicata* as between co-plaintiffs must have been essential for giving relief against the defendant. 36 B. 207. It must be also on points actively contested between co-plaintiffs. 38 I.C. 213; 1917 M.W.N. 14. There must also be conflict of interest between persons ranged as co-plaintiffs. 70 I.C. 232=1921 P. 369. Where no rights of the plaintiffs *inter se* were decided in a former suit which was compromised, no question of *res judicata* arises by virtue of the compromise in a subsequent suit between them. 1937 O.W.N. 423. *See also* 1937 R.D. 256. An issue may be *res judicata* between co-plaintiffs as well as co-defendants, and for an issue to be *res judicata* between co-plaintiffs it is not necessary that there must be a real contest between them. When the interests of various plaintiffs are common, and no question of adopting two conflicting positions as between themselves arises, the decision arrived at by the united efforts of all will bind them for ever, especially when the only person concerned in holding the opposite position has had a full right. 40 P.L.R. 591=1938 L. 571. On the point, *see also* 17 I.C. 205=14 Bom.L.R. 854; 21 M. 8; 36 B. 207; 31 M.L.J. 77; 1933 L. 569. Where in the prior suit it was not necessary to decide the rights of the plaintiffs *inter se* for granting relief as against the defendants and the later suit related to the individual right of one of the original plaintiffs, the prior decision did not operate as *res judicata*. 57 B. 488=35 Bom.L.R. 418=1933 B. 287.

LITIGATING UNDER THE SAME TITLE.—*See* 1937 M. 153=71 M.L.J. 823; 1940 M. 201=50 L.W. 809=(1939) 2 M.L.J. 836. The

phrase "litigating under the same title" means litigating in the same capacity. 140 I.C. 796=1933 L. 66; 153 I.C. 585=1935 O. 121; 1933 O. 535=147 I.C. 540; 45 C.W.N. 854; 192 I.C. 676; 40 Bom.L.R. 497; 1938 N. 401; 19 P. 250; 1937 B. 334; 1937 M. 651=(1937) 1 M.L.J. 575. It does not matter if the transfer attacked in one case is a mortgage and in the other case a gift. 140 I.C. 796=1933 L. 66; 11 O.W.N. 157=153 I.C. 585=1935 O. 121; 31 N.L.R. (Supp.) 202=163 I.C. 179=1936 N. 71. Litigating under the same title mean that the demand should be of the same quality in second suit as in first suit. 57 C. 258=33 C.W.N. 876; 140 I.C. 796; 1933 O. 535=147 I.C. 540; 1935 N. 61. "Title" is not the same as "cause of action." 116 I.C. 738=1929 A. 400. S. 11 must be read as a whole, and the words "litigating under the same title" must be read with the words "No Court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in the former suit. 1930 S. 227. A person who litigates a suit as the representative of a deceased defendant and who sues for the same subject-matter in his own right, does so in a different capacity and is not affected by the rule of *res judicata*. 17 C. 57. *See also* 5 M. 239; 1929 A. 352; 1927 M. 110; 1940 O.W. N. 1344. Where the first suit by plaintiff claiming succession to the suit property as daughter of the deceased owner, a woman was dismissed on the ground that she was an illegitimate offspring, a second suit by her claiming to succeed to the same property, as heir to her brother is not barred. 58 B. 119=149 I.C. 821=35 Bom.L.R. 1131=1934 B. 36. It cannot be said for the purpose of the section that a decision on a plea of *jus tertii* is a decision between the parties litigating under the same title when the *jus tertii* is put forward and actually relied on in later case by the third person. 50 M. 877=53 M.L.J. 864. A decision against a person in his individual capacity does not bind his successor in the office of trustee of an endowment. 47 C. 866. *See also* 69 I.C. 528; 1938 A.L.J. 1157; 42 C.W.N. 560; 1938 L. 499. Where the plaintiff in a subsequent suit sues under a title different from the one he endeavoured to support in a prior suit, the decision in the prior suit will not be *res judicata*. 55 I.C. 767=31 C.L.J. 163. *See also* 9 C. 945; 19 L.W. 369=1924 M. 576; 1938 A.L.J. 1157; 42 C.W.N. 560; 40 P.L.R. 867=1938 L. 499; 19 P. 250; 1931 O. 21; 1930 A.L.J. 1254; 1933 L. 920. Prior suit for possession in personal capacity does not bar subsequent suit as shebais and managers and in respect of property of idol. 1936 A. 422. A decision in a prior suit against a party in his personal capacity cannot operate as *res judicata* against him in a later suit by him as mutawalli of a certain endowment. 68 C.L.J. 293. A suit under S. 92, C. P. Code, for a scheme is not barred by a prior suit by them in which the defendant was held to be hereditary trustee. 43 M.L.J. 448. Dismissal of a suit by the members of a community to assert their personal rights is no bar to a subsequent suit by them as representatives of the community to establish the right of the community. 18



## NOTES.

A.L.J. 150. See also 1 Luck. 489. A suit by the plaintiff as owner is not barred because of a previous suit by him as expectant reversionary heir, as he cannot be said to be litigating under the same title. 117 I.C. 68. Where, in the former suit, the grandfather of the present plaintiff only claimed the property in dispute as reversioner, the second suit by the plaintiff for partition of the property on the footing of its being joint family property is not barred by *res judicata*. 149 I.C. 244=1934 O. 293. A decision against a Municipality regarding a tank the management of which is delegated to it by the Government cannot bind the Government, which cannot be said to claim under the same title as the Municipality. 31 N.L.R. 165=156 I.C. 180=1935 N. 61. There is no question of *res judicata* where the judgment has been delivered by a Court not competent to deliver it affecting the subject-matter of the suit. 37 B. 563, Rel. on; 1935 R. 517; 156 I.C. 1031 (L.).

COURT MUST BE COMPETENT TO TRY THE SUBSEQUENT SUIT.—The section applies only when the Court whose decision is cited as *res judicata* is competent to try the second case. 1 A.L.J. 503. See also 1925 M. 1270; 91 I.C. 1026=1926 C. 603; 43 C.L.J. 606=1926 C. 1053; 56 M.L.J. 52=110 I.C. 554=1928 M. 840; 108 I.C. 623; 1931 A. 454=53 A. 560; 12 P.L.T. 582; 1937 L. 346; 21 P.L.T. 894; 1940 O.A. 1293=1940 O.W.N. 1344; 1941 A. 18; 73 C.L.J. 475; 1939 S. 329; 18 P. 342=1939 P. 375; 1938 A. 82; 1938 A.W.R. (B.R.) 105. In order that a decision in a former suit may operate as *res judicata* in subsequent suit, it is necessary that the Court which tried the former suit was a Court competent to try the subsequent suit. Mere competency to try the issue raised in the subsequent suit is not enough. Further, it is the competency of the original Court which decided the former suit that must be looked to and not that of the appellate Court in which that suit was ultimately decided on appeal. Again, regard must be had to the jurisdiction of that Court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit. 1936 A.L.J. 1313=1937 A. 20; 151 I.C. 70=1934 P. 270; 57 B. 456=35 Bom.L.R. 630=1933 B. 398; 14 L. 437=1933 L. 646; 1933 L. 614; 14 L.R. 248 (Rev.)=17 R.D. 314. In determining the competency of a Court for purposes of *res judicata*, a distinction has to be drawn between an inherent want of jurisdiction and want of jurisdiction on grounds to be determined by the Court itself. The first makes the decree a nullity which can be ignored, and which will not be *res judicata*. The second does not make the decree a nullity but only voidable. 1935 M. 835=69 M.L.J. 196. The "competent" Court is the trial Court and it does not affect the question whether the decision is that of an appellate Court. 44 A. 712; 5 C. 832; 30 B. 220; 23 C. 415; 35 C. 356; 9 L.R. 264 (Rev.)=12 R.D. 547; 58 C.L.J. 120. See also 49 A. 543; 164 I.C. 118=1936 O.W.N. 784=1936 O. 387; 1940 A.L.J. 679. The fact that in the two suits appeals may lie in different Courts does not affect the application of the rule. 32 A. 67. See

also 99 I.C. 299=1927 A. 189. Court which decided the former suit must have been competent to try and decide not only the particular matter in issue in the later suit but also the latter suit itself in which the issue is subsequently raised. 45 B. 805; 29 C. 707 (P.C.); 14 L. 369=141 I.C. 454=1933 L. 551. See also 1937 A.L.J. 1339=1938 A. 82; 35 C. 553; 25 A. 138; 25 C. 571; 35 C. 356; 1932 A. 483. In determining the jurisdiction of the Court which decided the former suit regard should be had to the jurisdiction on the date, not of the subsequent suit, but of the former suit. 19 C.W.N. 128; 27 I.C. 954; 10 C. 697; 11 C. 153; 15 M. 494; 10 L. 528; 1928 L. 929; 1932 C. 271=59 C. 636; 37 C.W.N. 810=1933 C. 879. Where property in two suits is identical, the mere fact that its value has arisen in the interval between the two suits and the subsequent suit is, therefore, beyond the pecuniary jurisdiction of the former Court, cannot affect the question of *res judicata*. 1936 L. 998=44 L.W. 530=1936 M. 951=71 M.L.J. 619. The words 'competent to try such subsequent suit' occurring in S. 11 refer to the jurisdiction of the Court that decided the earlier suit at the time when the first suit was brought and that if at that time such Court would have been competent to try the subsequent suit, had it been brought, the decision of such Court would operate as *res judicata*, although on a subsequent date, by a rise in the value of the property, that Court had ceased to be a proper Court, having regard to its pecuniary jurisdiction, to take cognizance of a suit relating to that very property. S. 11 is silent as to the point of time with reference to which the competency of the Court, that decided the earlier suit to try the subsequent suit, is to be determined. It is, however, clear that the question of the competency is to be judged either by reference to the date on which the earlier suit was filed or by reference to the date on which the subsequent suit was filed. To hold that the competency is to be judged by reference to the date of the institution of the subsequent suit would lead to anomalous and startling results. 1940 A.L.J. 679. Even if S. 11 itself cannot be applied, according to its terms to a case of difference in the pecuniary value of the two suits, at any rate the principle can be applied. It was held that the principle underlying the section could be applied where the first suit was for dissolution of a partnership on a tentative value of Rs. 5,500 and the second was for a claim valued at two lakhs itself to start with. 1941 N.L.J. 508. A decree in a previous suit cannot be treated as *res judicata* in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue but also the subsequent suit itself in which the issue is subsequently raised. In spite of a large valuation in the subsequent suit, there would be *res judicata* at least with regard to so much of the property as was dealt with in the previous suit. 67 C.L.J. 223. Court which at date of the institution of the first suit had jurisdiction to try the subsequent suit but was deprived of such jurisdiction before it pronounced judgment in the first suit, is a "Court of jurisdiction competent to try such subsequent suit."



## NOTES.

42 M. 702=37 M.L.J. 248. If the Court which passed the decree in the first suit is competent to try the subsequent suit, it is immaterial that it is prevented from entertaining the subsequent suit by reason of the existence of another Court with preferential jurisdiction. 28 B. 338; 27 M. 63; 29 M. 65. See also 54 C. 114; 54 A. 824=1932 A. 660. Where the previous suit relates to only a portion of the property which is the subject-matter in the subsequent suit, if the other conditions under S. 11 are satisfied, the finding in the previous suit that the property therein is ancestral will be *res judicata* as regards that portion of the property which is the subject-matter in the subsequent suit notwithstanding the fact that the subsequent suit is beyond the limit of the pecuniary jurisdiction of the previous Court. 1935 L. 391. A plaintiff cannot evade the provisions of the section by joining several causes of action against the same defendant in the subsequent suit and instituting it in a Court of superior jurisdiction. 28 C. 72; 22 A.L.J. 745=1924 A. 849; 50 A. 306=1928 A. 714=113 I.C. 745. Or by including new properties in the claim so as to make the entire claim beyond the jurisdiction of the Court which tried the first suit. 148 I.C. 926=1934 Pesh. 7. Or by intentionally inflating the claim. See 51 M.L.J. 630; 28 Bom.L.R. 879=1926 B. 481; 1928 A. 127=25 A.L.J. 1035=108 I.C. 462. But it would be different if cause of action in subsequent suit was not available or did not exist at time of former suit. 1935 C. 792=40 C.W.N. 174. If any specific question be within the jurisdiction of the Court which decided it in the previous suit, the trial of it is barred though the whole suit is beyond the jurisdiction of the former Court. 25 M.L.J. 379. But see 117 I.C. 83=1929 L. 781; 29 L.W. 760=119 I.C. 377=1929 M. 529; 1935 C. 792=40 C.W.N. 174. Nor can the plaintiff deliberately overvalue the subsequent suit to get rid of the bar. 39 I.C. 551. The expression "competent to try the subsequent suit" in S. 11 means "competent to try the subsequent suit if brought at the time the first suit was brought." Where the later suit was valued at a figure beyond the pecuniary jurisdiction of the Court trying the first but it was shown that the subject-matter of the prior suit was really undervalued, *held*, that the Court may be deemed to be competent to try the subsequent suit. 37 C.W.N. 810=1933 C. 879=147 I.C. 719. Dismissal of a suit for possession filed in a Munsiff's Court is not *res judicata* in a subsequent suit for redemption of mortgage and possession the value of which is beyond the jurisdiction of the Munsiff's Court. 65 M.L.J. 761=1933 M. 913. See also 1941 O.A. 422=1941 O.W.N. 648; 1938 M. 257=(1938) 1 M.L.J. 193. Judgment of a Court of British India in respect of property situated in a Native State could not operate as *res judicata* in the Court of the Native State, as it is not competent Court. 20 C.W.N. 1213=36 I.C. 710; 37 A. 1=12 A.L.J. 1074. Then the British Indian Court to which the decree of the Court of the Native State is sent for execution refuses execution holding that the decree is a nullity as having not been passed by a Court of competent jurisdiction, such

decision is final between the parties and operates as *res judicata* so as to bar a suit on the foreign judgment under S. 13, C. P. Code. 63 C. 1033=63 C.L.J. 175=40 C.W.N. 591. The term "competent jurisdiction" has regard to the subject-matter as well as the pecuniary limit. 17 M. 273; 13 B. 224; 29 M. 65; 24 M. 444; 1930 L. 501=126 I.C. 591; 1930 A. 430=124 I.C. 714; 1930 A.L.J. 1254=130 I.C. 31. Judgment of a Court on issues which it is not competent to try could not operate as *res judicata* in a subsequent suit involving the same issue. 37 B. 563; 20 I.C. 557. Question regarding title to property decided under S. 4, Provincial Insolvency Act, at instance of person submitting to it, operates as *res judicata* in a subsequent suit by him for declaration of title. I.L.R. 1936 N. 28=164 I.C. 694=1936 N. 112. A decision of a Court of Small Causes on a question of title is not *res judicata*. 3 M. 192 (F.B.); 80 I.C. 724; 11 C. 301; 12 I.A. 123; 150 I.C. 17=1934 L. 324. The decision of a Small Cause Court in a suit for rent that tenant was permanent does not operate as *res judicata* in a subsequent suit on the regular side, even though the Small Cause Judge had jurisdiction to decide the latter suit. 48 B. 541. Where a suit of the nature cognizable by a Court of Small Causes is tried as a regular suit, the decision operates as *res judicata* though it is not appealable. 41 A. 54=47 I.C. 837. But see also 1927 M. 96=98 I.C. 176; 44 C.W.N. 1099=72 C.L.J. 99; 1941 C. 104; 41 C.W.N. 1019. A Small Cause suit transferred to a Munsiff retains its character as such and his decision does not bar subsequent suits not cognizable by the Small Cause Court. 26 I.C. 56=12 A.L.J. 853. See also 1934 N. 178. Where a Small Cause suit and an original suit as between the parties and involving a common question is decided by separate judgments by the same Judge exercising separate jurisdictions and an appeal is preferred against the decision in the original suit, as the Small Causes Court is not competent to try the matters involved in the original suit, there is no *res judicata*. 1939 N.L.J. 87=1939 N. 130. There is one apparent exception to the rule that the first Court must be a Court competent to try the subsequent suit, and that is where the first Court is a Court of exclusive jurisdiction, its decision on any matter on which it has exclusive jurisdiction is binding on the other Court. An instance of this is a decision by a Revenue Court on a matter on which it has exclusive jurisdiction. Similarly, if a Small Cause Court decides a matter on which it has exclusive jurisdiction, then that decision is binding on subsequent Courts. In a suit for rent, the Small Cause Court has no exclusive jurisdiction to decide the question of title. Hence the decision of Small Cause Court on title in suit for rent cannot be *res judicata* in the subsequent suit for rent and for ejectment, because the prayer for ejectment takes the suit away from the jurisdiction of the Court of Small Causes. 1938 L. 811. A Probate Court is not competent to try an ordinary suit for title and its decision is no bar to a suit in the Civil Court. 15 C.W.N. 1021=10 I.C. 434=13 C.L.J. 547; 20 C. 888; 34 B. 589. But



## NOTES.

see also 21 M.L.J. 485. A finding by a Probate Court in contentious proceedings operates as *res judicata* between the parties thereto. 38 B. 309. See also 31 C.W.N. 898=100 I.C. 510=1927 C. 421. The decision of a Settlement Officer construing a grant by the Crown and declaring the nature of the grant and the status and rights of the grantee in accordance with Settlement Circular No. 20 of 1863, is not *ultra vires*, and clearly operates as *res judicata* in a subsequent civil suit between the parties or their representatives. 161 I.C. 158=1936 O. 225. The decision of Revenue Court in a suit exclusively triable by it binds the Civil Court, though the subsequent suit could not be brought in the Revenue Court. 43 M. 859=39 M.L.J. 476. See also 3 O.W.N. 210=93 I.C. 62=1926 O. 205; 93 I.C. 374=1926 O. 348; 89 I.C. 810=1926 O. 181; 1926 C. 369=90 I.C. 756; 91 I.C. 528=1926 L. 178; 1941 O.W.N. 461; 1938 A.W.R. (B.R.) 90 (ejectment suit by Zamindar in Oudh); 1938 O.W.N. 306; 1926 A. 34; 4 Luck. 220; 19 A. 101. Where the question raised in the suit in the Civil Court was not decided by the Revenue Court in the prior suit as a Court of exclusive jurisdiction there is no bar. 3 Luck. 636; 52 A. 823=1930 A. 611. See also 44 L.W. 334=1936 M. 522=71 M.L.J. 227. Where in a suit under S. 105 of the B. T. Act, before the Revenue Officer, the question of the maintainability of the suit on the ground of jurisdiction was raised and adjudicated upon, and it was not appealed against the decree of the Revenue Officer cannot be attacked in a subsequent suit in a Civil Court. 30 C.W.N. 974=97 I.C. 702=1926 C. 1180. See also 49 C.L.J. 281=1929 C. 417=120 I.C. 104; 1937 A. 481; 1936 R.D. 457; 1936 R.D. 568; 1937 A.L.J. 979; 1937 M. 303. The decision by a Revenue Court on a question of title is no bar to the same question being litigated in the Civil Court. 46 I.C. 13; 34 I.C. 354; 67 M.L.J. 268=1934 M. 551. But see 1930 A.L.J. 1281. Decision of Tahsildar in suit for arrears of rent is not *res judicata* in subsequent suit for ejectment. 1936 A.W.R. 30=1936 R.D. 1. A decision on a question of tenancy by a Rent Court is not *res judicata* in a subsequent suit for declaration of title. 21 A.L.J. 476=1924 A. 163; 1933 L. 1016 (1)=147 I.C. 521; 1940 R.D. 602. But when a Revenue Court is invested with the powers of a Civil Court regarding a particular class of cases, its decision on a question of title will operate as *res judicata*. 18 A. 59; 18 A. 270 (F.B.); 29 C. 252. It would not be *res judicata* if the Revenue Court is not so invested. 26 A. 601. See also 33 A. 453; 29 A. 601. A Revenue Court's decision in a rent suit declaring a tenant's status bars a subsequent suit in the Civil Court for declaring the tenant as an occupancy tenant. 42 A. 191; 58 I.C. 771; 71 I.C. 307; 50 C. 79. See also 71 C.L.J. 232=1940 C. 347; 1938 R.D. 121; 1938 R.D. 132 (Correction case under Ss. 339 and 42, U. P. Land Revenue Act); 1938 A.L.J. (Supp.) 91. But see 100 I.C. 851=1927 O. 183, where the under-proprietary rights of the tenants were in question. The decision of a Revenue Court on a question as to the existence

of the relationship of landlord and tenant cannot operate as *res judicata* in subsequent suit in ejectment and for declaration of title, in a Civil Court. 30 C. 339; 25 A. 138; 26 A. 468; 26 A. 601. But see 13 M. 287; 33 A. 453. See also 37 A. 280; 41 A. 319. But see *contra* 34 P.L.R. 642=1933 L. 738, where the previous ejectment suit was exclusively within the jurisdiction of the Revenue Court. Certificate Officer under Bengal Public Demands Recovery Act is not a "Court." 112 I.C. 71=1929 C. 130. Decision under Bengal Tenancy Act, S. 106, in a suit for correction of entry in record-of-rights is *res judicata* in a subsequent suit. 49 C.L.J. 285=33 C.W.N. 623=1929 C. 385; 19 P.L.T. 456=1938 P. 359 (decision under S. 158, B. T. Act). Prior decision in land acquisition case though between same parties and in respect of adjacent land is not *res judicata* if land is acquired under a different notification. 1928 L. 263=112 I.C. 797. Competency of a Court in connection with S. 11, C. P. Code, has no reference to territorial jurisdiction. 1939 A. 202. The decision of the District Judge on a reference under S. 30 of the Land Acquisition Act is a decision by a Court of competent jurisdiction and would operate as *res judicata*. 53 L.W. 364=(1941) 1 M.L.J. 408.

EFFECT OF APPEAL.—When a judgment of a Court of First Instance is appealed against, it ceases to be *res judicata*. 11 A. 148 (161) (F.B.); 24 C. 616; 39 C. 925; 12 L. 497. But if the appeal fails, or abates or is otherwise not proceeded with, the judgment becomes final, and does not lose its effect or finality for the purpose of *res judicata*. 14 P. 633=159 I.C. 173=16 P.L.T. 819; and if the appellate Court declines to decide that issue and disposes of the case on other grounds, the judgment of the first Court on that issue is not a bar to a future suit. 6 B. 110; 5 C.L.J. 653; 164 I.C. 610 (L.). Where the plaintiff's suit was decreed both in the question of title as well as on a plea of adverse possession and the same was confirmed on appeal but in second appeal the question of adverse possession was not argued or considered, *held*, that the adjudication as to adverse possession would operate as *res judicata* in a later suit. 53 B. 676. As to the effect of appeal with some only of the defendants as respondents, see 6 R. 29=54 M.L.J. 88 (P.C.). When an appeal is preferred against the finding of an issue and the appeal is disposed of on other points, the finding of the lower Court cannot operate as *res judicata*. 28 M. 338; 4 Luck. 404. Where in appeal, permission is granted to withdraw a suit with liberty to file a fresh suit, the order of the trial Court on the merits *ipso facto* falls to the ground and hence cannot operate as *res judicata*. 74 I.C. 894; 40 M. 259=32 M.L.J. 477. Dismissal of the application to file appeal *in forma pauperis* decision cannot operate as *res judicata*. 1930 L. 501; 1930 A. 112. Such an order though erroneous and unjustifiable is not void or one made without jurisdiction and consequently the prior suit is not *res judicata*. 31 C.L.J. 482=24 C.W.N. 723 (F.B.); 32 M.L.J. 434. But the contrary has been held in 46 I.C. 322=3 P.L.J. 404; 44 C. 367. The dismissal or withdrawal of an



## NOTES.

appeal has the same effect as a decision on the merits and leaves the finding of the trial Court final. 22 A.L.J. 365=78 I.C. 677. Where pending a *Privy Council* appeal the matter is compromised and the appeal withdrawn, the decree of the High Court becomes final. 6 M. 43; 138 I.C. 406. A decision in the previous suit is final though an appeal is pending against the same in the Privy Council. 4 R. 8; 12 L. 497. Where two suits are disposed of at the same time, there is no prior decision which can operate as *res judicata* though one of them was filed before the other. 1938 R.D. 133=1938 A.W.R. 81 (B.R.). Other defendants claiming throughout 1st defendant, plaintiff-appellant not joining 1st defendant as respondent in appeal—Decision of *res judicata* between him and all the defendants. 54 M.L.J. 88.

CONNECTED OR CROSS SUITS TRIED TOGETHER.—Where two actions were tried together and there was a common judgment though separate decrees and no appeal was preferred against one of the decrees, the finding in the suit not appealed against operated as *res judicata* in the connected proceeding taken in appeal. 12 P. 139=141 I.C. 762=1933 P. 78; 75 I.C. 570 (Pat.); 34 C.W.N. 839; 37 C.L.J. 184=74 I.C. 591; 33 A. 51; 33 A. 151; 35 A. 187; 41 A. 54; 2 R. 633; 14 L.R. 552 (Rev.); 1934 Pesh. 116; 15 L.R. 6 (Rev.); 1939 O.W.N. 955; 40 P.L.R. 198=1938 L. 114; 51 L.W. 429=1940 M. 564=(1940) 1 M.L.J. 647; 1939 Sind 329; 1939 O.W.N. 955; 1939 A.W.R. (B.R.) 141; 15 L.R. 339 (Rev.); 14 L.R. 879 (Rev.); 10 O.W.N. 1093=1933 O. 531; 102 I.C. 171=4 O.W.N. 297; 40 C.W.N. 1176; 62 C. 642=39 C.W.N. 938=61 C.L.J. 193; 156 I.C. 998 (Lah.); 164 I.C. 743=1936 R. 401. But see *contra* 29 M. 333=16 M.L.J. 63; 1926 M. 378=92 I.C. 352; 29 M.L.J. 551; 67 M.L.J. 364; 8 L. 384=104 I.C. 849 (F.B.); 105 I.C. 850; 1927 L. 98; 93 I.C. 1014; 16 C. 233; 33 C. 1101; 14 L.R. 41 (Rev.)=17 R.D. 32. Per *Harper, S.M.*—Where four cases were heard together and disposed of by a single judgment and an appeal was preferred in one only, it was held that though the reasons given by the lower Court were not very strong, as the matter had been given judicial discretion there was no sufficient reason to differentiate in one case which came upon appeal from the rest. 1941 R.D. 586=1941 A.W.R. (Rev.) 579. See also 1941 O.A. (Supp.) 403=1941 A.W.R. (Rev.) 562. Where two suits were governed by identical evidence, identical issues and a common judgment and though two appeals were preferred, one of them is dismissed for insufficiency of court-fee, it would operate as *res judicata* as regards the other appeal which cannot be thereafter heard. 1940 A.L.J. (Supp.) 24. Where a common judgment disposes of a suit by a creditor on a pronote and a suit by the debtor under S. 33 of the U. P. Agriculturists' Relief Act and the debtor is made liable for the same sum of money in both the suits, the debtor in the absence of an appeal in his own suit, cannot maintain an appeal against the judgment in the creditor's suit in which he was the defendant. 1941 O.W.N. 502=1941 A.W.R. (H.C.) 128.

CROSS SUITS.—One decided after the other—Decision in the former is *res judicata* in the latter. 96 I.C. 694. See also 8 L. 384 (F.B.); 1927 L. 821; 14 R.D. 324; 34 C.W.N. 839. Where cross suits between the same parties on the same facts are tried together and disposed of by one judgment but separate decrees are passed and an appeal is preferred against one of the decrees alone, the decree unappealed does not operate as a bar under S. 11, C. P. Code, so as to preclude the appellate Court from dealing with the decrees appealed against. The doctrine of *res judicata* has no application when the very object of the appeal, in substance if not in form, is to get rid of the decision which is pleaded in bar. 152 I.C. 114 (2)=67 M.L.J. 364 [29 M. 333 (F.B.), Foll.] Cross-appeals from the same decree decided by appellate Court allowing one appeal and dismissing the other—Second appeal preferred against decree of dismissal only—No bar of *res judicata*. 50 A. 517. See also 1940 O. 45=15 Luck. 126.

CONFLICTING DECREES.—Where there are two conflicting decrees *inter partes* the later decree must, for purposes of *res judicata*, be taken to prevail. 19 P.L.T. 456=1938 P. 359. When there are two conflicting decisions upon the rights of parties to a litigation, the later decision must prevail particularly when that decision is that of a superior Court. It is the later decision and not the earlier one of the inferior Court which would operate as *res judicata*. I.L.R. 1937 A. 628=1937 A.L.J. 979=1937 A. 481. See also 1938 A.W.R. (B.R.) 81.

"CAUSE OF ACTION."—See 16 C. 98 (P.C.) and 34 M. 97.

RENT SUITS.—In a suit for recovery of rent under the Bengal Cess Act (1880), the decision as to amount of cess cannot be *res judicata*. 1927 P. 58. See also 21 P.L.T. 277.

PROOF AND PRACTICE.—The judgment pleaded in bar of the suit must be strictly proved. 31 M.L.J. 311. The original pleadings should be filed to sustain a plea of *res judicata*. 47 C. 662=47 I.A. 11=38 M.L.J. 424 (P.C.). Judgments which do not operate as *res judicata* may be used as evidence. See 22 I.A. 60; 24 I.A. 10; 12 A. 1; 25 M. 300 (F.B.); 28 C. 109. Per *Bhide, J.*—Where the previous suit was tried according to the procedure then in force, the mere fact that the procedure then in force was of summary character is immaterial for the purposes of S. 11. 40 P.L.R. 319=1938 L. 369 (F.B.). Plea of *res judicata* cannot be allowed to be taken for first time in second appeal when not already taken in written statement and not discussed in lower Courts. 1929 M. 775. The plea of *res judicata* can be raised for the first time in appeal or even in second appeal provided it can be clearly maintained from the undisputed facts on the record. 190 I.C. 609=1940 R. 136.

A DECREE is not sufficient evidence to support a plea of *res judicata* for it does not afford any information as to the matters which were in issue or have been decided. 43 L.W. 676=161 I.C. 748=1936 M. 469. Where the judgment of appellate Court was not filed even though it was a confirming judgment, the grounds for decision could not be ascertained and the decision of any particular point by the trial Court could not be treated as *res judicata*. 1935 C. 792.



12. Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

13. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

(a) where it has not been pronounced by a Court of competent jurisdiction ;

#### NOTES.

SEC. 12.—As to rules which preclude the institution of further suit in respect of same cause of action, see O. 2, R. 2 (suit in respect of part of claim omitted or relinquished); O. 9, R. 9, (where decree was passed against plaintiff by default); O. 22, R. 9 (abatement of suit); O. 23, R. 1 (withdrawal of suit without leave of Court). Dismissal of suit for non-prosecution under Ch. X, R. 36, of Calcutta High Court Rules (Original Side) does not bar fresh suit. 62 C. 15=38 C.W.N. 1132=1935 C. 212. Where a person obtains a decree to the extent of the assets against a supposed legal representative of a deceased debtor, who is subsequently found not to be so, a fresh suit on the same cause of action against the right legal representative is barred. 9 P.L.T. 807=108 I.C. 558=1928 P. 362.

SEC. 13.: SCOPE AND APPLICATION.—As to conditions of validity in British India of a Foreign Judgment, see I.L.R. (1938) B. 16=174 I.C. 615=1938 B. 173; 187 I.C. 57; Per Chatterji, J.—S. 13 simply says that a foreign judgment shall be conclusive evidence. But where a foreign judgment is made the sole foundation of a suit, the relief asked for in the suit must be such as is awarded by the foreign judgment. 1941 P. 109=1940 P.W.N. 758. This section enacts a rule of *res judicata* in the case of foreign judgments, except in the six circumstances specified in this section. It follows that in order to so operate, two other conditions of S. 11 should be fulfilled. 2 L. 107=63 I.C. 387. See also 158 I.C. 547=1935 R. 284. A Court which entertains a suit on a foreign judgment cannot enquire into the merits of the original action or the propriety of the decision. 46 A. 119. See also 28 C. 641; 107 I.C. 352=47 C.L.J. 263=1928 P.C. 83 (P.C.); 36 Bom.L.R. 844=155 I.C. 711=1934 B. 390. Where a judgment falls under any of the exceptions no judgment on them can be passed in a British Indian Court. 50 M. 261=52 M.L.J. 240 (F.B.). Every issue decided by the foreign Court is not binding on the British Indian Court. The expression "matter directly adjudicated upon" in the section should be held to include the right set up by the plaintiff limited only to the particular relief granted or refused. 51 M. 720=54 M.L.J. 479; 1929 L. 627=139 I.C. 482. Section is not confined in its application to plaintiffs. A defendant is equally entitled to non-suit the plaintiff on the basis of a foreign judgment. 54 M.L.J. 479=51 M. 720; 6 R. 552=1928 R. 319. A foreign judgment has no force or authority as such in British India, but may give a cause of action for a suit to obtain the

same relief in British India. 31 M.L.J. 563=43 I.A. 249=44 C. 186 (P.C.). The judgment of a foreign Court obtained on a decree of a Court in British India is no bar to the execution of the original decree. 7 C. 82. A foreign judgment may, in certain specified cases, be enforced by *proceedings in execution*, instead of by a suit. (See S. 44). But S. 44 does not override this section. 53 A. 747=1931 A.L.J. 653=136 I.C. 353=1931 A. 689. Hence a British executing Court can enter into the question whether the foreign Court had jurisdiction to pass the decree. 37 P.L.R. 240=158 I.C. 232=1935 L. 551; 63 C. 1033=53 C.L.J. 175=40 C.W.N. 591. Foreign judgments in respect of immovable property in British India do not bar the trial of the same question in British Courts. 119 I.C. 482=1929 L. 627. But a suit upon it lies in a British Indian Court, 6 M. 273; 7 M. 164; 24 B. 86; 22 C. 222=21 I.A. 171 (P.C.). See also 13 B. 224. A foreign judgment cannot directly affect land situated in British India. 19 M. 527. As to the effect of adjudication of insolvency in a foreign Court, see 23 M. 458. British Indian Courts are not bound in all cases to take cognizance of a suit based on a foreign judgment, and they may refuse to entertain it on grounds of expediency 23 M. 458.

SEC. 13 (a) : JURISDICTION OF FOREIGN COURT.—A British executing Court has jurisdiction to see whether the foreign Court had jurisdiction to pass the decree in question. Scope of Ss. 13 and 14 considered. 39 M. 24=27 M. L.J. 535 (F.B.); (1941) 2 M.L.J. 68; 40 B. 551; 53 A. 747=1931 A.L.J. 653=136 I.C. 353=1931 A. 689. Competency of jurisdiction of foreign Court is to be determined with reference to principles of international law. I.L.R. (1938) B. 16=174 I.C. 615=1938 B. 173. See also (1941) 2 M.L.J. 68. The defendant must either be a subject of the foreign State or reside in it, at the date of suit where the claim against him is of a personal nature. 37 M. 163=24 M.L.J. 619; 22 C. 222 (P.C.); 26 C. 931; 24 B. 77; 20 M. 112; 32 M. 469; 158 I.C. 24; 63 C. 1033=63 C.L.J. 175=40 C.W.N. 591; 59 M. 918=43 L.W. 607=1936 M. 552=71 M.L.J. 93. A service on the agent of a firm within jurisdiction cannot create jurisdiction against non-resident partners and the judgment against the firm does not amount to personal decree against them. 37 M. 163=24 M.L.J. 619. See also 20 M. 112; 24 B. 77; 63 M.L.J. 761=140 I.C. 588. But where there has been submission to the forum by the partners for many years, a decree against them can be personally enforced against them. Service of suit notice on agent of partnership whose members



## NOTES.

reside outside jurisdiction does not create jurisdiction on the ground of residence. 37 M. 163 = 24 M.L.J. 619. Irregularities which do not affect the jurisdiction of the Court do not vitiate a foreign judgment. 30 M. 292; 36 Bom.L.R. 844 = 155 I.C. 711 = 1934 B. 390.

**SUBMISSION TO JURISDICTION.**—Where there has been consent to submit to the jurisdiction of the foreign Court, the decision is binding. 37 M. 163 = 24 M.L.J. 619. The question whether a party has so submitted is one of fact. Such submission must be before judgment is pronounced. Submission afterwards, unless supporting an inference that there was submission before, is only effective as creating a sort of estoppel. 57 M. 824 = 1934 M. 434 = 67 M.L.J. 187. See also 39 M. 733 = 30 M.L.J. 148; 64 M.L.J. 531; 37 M. 163 = 24 M.L.J. 619; 15 M. 82; 30 M. 292. Though a defendant who remains *ex parte* does not, by that mere fact, submit to the jurisdiction of foreign Court, his conduct both before and after the decree is passed may afford evidence of his submission to jurisdiction and his intention in remaining *ex parte*. 59 M. 918 = 1936 M. 552 = 71 M.L.J. 93. See also 53 A. 747 = 1931 A.L.J. 653 = 136 I.C. 353 = 1931 A. 689; 57 M. 824. The action of a defendant in filing a written statement in a suit against him in a foreign Court and attacking the jurisdiction of that Court amounts to submission to its jurisdiction, as by such a course he is asking the Court to decide a point in controversy between himself and the plaintiff; even a mere submission of the issue of jurisdiction to the decision of the Court amounts to acceptance of that Court's jurisdiction. S. 13 (a) does not apply to such a case, and the decree passed cannot be said to be one not pronounced by a Court of competent jurisdiction. 53 L.W. 89 = (1941) 1 M.L.J. 140. See also 20 P. 144 = 1941 P. 109. The protest against jurisdiction must be made at an early stage of the proceedings. 7 M. 105. Where defendant appeared before foreign Court in the suit, thus recognizing its jurisdiction but failed to appear at a later stage and a decree was passed against him *ex parte*, he cannot afterwards in proceedings in execution of the decree, taken in British India, contest that the foreign Court had no jurisdiction. 44 L.W. 752 = 1937 M. 97 = 71 M.L.J. 838; 63 C. 1033 = 63 C.L.J. 175 = 40 C.W.N. 591; 53 L.W. 89 = (1941) 1 M.L.J. 140. The mere fact that a party has once appeared before a foreign Court in the character of plaintiff, is not sufficient to regard him for ever afterwards as having submitted to its jurisdiction in any suit instituted against him later on in that Court, in which he never appeared at all. 71 M.L.J. 93 = 1936 M. 552 = 59 M. 918 (noted *supra*). Nor does the fact that a British subject has entered into a partnership in the foreign country, and that the suit relates to a transaction entered into in the course of the business of the partnership, lead to the inference that he has agreed to be bound by the decision of the foreign Court. 36 L.W. 756 = 1933 M. 112 = 63 M.L.J. 761. If the decree at the time when it was passed was an absolute nullity, it cannot be subsequently and retrospectively clothed with jurisdiction by an application by the judgment-debtor to the foreign Court to set aside the

*ex parte* decree. 37 L.W. 410 = 1933 M. 393 = 64 M.L.J. 531. But see 8 L. 54 = 1927 L. 200, where it was held that there was voluntary submission to jurisdiction when a party applied for review of an order passed against him. Execution of power of attorney whether submission. 92 I.C. 491 = 1926 M. 259. The mere engagement of a pleader to defend a suit, does not amount to submission to jurisdiction, where the pleader reports no instructions at the time of trial. 18 M. 327. But see also 40 M. 112 (P.C.) and 39 M. 95 = 27 M.L.J. 670. Where defendant appears not voluntarily but under duress or coercive process, the decree cannot be binding. 39 M. 733 = 30 M.L.J. 148; 64 M.L.J. 531 = 144 I.C. 557. A submission to jurisdiction for saving property is not a voluntary submission. 39 M. 24 = 27 M.L.J. 535 (F.B.). What amounts to submission. See 22 N.L.R. 82 = 1926 N. 77; 1931 A. 689; 41 Bom.L.R. 818 = 1939 B. 374.

**PERSONAL ACTIONS.**—So far as *personal actions* are concerned, competency of jurisdiction must be determined, not by territorial law of the foreign state but by the rules of Private International Law. 63 C. 1033 = 63 C.L.J. 175 = 40 C.W.N. 591. A foreign Court has jurisdiction in an international sense in *personal actions* in the following cases, viz., (1) where defendant is subject of the foreign country in which judgment is obtained, (2) where he is such subject when action is commenced, (3) where he, in the character of plaintiff, has selected the foreign Court in which he is afterwards sued; (4) where he has voluntarily appeared in that Court and submitted to its jurisdiction; (5) where he had contracted to submit himself to the foreign *forum* in which the judgment is obtained. 63 C. 1033. But the case may be otherwise where the non-resident foreigner is a subject of the same sovereign power which legislates, although even in such a case there must be an express power of territorial legislation conferred by statute to give rise to jurisdiction over him. 63 C. 1033. Therefore where the judgment is that of a Court in England and the defendant resides in British India, the decree is not a nullity. 28 C. 641; 40 M. 112 = 44 I.A. 6 = 38 L.C. 683 = 32 M.L.J. 35 (P.C.).

**SUIT RELATING TO IMMOVABLE PROPERTY.**—Where a suit relates to *immovable property* foreign Court will have jurisdiction where defendant has such property within the foreign jurisdiction in respect of which cause of action has arisen during his stay within that jurisdiction. 63 C. 1033 = 63 C.L.J. 175 = 40 C.W.N. 591. But the claim must be with reference to the *property itself*, and it will have no jurisdiction in *personam*, over the possessor, even in regard to obligations connected with that property. 63 C. 1033. [*Emanuel v. Symon*, (1908) 1 K.B. 302.] A personal decree in mortgage suit against legal representative of mortgagor limited to assets of the mortgagor cannot be passed so far as such assets are not situate within its jurisdiction—Invalidity of such decree by a foreign Court. 41 Bom.L.R. 818 = 1939 B. 374.

**SUIT RELATING TO WILL.**—Grant of probate of a will or revocation thereof by a foreign Court cannot be treated as a *judgment in rem* so as to make it incumbent on a Court in British



(b) where it has not been given on the merits of the case ;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of British India in cases in which such law is applicable ;

#### NOTES.

India to hold that the deceased left a will or died intestate. 43 L.W. 75=160 I.C. 733=1936 M. 197. The Court in British India can, in spite of the revocation by a foreign Court, hold that the will is true, valid and binding in respect of properties left by the deceased in British India, the devolution of which is governed by the law in British India and not by the law of the place where the owner of the properties resided and died. 1936 M. 197. See also 40 Bom.L.R. 571.

**SUIT RELATING TO TRUST.**—In actions relating to the recovery of the office of trusteeship the Court of competent jurisdiction is the Court of what may be called the domicile of the trust. 54 M.L.J. 479.

**SUIT FOR DIVORCE AND MAINTENANCE.**—Where a decree for divorce was passed by a foreign Court under which husband was to pay a monthly sum for maintenance of wife and children, and a suit was filed in British India based on that decree in respect of instalments which had already become due, it is final and conclusive. But she would not be entitled to obtain except by means of a fresh suit for the instalments accruing after the institution of the suit. 158 I.C. 547=1935 R. 284.

**SEC. 13 (b).**—The law laid down in this clause is wider and more elastic than that in England. I.L.R. (1938) B. 16=174 I.C. 615=1938 B. 173. This clause refers to cases where, for one reason or another, the controversy raised in the action has not, in fact, been the subject of direct adjudication by the Court. 40 M. 112=44 I.A. 6=21 C.W.N. 358=32 M.L.J. 35 (P.C.). Where the defendant raised a defence in the suit but refused to answer interrogatories submitted to him, and his defence was consequently struck out without investigation under the English Supreme Court Rules, and judgment was given to plaintiff, *held*, it was no judgment on merits. 40 M. 112 (P.C.). Judgment cannot be said to be on merits, when it has only followed as a penalty upon defendant not complying with orders of Court and the facts and circumstances of the case were never gone into at all. 41 A. 521=50 I.C. 780=17 A.L.J. 501 ; 50 A. 270=25 A.L.J. 877=1927 A. 510. See also 41 Bom.L.R. 818=1939 B. 374. Where a defendant, after getting an order setting him *ex parte* set aside, files his written statement raising various issues in the foreign Court and then withdraws, and a decree is given against him by that Court after the plaintiff has actually been examined in the witness-box, it cannot be held that the decision is an *ex parte* decision and not given on the merits of the case within the meaning of S. 13 (b). 53 L.W. 89=(1941) 1 M.L.J. 140. As to the true test of deciding whether a judgment has been given on the merits, see 14 L. 58=34 P.L.R. 311=1932 L. 649. Decree passed on admission of defendant is one on merits. 16 L. 768=158 I.C. 113=1935 L. 396 ; (1941) 1 M.L.J. 140.

**EX PARTE DECREES.**—Where defendant does not appear, his default and failure to contest after due service of summons tantamounts to an admission of the claim, and judgment given in favour of plaintiff is one on merits. 41 A. 521=50 I.C. 780=17 A.L.J. 501 ; 50 A. 270=25 A.L.J. 877=1927 A. 510. But see *contra*, 50 M. 261=1927 M. 265=52 M.L.J. 240 (F.B.). Where it was held that a foreign judgment passed on default of appearance of defendant duly served with summons, merely on the plaint allegations without any trial or evidence is not one passed on merits. (This overrules 47 M. 877=82 I.C. 425=1925 M. 155=47 M.L.J. 356 ; 22 L.W. 820=92 I.C. 491=1926 M. 259.). See also 62 C. 682=39 C.W.N. 557=61 C.L.J. 29. An *ex parte* decision may or may not be on the merits. The mere fact of its being *ex parte* will not justify a finding that the decision was not on the merits. The real test is whether it was merely formally passed, as a matter of course or by way of penalty, or whether it was based upon a consideration of the truth or otherwise of the plaintiff's claim. 20 P. 144=1940 P.W.N. 758=1941 P. 109. Decrees passed under Ceylon C. P. Code Ss. 85 86, on plaintiff's affidavit in the absence of defendant, are not decisions on merits but are a penalty for default of appearance. 30 L.W. 349=1930 M. 149=57 M.L.J. 459. See also 38 L.W. 232=144 I.C. 22=1933 M. 544. Where pleader holding power does not receive instructions to defend the case on the merits, and appears in it, the mere fact of his being without such instructions, does not prevent the decision from being one on the merits. 32 Bom.L.R. 1178=128 I.C. 609=1930 B. 511. See also 41 A. 521. Judgment for plaintiff in defendant's absence based on agreement between the parties is one on merits. 158 I.C. 547=1935 R. 284 ; 52 M. 503=1929 M. 469=56 M.L.J. 547. A foreign judgment cannot be said to be not on the merits merely because it happens to be erroneous on the merits. 13 B. 244 ; 24 B. 86 ; or because it has proceeded on a wrong view as to burden of proof or as to the legal liability of a party. 41 M. 205=45 I.C. 703. See also 36 Bom.L.R. 844=155 I.C. 711=1934 B. 390. Absence of notice to defendant before a foreign judgment is passed renders it void. 13 M. 496 ; 11 B. 241. But not mere irregular service of notice. 47 M. 877 (noted *supra*). As to invalidity of an *ex parte* order when *de jure* or *de facto* guardian has not expressed his unwillingness to act as guardian *ad litem* of minor party, see 41 Bom.L.R. 818=1939 B. 374.

**SEC. 13 (c) : MISTAKE OF LAW.**—A mistake of law in a foreign judgment is no ground for vacating it. A wrong view as to burden of proof will not make a foreign judgment erroneous on the face of it. 41 M. 205=34 M.L.J. 295. In a suit by a Mahomedan widow for the administration of her husband's estate against the executors, the Supreme Court of Straits Settlements gave her a decree for a third share, including



(d) where the proceedings in which the judgment was obtained are opposed to natural justice ;

(e) where it has been obtained by fraud ;

(f) where it sustains a claim founded on a breach of any law in force in British India.

14. The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record ; but such presumption may be displaced by proving want of jurisdiction.

#### NOTES.

certain properties in British India, even though the probate granted by the Court in respect of the will left by the deceased had been explicitly confined to the property at Penang. In a suit brought in British India on that foreign judgment, *held*, that the judgment was not one on which a suit in British India could be successfully maintained for two reasons : (i) the foreign Court had no jurisdiction to bind, dispose of, or distribute immovable property outside the Crown Colony ; so the judgment was founded "on an incorrect view of international law." (ii) Under the Mohammadan Law relating to the Sunnis of the Hanafi School as applied in British India, the widow, who has a child, is only entitled to one-eighth share in the property of her husband. As the foreign Court, however, awarded the widow a third share in her husband's property part of which was situate in British India, the judgment was founded "on a refusal to recognise the law of British India in a case in which such law was applicable." 39 L.W. 58=1934 M. 145=66 M.L.J. 209. *See also* 191 P.R. 1888 ; 4 M. 359.

SEC. 13 (d).—There must be something in the procedure anterior to the judgment which is repugnant to natural justice. 41 M. 205=45 I.C. 703=34 M.L.J. 295. "Natural Justice" in S. 13 (d) does not mean British justice as opposed to the justice of any particular foreign country. The fact that the foreign Court follows its own rules of procedure and does not follow the procedure of British Courts and observe British Indian rules as to evidence cannot afford ground for finding that the proceedings are opposed to natural justice. 20 Pat. 144=1941 P. 109. A decree pronounced in absence of a party in personal action by a Court of a foreign State is null and void. 22 C. 222=21 I.A. 171 (P.C.) ; 40 B. 551 ; 64 M.L.J. 531=144 I.C. 557. A judgment without notice of suit to the party is contrary to natural justice. 28 C. 641 ; 29 C. 509 ; 5 B. 223 ; 9 B. 346 ; 11 B. 241 ; 13 M. 496. Where in a foreign judgment no guardian *ad litem* of a minor was appointed, where legal representative of a deceased defendant were not brought on record and where after a decree a third application for review was allowed such a judgment falls under Cl. (d). 8 L. 54=102 I.C. 523=1927 L. 200. *See also* 36 Bom.L.R. 844=1934 B. 390=155 I.C. 711 (Case where a foreign Court appointed as guardian *ad litem* a person having adverse interest. A procedure opposed to rules of natural justice). Where a judgment is

passed by a Court composed of persons who have an interest in the judgment and its result, it would be contrary to natural justice. 191 P.R. 1888. Where a foreign Court has held service of notice of suit sufficient it must be presumed to be correct in the absence of evidence to the contrary. 47 M. 877=1925 M. 155=47 M.L.J. 356.

SEC. 13 (e) : FRAUD.—Where a decision is obtained by fraud, it is not binding on the parties. 1922 L. 175. *See also* 15 B. 216 ; 7 M. 164 ; 191 P.R. 1888. In the case of a domestic judgment, the fraud must be extrinsic to the matter tried in the cause, and not merely that consisting in false evidence or forged documents submitted to the Court, and the truth of which was contested before and passed by it. 26 C. 891. A foreign judgment cannot be rendered ineffective merely by reason of frauds perpetrated on the Court by witnesses other than the plaintiff ; the only way in which it can be rendered ineffective on the ground of fraud is by proving that it was obtained by fraud of the plaintiff who relies on it. 36 Bom. L.R. 844=1934 B. 390=155 I.C. 711. *See also* 144 I.C. 557=1933 M. 393=64 M.L.J. 531. It cannot be said that merely because a plaintiff obtains a decree upon evidence which is believed by the Court, but which in fact is not true, the decree has been obtained by fraud so as to attract the operation of S. 13 (e), C. P. Code. In order to attract S. 13 (e) there must be fraud connected with the procedure in the suit itself. 53 L.W. 89=(1941) 1 M.L.J. 140.

SEC. 13 (f).—Where limitation only prohibits the remedy but does not destroy the right itself, a foreign judgment cannot be impeached on the ground that the suit could not have been brought in British India under the law of limitation. 2 M. 400 ; 4 M. 14. Where a foreign Court passed a judgment according to the law of limitation in force in that foreign country, although it is not in accordance with the law of limitation in force in this country, it may operate as conclusive in a suit in a British Indian Court based on that judgment. 46 A. 119=21 A.L.J. 890=1924 A. 161 ; 9 Bur.L.T. 106=35 I.C. 741. Claim in foreign Court to recover money spent on marriage of minor members of joint family—Defendants over 18 years but minors under British Indian Law being wards under guardian—Decree not unenforceable in British India. 53 L.W. 89=(1941) 1 M.L.J. 140.

SEC. 14 : BURDEN OF PROOF.—In a suit on a foreign judgment, the onus is on the defendant to prove want of jurisdiction. 24 M.L.T. 244



## PLACE OF SUING.

Court in which suits to be instituted.

15. Every suit shall be instituted in the Court of the lowest grade competent to try it.

Suits to be instituted where subject-matter situate.

16. Subject to the pecuniary or other limitations prescribed by any law, suits—

## NOTES.

=49 I.C. 202. See also 13 B. at p. 227; 25 A.L.J. 887=108 I.C. 186=1927 A. 510; 1928 P. 375=9 P.L.T. 397.

SEC. 15: SCOPE AND OBJECT OF SECTION.—This and the following sections under the head 'place of suing' regulate the name in British India and apply only to those places where the Code is in force. They deal with matters of domestic concern and prescribe rules for the assumption of territorial jurisdiction by British Indian Courts in matters within their cognizance, and do not govern claims against persons or things wholly outside their jurisdiction. 9 L. 455=109 I.C. 28=1928 L. 297. This section merely lays down a rule of procedure so as to prevent the Courts of higher grades from being overcrowded and it is not meant to oust the jurisdiction of the Courts of higher grades. 7 A. 230 (F.B.). See also 17 C. 155; 25 C. 46; 31 C. 849; 14 M. 183; 14 C.W.N. 322. Exercise of jurisdiction by a Court of higher grade than is competent to try it is a mere irregularity. 7 A. 230; 13 M. 145; 17 C. 155; 1925 R. 278. But see 112 I.C. 187. But exercise of jurisdiction by a Court of lower grade than is competent to try it is a nullity and the decree will be set aside. 17 C. 155; 38 C. 639. Effect of Punjab Courts Act, S. 35, on S. 15. 1928 L. 484. The Court of the lowest grade in S. 15 refers to Courts subject to the Code and not to a Village Munsiff's Court. I.L.R. (1940) M. 684=1940 M. 495=(1940) 1 M.L.J. 220.

JURISDICTION—PRINCIPLES REGULATING.—To determine the jurisdiction of the Court the plaint and not the written statement should be looked into. 13 P. 65=145 I.C. 294=1933 P. 246. Nor does it depend upon the amount found and decreed by the Court. 8 B. 31; 13 A. 320; 16 A. 286. The plaintiff's valuation determines jurisdiction not only of the first Court, but of the Appellate Court. 13 A. 320; 16 A. 286; 58 C. 829; 1935 M. 723. (But see 38 C. 639=12 I.C. 464); unless plaintiff knowingly makes false statements. 45 A. 193=71 I.C. 411. Consent of parties cannot confer jurisdiction. 9 A. 191=13 I.A. 134 (P.C.). See also 38 C. 639=12 I.C. 464; 24 C.W.N. 633; 89 I.C. 353. See however, 14 C.L.J. 337; 43 C.L.J. 116; 73 I.C. 903. Where the plaint is amended so as to render the claim beyond the pecuniary jurisdiction of the Court in which it is instituted, the suit cannot be tried by that Court. 9 M. 208.

OVER-VALUATION OR UNDER-VALUATION OF SUIT.—Though jurisdiction is determined *prima facie* by valuation given by plaintiff, he is not quite free to give any arbitrary valuation and thus institute the suit in the Court of his choice. 31 B. 73; 40 C. 245=17 I.C. 162; 17 C. 680. Where it is patent on the face of the plaintiff that suit is over or under valued, the Court will return the same to be presented to proper Court under O. 7, r. 10. Where

it is not so patent, even then, the plaintiff may be called upon to prove proper valuation, when objection is raised to it by the defendant. 24 C. 661; 24 M. 158; 21 M. 271. Where in the course of preliminary inquiry it becomes clear to the Court that there has been gross undervaluation, it is the duty of the Court on the motion of either party or *ex proprio motu* to order that the plaint be returned for presentation in the proper Court if the value be held to be not higher than the figure up to which that Court has jurisdiction. 1935 A. 157. As to validity of decree passed in suit instituted in Court of lower grade, see S. 11 of Suits Valuation Act, 1887. See however, 38 C. 639=12 I.C. 464.

WHERE SUBJECT-MATTER OF SUIT IS INCAPABLE OF VALUATION.—See S. 9 of Suits Valuation Act, 1887. Suits for restitution of conjugal rights are incapable of proper valuation, and plaintiff's valuation must hold good. 28 A. 545; 34 C. 352. But the same cannot be said in the case of suits affecting property, e.g., suit to compel registration of document, suit for removal of *karnavan*, suit to set aside adoption. In such cases the Madras High Court has held that the proper valuation would be the interest of the plaintiff in the property that would be affected by the suit. 31 M. 89 (F.B.); 13 M. 56; 14 M. 169; 15 M. 294; 11 M. 266; 6 M. 192; 75 I.C. 115. But see 15 A. 378; 32 C. 734; 8 Bom.P.J. 334 in which a different view has been held. See also 11 M.L.T. 155.

SEC. 16.—As to pecuniary limitations, see S. 15, *supra*; and as to other limitations prescribed by law, see S. 92, *infra*. and S. 32, Bombay Civil Courts Act, 1869, Small Cause Courts Acts, Provincial and Presidency.

SCOPE AND APPLICATION OF SECTION.—This section does not apply to chartered High Courts, *vide*, S. 120; applies to movables. 96 I.C. 691=1926 L. 503. In suits relating to *movable property* the Court within whose jurisdiction the movable property is kept has jurisdiction to try the case. 147 I.C. 591=1934 A. 226. *Transfer of place* where subject-matter is situated to jurisdiction of different Court does not deprive Court which originally entertained the suit from jurisdiction to try to its conclusion. 47 M. L.J. 448=87 I.C. 152; 1928 M. 746=28 L.W. 885. The jurisdiction of Courts in British India is governed by the same principles as are applied by Courts of Equity in England except in so far as they may be at variance with legislative enactment. S. 16 does not lay down any rule of law different from that prevailing in England. 28 S.L.R. 54=155 I.C. 677=1934 S. 123. Non-compliance with the provisions of this section and of Ss. 17 to 20, is in no way fatal to the jurisdiction of the Court and does not render a decree passed by a Court of competent jurisdiction a mere nullity so as to empower the executing Court to refuse to



- (a) for the recovery of immovable property with or without rent or profits,
- (b) for the partition of immovable property,
- (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,
- (d) for the determination of any other right to or interest in immovable property,
- (e) for compensation for wrong to immovable property,

## NOTES.

execute it on that ground. 25 S.L.R. 204=131 I.C. 182=1931 S. 47. Where in a money suit immovable property is attached before judgment and the objector's claim as owner is allowed, a suit by the plaintiff for a declaration that the property belongs to the defendant should be instituted in the Court within the local limits of whose jurisdiction the property is situate. 1941 C. 363.

SEC. 16 (a): IMMOVABLE PROPERTY.—As to definition of term, see Cl. (25) of S. 3, General Clauses Act, 1897. Trees standing on land are immovable property. 19 B. 207; but they are no longer such when cut down. (*ibid.*). Growing crops are not immovable property, see S. 2 (13), *supra*.

IMMOVABLE PROPERTY IN FOREIGN COUNTRY—JURISDICTION OF BRITISH INDIAN COURTS.—The English Courts, and so also British Indian Courts, have jurisdiction *in personam* in respect of foreign immovables against persons locally within their jurisdiction, in cases where there is an equity between the parties arising from contract, fraud, or trust, provided that the decision of title be not directly involved. But such an equity must be of a personal nature, either a fiduciary relationship or privity of some other kind between the parties. Such jurisdiction *in personam* has always to be exercised for the purpose of deciding the existence of a valid trust in respect of foreign immovables and for the purpose of giving relief against fraudulent and inequitable dealings with regard to foreign immovables; for ordering accounts of rents and profits and for appointing a receiver of foreign property; and although the Courts have not and could not put the receiver in possession of such property, they have given effect to such orders by dealing for contempt the party preventing possession being taken. 28 S.L.R. 54=155 I.C. 677=1934 S. 123; 23 N.L.R. 170 (suit for mesne profits as to immovable property situated within foreign jurisdiction). British Indian Court has no jurisdiction to pass a decree upon a mortgage of immovable property situated in Berar. 4 N.L.R. 61; 1935 N. 192; 31 N.L.R. 43 (Sup.)=159 I.C. 739=1935 N. 250 (F.B.).

SEC. 16 (b).—When in a suit for partition of movable and immovable property, the latter is situated outside the jurisdiction of the Court, leave can be granted to withdraw the suit, so far as it relates to it and relief may be granted so far as the movables are concerned. 28 M. 216; 25 S.L.R. 275=131 I.C. 186=1931 S. 50; 4 B. 482; 1926 L. 503; 27 M. 157. This clause does not include a suit for dissolution of partnership. 41 A. 513=17 A.L.J. 567=50 I.C. 156.

SEC. 16 (c).—Suit for a declaration that a

mortgage in favour of the defendant is *invalid*, falls under the section. 23 M.L.J. 679. Where a Court grants a decree declaring a charge on immovable property situated wholly outside its jurisdiction, a purchaser under such decree would be treated only as a purchaser under a money decree. 8 A. 117. A suit to enforce a charge created on the land for Government revenue on it can be instituted at the place where the land is situated. 29 M.L.J. 639=39 M. 795. Where lands are situated in 2 districts, and an order has been passed by the revenue authorities for the payment of the revenue regarding both the lands in one of the Districts and they were so paid; neither the order nor the payment would show conclusively that a civil suit in respect of that land lies within that district. 149 I.C. 758=1933 P. 555.

SEC. 16 (d): RIGHT TO OR INTEREST IN IMMOVABLE PROPERTY.—WHAT ARE.—This clause includes a charge on immovable property. 25 S.L.R. 204=131 I.C. 182=1931 S. 47. Right of fishery in enclosed water. 24 C. 449; a right of ferry, 13 M. 54; right to have a water course opened. 4 W.R. 107. Right to maintenance claiming charge on immovable property in defendant's possession. 40 B. 337=32 I.C. 985; 42 L.W. 647=158 I.C. 1012=1935 M. 1043. Widow's estate in husband's immovable properties. 23 B. 1. Suit for money due on promissory note with claim for charge on immovable property. 96 I.C. 752=1926 L. 660. Suit by vendor or vendee to enforce specific performance of contract to purchase land or by vendee for return of purchase money owing to vendor's default to convey. 143 I.C. 759=1933 M. 436. See also 33 C. 1065. But see 9 Bur.L.T. 119=36 I.C. 431. Suit for recovery of unpaid purchase money. 28 M. 227; Suit for declaration of plaintiff's *right to rent*, where it is denied by the defendant. 22 B. 22.

RIGHT TO OR INTEREST IN IMMOVABLE PROPERTY, WHAT ARE NOT.—A suit for *arrears* of rent, although the plaintiff's title to the property may incidentally come in question. 6 B.H.C.A.C. 29; 10 I.C. 267=9 M.L.T. 372. Suit for declaring validity of adoption. 30 L.W. 691. Suit for declaration of title and for administration, declaring prior probate proceeding as not binding. 1926 L. 456=94 I.C. 1046; 1926 L. 503=96 I.C. 691. A suit for declaration that the plaintiff is beneficiary interested in a decree for sale, although it did not run in his name. 26 A. 603. A suit for dissolution of partnership even though partnership assets include a factory. 41 A. 513=50 I.C. 156. So also a claim for accounts relating to a factory. 1931 L. 673=32 P.L.R. 464=132 I.C. 218.

SEC. 16 (e).—This clause refers to tort



(f) for the recovery of movable property actually under distraint or attachment, shall be instituted in the Court within the local limits of whose jurisdiction the property is situate :

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

*Explanation.*—In this section “property” means property situate in British India.

17. Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate :

#### FOTES.

affecting immovable property as in the case of trespass. 20 C. 689.

SEC. 16 (f).—As to jurisdiction in a suit for recovery of movable property under attachment by a foreign Court. See 14 I.C. 279=1912 M.W.N. 524. In suits relating to movable property, the Court within whose jurisdiction the movable property is kept, has jurisdiction to try the case, 147 I.C. 591=1934 A. 226.

PROVISO.—See 43 Bom.L.R. 293. ‘Defendant’ means all the defendants where there are more than one. 73 I.C. 405=1924 C. 443. A suit by the vendor to enforce specific performance of a contract to purchase land is a suit for land within the meaning of S. 16. The proviso appears to extend the section to a suit by the vendee. Hence the Court in whose jurisdiction the property is situated has jurisdiction to try the suit even though defendant does not reside within the jurisdiction of the Court. 143 I.C. 759=1933 M. 436; But see 9 Bur.L.T. 119=36 I.C. 431. When the relief granted by the award is a declaration of proprietary title to certain immovable property, the proviso is not applicable and the Court outside whose jurisdiction the property is situate has no jurisdiction to file the award. 55 A. 542=1933 A.L.J. 741=1933 A. 380. See also 153 I.C. 300=1934 S. 183 (2). The fact whether the charge over immovable property was or was not the subject-matter of reference is not material. 25 S.L.R. 204=131 I.C. 182=1931 S. 47. See also 32 P.L.R. 464=132 I.C. 218=1931 L. 673. Suit for mesne profits of lands situated outside British India can under the proviso be instituted in a British Indian Court, if the defendant is residing within its jurisdiction. 46 B. 108=68 I.C. 510=1922 B. 188; But if the defendant is a *non-resident* foreigner the suit would not lie in British Indian Court. 41 L.W. 381=1935 M. 545=68 M.L.J. 506. The Secretary of State for India in Council is not a person who dwells or carries on business or personally works for gain within the local limits of Calcutta within the meaning of the proviso. 40 C. 308. On this section (proviso). The proviso will not apply when the property is in the possession of the plaintiff. 20 C. 689.

SEC. 17 : OBJECT AND APPLICABILITY OF SECTION.—This section is only permissive, and so where the properties are situate in different jurisdictions, the section is no bar to parties bringing successive suits. 32 I.C. 423=3 L.W. 107 (22 B. 922; 14 C. 835, Foll.) See also 3 M.H.C.R. 376; 14 M. 324; 12 C. 566; 59 I.A. 268=63 M.L.J. 336 (P.C.). See also 1941 M. 129=(1940) 2 M.L.J. 520. The object of the section is to avoid plurality of suits. 16 A. 359. As to applicability of section to movable property, see 96 I.C. 691=1926 L. 503. A British Indian Court cannot pass a decree in respect of property situate outside British India. But it can pass a decree in respect of property situate outside the local limits of its jurisdiction when the suit is to obtain relief in respect of that property as well as property situate within its local limits. 43 P.L.R. 489. This section does not apply to Chartered High Courts in their original Civil jurisdiction. (See S. 120, *infra*.) As to applicability to Oudh Rent Act, see 13 R.D. 130. 1941 M. 129 (Applicability to arbitration proceedings). All the Courts situated outside the *Santal Parganas* to which S. 17 applies have concurrent jurisdiction with the Courts inside the *Santal Parganas* for the trial of suits in which the properties involved are both outside and inside the *Santal Parganas* and the value of the properties exceed Rs. 1,000; and therefore in ordinary circumstances the Gaya Court has jurisdiction to try such suits, barring of course the restrictions placed under S. 5 of *Santal Parganas Regulation* (1872). 13 P. 486=152 I.C. 301=1934 P. 292. The C. P. Code including this section extends to Courts established under the Bengal, Agra and Assam Civil Courts Act. 63 I.A. 311=15 P. 567=40 C.W.N. 1061=1936 P.C. 189=71 M.L.J. 60 (P.C.). The choice given by this section can be utilized only if the Code applies to both the Courts. (*ibid.*). Where a plaintiff has two or more causes of action in the suit he can take advantage of the provisions of S. 17, C. P. Code, if the joinder of such causes of action is permitted by the succeeding provisions of the Code, for instance, O. 1, r. 3 and O. 2, r. 3. If he cannot do so and the joinder of the causes of action is bad for multifariousness, then the



Provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court.

18. (1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immovable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction :

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under sub-section (1), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

19. Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

#### NOTES.

suit cannot be tried in either of the Courts within whose jurisdiction the properties are situate. 1940 A.L.J. 110=1940 A. 205. The Court passing decree under this section as to immovable property situated outside its jurisdiction, can also execute it in respect of that property. (See S. 38, *infra*). 'Courts' means Courts in British India. 39 Bom.L.R. 1287=174 I.C. 116=1938 B. 121. As to where properties are situate within jurisdiction of a British Indian and a foreign Court, see 1938 B. 121.

COURTS.—'Courts' means Courts to which the Code applies. The Court of a district subject to the Code has no jurisdiction to entertain a suit so far as it claims a decree for sale of mortgaged land situated in a scheduled district. 42 M. 813=46 I.A. 151=51 I.C. 185=37 M.L.J. 11 (P.C.); or in respect of properties situate out of British India. 54 B. 495=59 M.L.J. 379 (P.C.). See also 42 C. 116=27 M.L.J. 459 (P.C.); 33 B. 373=2 I.C. 489. But if in such suits, properties within jurisdiction also are involved, relief may be given with reference to such properties, while declining relief with reference to the rest. 14 C. 836; 22 B. 922. As to application of section to Courts in Berar which are foreign Courts but to which the C. P. Code has been made applicable, see 39 Bom.L.R. 1287=174 I.C. 116=1938 B. 121.

BONA FIDES OF PARTIES.—Jurisdiction vested in Courts—Whether can be taken away by proof of plaint items not being within jurisdiction—*Bona fide* suit protected. 1930 N. 189. A *bona fide* compromise as to properties situated within jurisdiction will not divest the jurisdiction of the Court to proceed with the trial regarding

the claim as to rest of properties outside jurisdiction (included in the suit) unless it was shown that the compromise was a mere continuance to defeat the policy of the rule of procedure as to local jurisdiction. 12 M. 380; 30 A. 560.

ILLUSTRATIVE CASES.—Where the question that arises for decision is common as against all the defendants, but the property in dispute is situate in different districts, S. 17 read with O. 1, R. 3, is applicable and the plaintiff can bring a suit in any one of such districts. 124 I.C. 202=37 L.W. 681=1933 M. 622. But where plaintiff brought a suit to recover several properties situated in Lahore and Oudh, claiming Lahore properties under a trust deed, as trustee, and Oudh properties under the terms of a will, *held*, that there were distinct and separate causes of action, and a single suit cannot be instituted in one place regarding all the properties. 59 I.A. 268=7 Luck. 324=1932 P.C. 172=63 M.L.J. 336 (P.C.). Suit regarding house and land in Court within whose jurisdiction house alone is situate—Appeal from decree filed in proper Court—Claim regarding house abandoned in appeal and confined only to land not within jurisdiction of appellate Court—Competency to hear appeal. 1938 O.W.N. 104=172 I.C. 637=1938 O. 65.

SEC. 18: REASONABLE GROUND FOR UNCERTAINTY.—This may be caused by absence of notification as to the boundaries of a district. 24 C. 449. The boundaries may have also been changed by fluvial action, and uncertainty may be caused thereby.

SEC. 19.—This section is applicable only to torts committed in British India and only to defendants residing in British India. 39 M.



*Illustrations.*

- (a) *A*, residing in Delhi, beats *B* in Calcutta. *B* may sue *A* either in Calcutta or in Delhi.
- (b) *A*, residing in Delhi, publishes in Calcutta statements defamatory of *B*. *B* may sue *A* either in Calcutta or in Delhi.

Other suits to be instituted where defendants reside or cause of action arises.

20. Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

- (a) the defendant, or each of the defendants where there are more than one, at the time, of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

## NOTES.

433=28 I.C. 394. As to the place of suing where the wrong consists of a series of acts, see 3 L.B.R. 164. As to suits against the Secretary of State for damages in respect of tort committed by him, see 50 M. 449=1927 M. 689=53 M.L.J. 355.

MEANING OF TERMS.—The word 'resides' refers to natural persons and not to legal entities such as limited companies or Governments. The words 'carry on business or personally work for gain' are inapplicable to the Secretary of State. The business intended by the section is a commercial business and not a business of State or Government. 50 M. 449=1927 M. 689=53 M.L.J. 355.

SEC. 20: SCOPE OF THE SECTION.—See 19 M. 477; 19 A.L.J. 696=65 I.C. 93. The Code does not forbid the institution of a suit against a defendant resident in British India even if the decision may involve adjudication regarding plaintiff's title to immovable property outside British India. 23 N.L.R. 170. Cause of action arising in native state where parties reside—British Courts have no jurisdiction to try suit. 54 B. 192=32 Bom.L.R. 171. Court's jurisdiction does not cease because the place of cause of action ceases to be in its jurisdiction after the institution of the suit. 1928 M. 746=28 L.W. 885. Agreement cannot confer jurisdiction where there is none. 1929 S. 227. Effect of failure to take objection as to territorial jurisdiction in a suit for money for goods supplied 168 I.C. 714=1937 N. 94.

QUESTION OF JURISDICTION—MODE OF DETERMINATION.—The question of jurisdiction is to be determined with reference to the allegations in the plaint and not with reference to the pleas. Where it was alleged in the plaint that according to the agreement, which was the basis of the suit, the amount claimed was payable at the place of suit, the question of jurisdiction could not be separated from the merits of the case, and the Court should allow the parties to produce their full evidence in regard to the execution of the agreement before coming to any decision as to whether the suit was cognizable by it or not. 151 I.C. 726=36 P.L.R. 6=1934 L. 803.

SEC. 20 (a): ACTUALLY AND VOLUNTARILY RESIDES, ETC.—Under S. 20, residence means permanent residence, not a temporary or casual residence as traveller. 54 I.C. 65 (Bur.); 38 B. 125 Foll. But see 14 I.C. 573 (M.). See also 34 M. 257; 143 I.C. 357=34 P.L.R. 908=1933 L. 120. A Government servant liable to be sent to various places but stationed in one place for several years cannot be said to have

only a temporary residence there. 11 I.C. 851=4 Bur.L.T. 183. The mere fact that the defendants had their ancestral home within the jurisdiction of the Court would not give jurisdiction to it. 64 I.C. 688 (1)=19 A.L.J. 822; 38 I.C. 62=112 P.R. 1916. But see 57 C. 65. The fact that the debtor had a family home in a particular place is not conclusive of the question whether he resided there. 145 I.C. 755=34 P.L.R. 658=1933 L. 851 (1). The words "actually and voluntarily resides" applies only to natural persons and not to legal entities. 1930 L. 818.

CARRIES ON BUSINESS.—The test of 'carrying on business' is not the continuity or intermittency of the business, but the fact of owning interest in the business and receiving profits. 28 N.L.R. 118=140 I.C. 63=1932 N. 114. 'Carrying on business' is used as distinct from personally working. It does not involve personal appearance or personal effort. It means having an interest in business, a voice in what is done, a share in the profit or loss and some control upon the business. 19 A.L.J. 696=65 I.C. 93. See also 4 M. 29; 96 I.C. 887=31 C.W.N. 174=1926 P.C. 88 (P.C.). But where business is carried on by an agent, he should be an agent in the strict sense of the term. 23 M. 458. 'Carrying on business' in S. 20 means having an interest in the business transaction at the particular place and a voice in what is done and a share in the gain or loss. Where an insurance company having a head office at Calcutta has a sub-agency office in Nagpur, and all business in connection with the policy-holders are transacted by sub-agency office and a Bank account is also maintained in that place, the company must be said to be carrying on business at Nagpur within the meaning of S. 20. 1941 N.L.J. 37. The employment of a mere commission agent without power to enter into contract is not enough. 8 B.H.C. 102; 12 B. 507; 8 C. 678; 73 I.C. 205=1923 L. 427; 29 S.L.R. 292=164 I.C. 1015=1936 S. 121. Partnership contract by *P* and *D* firms both having head offices at Calcutta—*P* firm having branch at Muzaffarpur District—Contract that jute be purchased by *P* at Muzaffarpur and sold at Calcutta by *D*—Suit by *P* for dissolution of partnership and accounts at Muzaffarpur Court. Held, that purchase of suit for purpose of business could not necessarily be 'carrying on business of partnership,' and hence Muzaffarpur Court had no jurisdiction. 160 I.C. 353=1936 P. 6. Whether mere letting of house property through an agent can be said to be carrying on business. 66 I.C. 865=1922 L. 164. A minor



(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

#### NOTES.

French subject cannot be said to carry on business in British India merely because he has immovable properties there. 20 L.W. 691. A corporation resides wherever it carries on business, irrespective of the location of its Head Office and if a Bank has 50 branch offices, it has 50 separate and distinct jurisdictions. 4 P.L.J. 141=48 I.C. 943; 1933 L. 11=14 L. 42=149 I.C. 473. See also 8 C. 678; 56 M.L.J. 299. "Business" means commercial business and not business of Government. The whole of a province cannot be said to be a single place for the purposes of Expl. II and a Government cannot be sued at any place within that province. 1930 L. 818=126 I.C. 514.

SEC. 20 (b): LEAVE OF THE COURT.—Leave may be given even after the institution of the suit. 30 B. 570; 68 M.L.J. 205. An application for leave under S. 20 (b) can be made after the passing of a judgment on the preliminary issue relating to jurisdiction but before the plaint is ordered to be returned for presentation to the proper Court. 145 I.C. 706=27 S.L.R. 230=1933 S. 179. As to considerations by the Court before the grant of leave, see 1938 N. 262. Leave may be granted without previous notice to the defendant. 64 I.C. 794; 25 A. 603. The leave can be granted in appeal by the District Judge. 35 I.C. 74=4 L.W. 411. Where leave was sought for but refused, the suit, cannot go on with the defendants on the record, when no permission was granted by the Court. 46 B. 229. A defendant may be taken to have "acquiesced in such institution" if he does not object. See 6 M. 349; or apply under S. 22; 30 B. 81. As to when and how objection to jurisdiction is to be taken, see Ss. 21 and 22. When cause of action arises in Court's jurisdiction—Leave if necessary. 1929 S. 170. If leave is granted without notice to the opposite party Court can in the exercise of its inherent jurisdiction, hear objections and pass necessary orders under S. 151. 150 I.C. 559=1933 L. 266. As to proper procedure for objection regarding grant of leave without notice, see 174 I.C. 815=1938 Pesh. 15; leave may be granted to implead even a non-resident foreigner in personal actions. 47 L.W. 552=1938 M. 731. Discretion of lower Court in granting or refusing leave will not be lightly interfered with by the appellate Court, but where the lower Court has refused to exercise its discretion in a fit case, the appellate Court can interfere. 145 I.C. 706=27 S.L.R. 230=1933 S. 179.

SEC. 20 (c): CAUSE OF ACTION.—As to interpretation of term, see I.L.R. (1937) A. 234=167 I.C. 897=1937 A. 208. Not to be construed in the light of the old Code of 1882, but as defined in English Courts. I.L.R. (1937) A. 234. The expression means the bundle of facts which is necessary to be proved to entitle the plaintiff to a decree. 29 B. 368; 22 C. 451; 23 C.W.N. 517; 30 B. 167; 39 A. 506; 31

M.L.J. 816; 72 I.C. 920=1923 M. 109; 1924 N. 308; 65 I.C. 425=1922 O. 109; 147 I.C. 591=1934 A. 226; 61 C. 1023=39 C.W.N. 293=1935 C. 160; 27 S.L.R. 230=145 I.C. 706=1933 S. 179; 30 S.L.R. 182=1936 S. 229; 57 B. 306=35 Bom.L.R. 168=1933 B. 179. It means everything which if not proved gives the defendant an immediate right to judgment, every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which the defendant would have a right to traverse. 58 C. 539=134 I.C. 65=1931 C. 659; 60 C. 918; 28 S.L.R. 102; 1934 R. 234. Where a matter is not necessary to be proved by plaintiff to succeed in his claim (e.g. receipt of registered notice of demand), it will not form part of cause of action, 1937 C. 643. A *bona fide* voluntary assignment affords a valid cause of action not only against the assignor, but also against the original debtor. 1926 S. 31; 145 I.C. 706=27 S.L.R. 230=1933 S. 179; 34 P.L.R. 771=1933 L. 940 (Assignment of promissory note within jurisdiction giving rise to cause of action). The cause of action must be antecedent to the institution of suit. 4 P.L.J. 387 (393). The term means the cause of action as it was at the time when the right to sue arose for the first time. Per Krishnan, J., in 31 M.L.J. 816. It has no relation to the defence set up or to the character of the relief prayed for in the plaint. 16 C. 98; 46 I.C. 913. For place of filing an application under Sch. II, para. 17, see 1933 L. 18.

CAUSE OF ACTION—SUITS ON CONTRACT.—The cause of action in suits on a contract arises at the place where the contract was made or where the contract was to be performed or performance completed or where in performance of the contract any money to which the suits relate was expressly or impliedly payable. 1 R. 231; 7 N.L.J. 25; 79 I.C. 30; 13 I.C. 943=16 C.W.N. 325; 27 I.C. 129=8 S.L.R. 107. See also 145 I.C. 464=1933 L. 559; 9 I.C. 824; 11 B. 649; 31 M. 223=134 I.C. 65; 1926 C. 100; 1929 S. 227; 58 C. 539; 57 B. 306=35 Bom.L.R. 168=1933 B. 179; 26 S.L.R. 167=139 I.C. 114=1932 S. 9. If there is a contract made by means of correspondence between the parties, part of the cause of action arises where some of the letters are written or sent, and a suit can therefore be instituted at that place. 39 C.W.N. 174. In suits arising out of contracts, a part of the cause of action arises where the letter or telegram of acceptance of the offer is received and delivered. 54 L.W. 345=(1941) 2 M.L.J. 481. If the parties to contract for supply of goods agree that the delivery is to be made at a particular place, a cause of action would arise there in part at least, because under the terms of the contract, it is the place where a part of the contract is to be performed. And if owing to the action of the buyer the seller is unable to perform the contract at the place agreed upon, he will have a right



## NOTES.

to institute his suit there. In a suit for damages for breach of contract the cause of action consists of making the contract, and of its breach, so that the suit may be filed either at the place where the contract was made, or at the place where it should have been performed. 56 A. 828=1934 A.L.J. 1093=1934 A. 740; 16 C.W.N. 325; 50 I.C. 139; 21 B. 126; 27 M. 494. See also 27 M. 355. 103 I.C. 37 (2); 19 S.L.R. 207. Where the plaintiff residing in a place *T* gave orders to the defendant firm in *M* to send certain goods for which he sent an advance and instructed them not to send the goods per V.P.P. and when the goods were sent by V.P.P. in contravention of his order he refused to receive them and claimed the refund of the advance paid by him by a suit in the Court at *T*. Held, that the Court at *T* had jurisdiction as the contract was made and was to be performed or the performance thereof completed at that place. 40 L.W. 498=1934 M. 581=67 M.L.J. 296. Where no place for the performance is prescribed by the agreement, the place where it is intended by the parties that such contract should be performed ought to supply the forum. 13 Bom.L.R. 46; 11 B. 649; 31 M. 223.

**BANKER AND CUSTOMER.**—A fixed depositor cannot bring a suit for repayment from a Bank in any place where he may happen to reside. It has to be filed only in the place where the Bank is situated. I.L.R. (1940) A. 207=1940 A.L.J. 94=1940 A. 243.

**CONTRACT OF SALE.**—A contract is made where it is accepted and the buyer at Agra cannot sue at Agra for breach of a contract to sell goods concluded by acceptance at Delhi. 41 A. 602. On this point, see also 60 I.C. 481; 2 L.L.J. 555; 53 I.C. 331; 22 P.L.T. 282; 43 P.L.R. 158. Cause of action may arise in the place of delivery of goods, if such place is an essential part of the contract. 39 A. 368. See also 144 I.C. 828=1934 L. 44. Even if the price was stipulated to be paid at another place. 1930 N. 90. A suit on account of non-delivery of goods may be brought in a Court of the place where delivery and payment were to be made. 42 A. 480. On this point, see also 71 I.C. 38; 39 M. 195; 43 A. 334; 77 P.R. 1909; 65 I.C. 282; 1924 L. 349; 79 I.C. 30. Where goods are ordered by V.P. the place of suing is the place where the goods were delivered and paid for. 42 A. 619. The cause of action for a suit by the seller for balance of accounts due from the buyer arises at the place of consignment of the goods to the railway. 24 I.C. 423=1914 M.W.N. 803. Delivery to carrier is equivalent to delivery to buyer. 1925 L. 555=89 I.C. 751; 144 I.C. 828=1934 L. 44 (66 I.C. 501 Not Foll.). Cause of action arising in place where money is payable. See 42 A. 480; 1925 O. 209. Payment is due at creditor's place in absence of express or implied specification. 83 I.C. 339; 118 I.C. 898. See also 1937 N. 39=1937 R. 433. Place of performance of contract is place where money is payable. See also 86 I. C. 1046; 89 I. C. 181=1925 N. 408; 40 M.L.J. 806 (P. C.); 1930 O. 91. In a contract of sale of goods by Calcutta firm to Madras firm, where the payment was to be by hundies to be drawn by the former upon

the latter, the cause of action for a suit to recover money overpaid arose in Madras, the payment having been made in Madras. 47 M. 403=46 M.L.J. 82. When there is a clause in the contract that all claims should be decided at a particular place, whether suit can be instituted, at any other place where cause of action may have arisen. See 144 I.C. 828=1934 L. 44. See also 110 I.C. 727; 113 I.C. 783; 119 I.C. 481; 49 M.L.J. 25 (P.C.). Contract—Principal and agent—Supply of goods by agent—Balance struck at principal's place of business—Suit by agent at his place of business—Maintainability. 152 I.C. 802=1935 L. 68. See also 1937 S. 317.

**PARTNERSHIP SUITS.**—A suit for dissolution of partnership can be brought only at the place of its business. 42 P.R. 1916=33 I.C. 953; or where the partnership is entered into, 1929 A. 236; 32 P.L.R. 464=132 I.C. 218=1931 L. 673. If there are two such places at any one place, 23 L.W. 361=92 I.C. 915=1926 M. 427; 50 M.L.J. 298. A suit for dissolution of partnership carried on in foreign territory is maintainable in British India if the parties are resident there. 23 Bom.L.R. 543=63 I.C. 959=45 B. 1228. Where the transactions had at a place cannot be said to amount to "carrying on of business," that place cannot have jurisdiction to entertain suit for dissolution of partnership and accounts. 160 I.C. 353=1936 P. 6 (Distinguishing 1926 M. 427.)

**CONTRACTS OF AGENCY.**—Where goods are sent to a place to be sold there and a sale takes place in contravention of instructions, a suit for damages will be at place *A*. 1924 N. 308. In a suit for damages caused by the agent's negligence, cause of action was held to have arisen in the place where the agent's negligence occurred and the Court elsewhere had no jurisdiction. 34 A. 49; 1922 N. 167; 94 I.C. 287=1926 S. 238. The cause of action in a suit for accounts against an agent arises at the place where the contract of agency took place or where it was to be performed and where account was to be rendered or was refused. 55 I.C. 266=12 Bur.L.T. 198; 94 I.C. 287=1926 S. 238. See also 6 L. 153; 1924 A. 530; 9 L. 455; 1929 S. 227; 1929 L. 605=119 I.C. 481; 182 I.C. 734; 33 Bom.L.R. 1364=135 I.C. 170=1932 B. 42; 163 I.C. 397=1936 R. 251. It cannot be laid down absolutely that the principle that the debtor is bound to seek out his creditor and pay his debt is applicable in India even for the purpose of determining the local jurisdiction of a particular Court to entertain a suit. Assuming that that rule of English law either in terms or by analogy could be applied in India, it cannot be extended to a case not arising out of the relationship of debtor and creditor, as for example, a contract of agency. Where a person employs an agent to do acts for him at a particular place, the legitimate inference is that the contract is to be performed at that place. S. 213 of the Contract Act cannot be read as laying down that the agent should render accounts at the principal's place. The principal has to demand accounts at the agent's place of business. A suit by a principal against his agent for accounts should therefore be instituted at a Court having jurisdiction



## NOTES.

over the place of business of the agent. 51 L. W. 747=A.I.R. 1940 Mad. 588=(1940) 1 M. L.J. 558. Where money was intended to be paid to the plaintiff at his place, part of the cause of action arose there. 46 M.L.J. 371. Unless the contract clearly indicated the contrary a commission agent is liable to render account only at the place where all the business is transacted. 46 A. 465. See also 152 I.C. 802; 92 I.C. 273=1926 L. 287. The general rule is that a suit for accounts against a commission agent must be filed at the place where the commission agent works. 42 P.L.R. 203=A.I.R. 1940 Lah. 171.

**CONTRACT FOR REMUNERATION FOR SERVICE.**—The defendant wrote a letter from S to plaintiff at F calling upon him to go to S to treat the defendant. After plaintiff's arrival at S an agreement regarding the fees, payment, etc., was arrived at S and the plaintiff was to be paid at S. Plaintiff sued for the fee fixed at F; held, that the cause of action arose at S as the whole contract was made at that place. Held further, that as there was no failure of justice caused by the suit being tried at F the objection as to jurisdiction need not be given effect to in revision. 148 I.C. 875=1934 A. 549.

**SUIT FOR MONEY.**—The cause of action for the payment of a debt will arise at the place where the debt is payable. 20 I.C. 683 (Bur.). If there is nothing as to the place where the money under a bond is payable, the Court must be guided by the intention of the parties. 49 I.C. 950. Payment actually made by debtor at place other than where creditor resides resists the above presumption. 1930 L. 818=126 I.C. 514. The debtor must seek his creditor and pay him. 27 I.C. 1027=1926 M. 1207. See also 24 A.L.J. 48; 23 L.W. 3=1926 M.W.N. 108; 53 I.A. 58=53 C. 88=49 M.L.J. 806 (P.C.); 118 I.C. 718=1929 L. 868 (1); 131 I.C. 303 (2)=1931 L. 431. I.L.R. 1937 N. 97=167 I.C. 700=1937 N. 39 (Suit for maintenance amount based on agreement which had fixed no place of payment); 1937 R. 433 (Suit for money based on loan and not on promissory note). Where loan was made at creditor's residence in British India to defendant residing outside British India, and the contract was silent as to the place of payment, held that the creditor could institute a suit for the recovery of the amount in the British Indian Court having jurisdiction over his place of residence 59 B. 365=37 Bom.L.R. 357=1935 B. 283.

**SUIT ON NEGOTIABLE INSTRUMENTS.**—A suit on promissory note lies at the place where it is drawn and signed and dated. 28 M. 19=1939 Pat. 294. Also where money on a promissory note was intended to be paid. 2 P.R. 1916=31 I.C. 698. The assignment of a promissory note is a part of the cause of action and the assignee can sue on it in the Court within whose jurisdiction it took place. 31 M.L.J. 816; 34 P.L.R. 771=147 I.C. 229=1933 L. 940. See also 21 S.L.R. 192. But not in the place of his residence even if assignment says, that money should be paid there. 1929 C. 306=119 I.C. 295. See also 155 I.C. 953=1935 N. 144. As to where promissory note

was signed at one place and delivered at another place, see 1937 Lah. 800; 171 I.C. 278=1937 N. 241. (Pro-note describing plaintiff as resident of M, but delivered at B: Held Court at B alone had jurisdiction). The cause of action on a *hundi* arises at the place where it is endorsed by the payee. 22 C. 451. See also 107 I.C. 218. The dishonour of a *hundi* by non-acceptance constitutes part of the cause of action in a suit against the drawer. 20 B. 133. Where a *hundi* drawn in Cawnpore for acceptance and payment in Calcutta is so accepted and paid in Calcutta, part of the cause of action arises in Calcutta. 47 C. 588. Where in respect of sale of goods at Tuticorin to plaintiff residing thereby defendant carrying on business at Rangoon, the contract was that plaintiff should make payment by *hundies*, and the defendant should obtain payment by endorsing the same at Rangoon, held, that Tuticorin Court had jurisdiction to entertain suit for damages for short delivery. 41 L.W. 519=1935 M. 665=68 M.L.J. 504 (F.B.). S. 20 is subject to limitations of S. 19. An action in tort for wrongful conversion of a *hundi* is subject to the rule in S. 19 and must be instituted in the Court within the limits of whose jurisdiction the defendant wrongdoer resides; and the Court within whose jurisdiction the *hundi* is endorsed over to the plaintiff will not have jurisdiction. But if the suit is one for money had and received upon an implied contract, the position would be different, for in this case, S. 20 would determine jurisdiction. 30 S.L.R. 182=1936 S. 229.

**MATRIMONIAL SUITS.**—In matrimonial suits to which the Divorce Act does not apply, questions of jurisdiction should be decided under this Code. 54 I.C. 65=12 Bur.L.T. 120. A Court is competent to try a case of breach of contract of betrothal when the breach took place within its jurisdiction, though the defendants may be residing elsewhere. 37 I.C. 114=93 P.R. 1916. In a suit for damages for breach of contract to marry, part of the cause of action arises at the place where the marriage is to take place, though the agreement to marry is entered into at another place. 65 I.C. 812. A suit for restitution of conjugal rights may be brought either where the husband resides or the wife resides. 18 B. 316; 54 I.C. 120. In a suit for restitution of conjugal rights the mere fact that the plaintiff has his home within jurisdiction is sufficient to give the Court jurisdiction. Even where the defendant is not resident within its jurisdiction and the parties had at no time been living together within that jurisdiction the Court cannot refuse to entertain the suit. 59 M. 392=1936 M. 288=70 M.L.J. 288 (on appeal from 67 M.L.J. 271 which held otherwise). But where wife's father is also impleaded and injunction is claimed against him, so far as he is concerned it cannot be maintained at the plaintiff's place when the father lives beyond jurisdiction. (*Ibid.*). A suit for dower lies in a Court within whose jurisdiction the marriage and divorce took place. 32 C. 146. See also 18 A. 400. A suit for recovery of prompt dower lies also in the place where the plaintiff resides, on the principle that debtor must follow creditor unless there is



## NOTES

different contract between them. 63 C. 726 = 40 C.W.N. 392 = 1936 C. 97. Suit by wife against husband and father-in-law for maintenance and return of stridhan property entrusted at time of marriage—Place of suing—Suit at place of wife's residence not maintainable—Rule of debtor seeking out creditor is not applicable to such cases. 53 L. W. 686 = (1941) 1 M.L.J. 784.

**SUITS FOR DAMAGES FOR TORTIOUS ACTS.**—If tort is committed within the limits of one Court and the tort-feasor resides within the limits of another, both Courts have jurisdiction. 39 M. 483 = 28 M.L.J. 310. Where a person purchases a ticket for journey by railway at A, but fell out of the train and was injured owing to the neglect of the Railway Co., at B, the cause of action for a suit for damages arises at B and not at A. 42 A. 488. See also 9 L. 140 = 112 I.C. 153. A suit for defamation may be instituted at the place where the defamatory matter was published. 13 B. 178. In a suit for malicious prosecution and arrest part of the cause of action arises at the place where the person is arrested. 6 Bom.L.R. 141.

**INSURANCE CONTRACTS.**—In cases based on contract of insurance, the words 'cause of action' do not include the loss or damage of the property insured, which is merely a cause of the cause, the real cause of action being failure to pay money under the contract. 1 R. 231 = 76 I.C. 482 = 1924 R. 2. But see 1928 N. 305 (2). The only definition of cause of action that will work if it has to be applied to cases of all kinds is the entire set of the facts that gives rise to an enforceable claim. In the case of an insurance policy payable at death, the claimant must prove the death of the insured; hence the place of the death of the assured is a place where the cause of action arises, so as to give jurisdiction to the Court of that place. The words "on proof to the satisfaction of directors, that the sum assured has become payable" mean only proof of death of insured. 28 S.L.R. 192 = 151 I. C. 516 = 1934 S. 76; 44 I.C. 694 = 22 C.W. N. 517; 41 I.C. 392 (M.); 34 Bom.L.R. 815 = 140 I. C. 262 = 1932 B. 292. See also 98 P.R. 1918 = 45 I.C. 900 = 29 P.L.R. 1918; I.L.R. (1937) A. 234 = 167 I.C. 897 = 1937 A. 208. (Insurance against burglary); mere receipt and forwarding of proposal of policy by sub-agent to Head Office which alone could accept or reject the same does not form part of cause of action. 45 L.W. 616 = 170 I.C. 279 = 1937 M. 571; 167 I.C. 669 = 1937 Sind 17. See also 1941 N.L.J. 37. An Insurance Company having its office at Lahore appointed certain person working at Meerut as the chief agent for Rajputana and Bundelkhand area. The appointment was made at Lahore and all the payments were to be made at Lahore and all accounts were to be rendered at Lahore. Subsequently disputes arose between the parties and the appointment was cancelled. The Company instituted suit at Lahore against the agent for re-

covery of certain sum due by the agent. *Held*, that cause of action arose at Lahore and the Court at Lahore had jurisdiction to try the latter suit. A.I.R. 1940 Lah. 85.

**LEASE.**—A lessee of a grove must apply to the lessor to fix a place for payment of the premium due; and when he does not do so, he has to make the payment at the lessor's place of residence, because he, as a debtor, has to find the creditor. Therefore a suit by the lessor for the premium due can be instituted at the place where the lessor lives, since part of the cause of action arises there, though the lands may be situate and the lessee may reside in a different place. 18 R.D. 403 = 15 L.R. 527 (Rev.). A instituted a suit in the Court of Small Causes at X against her agent D, for recovery of Rs. 100 being the unpaid balance of the premium collected by D in respect of a lease in favour of B. On D pleading that he had recovered Rs. 800 only and the remaining Rs. 100 was paid by B to A herself, A amended the plaint impleading B claiming the sum from B in the alternative. The grove to which the lease related was situated at Y and A resided at X where most of her property was. *Held*, that the cause of action accrued to A at X as under S. 49, of the Contract Act, there was an implied promise to pay at X. 1933 A. 147 = 150 I.C. 289. See also 48 L.W. 438 = 1938 M. 977. As to form in suits for rent, with and without an additional prayer for ejectment, under S. 66, B. T. Act, see 27 C.W.N. 542 = 1923 C. 619 = 77 I.C. 253.

**SUITS AGAINST NON-RESIDENT FOREIGNERS.**—A British Indian Court has jurisdiction to entertain a suit if the cause of action arises within its jurisdiction, even where the defendant is a non-resident foreigner. 59 B. 365 = 37 Bom.L.R. 357 = 1935 B. 283 (suit for recovery of loan); 35 M.L.J. 189 (a case against a foreign ship-owner for short delivery of goods). See also 56 A. 828 = 1934 A.L.J. 1093 = 1934 A. 740. Neither the fact that the rent sued for is in respect of property situated in a Native State, nor that defendant is resident of a Native State, will prevent British Indian Court from entertaining the suit for rent where the rental agreement had been executed in British India. 157 I.C. 281 = 1935 M. 545 = 68 M. L.J. 506. The question whether its decree could be enforced against him in the foreign Courts is one for consideration of the Courts of that State. 35 M.L.J. 189. See also 29 M. 69 (suit against a subject of a protected Native State). On this point, see also 187 I.C. 19; 20 B. 133; 17 B. 662; 30 I.A. 220 = 13 M.L.J. 287 = 26 M. 544 (P.C.); 25 B. 528.

**ARBITRATION.**—Refusal to refer to arbitration by the other party is a fundamental part of the cause of action in an application under Sch. II, para. 17 to have the agreement filed in Court. Such refusal confers jurisdiction. 1933 L. 18 = 150 I.C. 674. It is immaterial that the proposed arbitrator resides elsewhere, and the cause



*Explanation I.*—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

*Explanation II.*—A corporation shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

*Illustrations.*

(a) *A* is a tradesman in Calcutta. *B* carries on business in Delhi. *B*, by his agent in Calcutta, buys goods of *A* and requests *A* to deliver them to the East Indian Railway Company. *A* delivers the goods accordingly in Calcutta. *A* may sue *B* for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where *B* carries on business.

(b) *A* resides at Simla, *B* at Calcutta and *C* at Delhi. *A*, *B* and *C* being together at Benares, *B* and *C* make a joint promissory note payable on demand, and deliver it to *A*. *A* may sue *B*, and *C* at Benares, where the cause of action arose. He may also sue them at Calcutta, where *B* resides, or at Delhi, where *C* resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court.

21. No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible

NOTES.

of action as to the other reliefs also have arisen elsewhere. 150 I.C. 674.

**SUITS TO SET ASIDE DECREE ON THE GROUND OF FRAUD.**—A suit to set aside a decree obtained by fraud, where no other relief is claimed, cannot be maintained in any district outside the district in which the fraud was committed and the decree obtained. 29 A. 418; 25 A. 48; 36 A. 564. See also 21 Pat.L.T. 259=1940 Pat. 444. Defendant fraudulently obtained a decree in *S* and transferred it to *A* and in execution had the plaintiff arrested in *A*. Held, a suit to set aside the decree could be filed at *A* as the material portion of the cause of action accrued at *A*. 39 A. 607; 5 C.W.N. 559. See also 3 Luck. 142=4 O.W.N. 1103; 1927 L. 778=100 I.C. 164 (2). As to whether the Court in whose jurisdiction the property attached under the decree is situate, has jurisdiction to entertain a suit to set it aside, see 37 A. 189. Decree obtained at one place and transferred to another place for execution. Suit to set aside can be filed at either place. 7 L. 61=94 I.C. 377.

**REVISION AND APPEAL.**—No hard and fast rule as to revision can be laid down in cases of decisions as to jurisdiction under S. 20 and each must be decided on its own merits. 1923 L. 565. See also 41 A. 602. Where leave to sue is granted or refused by the trial judge, his discretion should not be lightly interfered with in appeal. But where the trial judge has refused to exercise his discretion, the appellate Court can interfere. 27 S.L.R. 230=145 I.C. 706=1933 S. 179.

**EXPL. I.**—Defendant having permanent dwelling at one place and temporary residence at another for carrying on business—Goods sold to defendant and document got

executed at place of temporary residence—Suit is maintainable at place of permanent dwelling, where there was no intention on the part of defendant to abandon the idea of returning to it. 143 I.C. 357=34 P.L.R. 908=1933 L. 120 (57 C. 65, Appr.; 2 Bom.L.R. 605, Not Foll.; 42 P.R. 1916=112 P.R. 1916, Dist.). See also 1936 L. 853. The onus of proving that he has abandoned his permanent residence lies on the person who so alleges. 1936 L. 853.

**EXPL. II.**—The plaintiff carried on business at Amritsar. The defendant firm had its head office at Bombay and a sub-office at Amritsar. This sub-office conducted correspondence with its local customers, received orders and moneys were received and disbursed. The orders placed at Amritsar were not, however, binding unless they were accepted by the head-office held, that the defendant firm was "carrying on business" at Amritsar and a suit filed at Amritsar was regular. (45 I.C. 900, R.) 14 L. 42=140 I.C. 473=1933 L. 11.

**SEC. 21: SCOPE AND APPLICABILITY OF SECTION.**—Section 21 is new and the alterations in procedure are retrospective in effect. 87 P.R. 1914=26 I.C. 543. Section does not apply to cases of want of pecuniary jurisdiction or of exclusive jurisdiction. I.L.R. (1937) A. 670=170 I.C. 706=1937 A. 515. The rule embodied in S. 21, is not limited to appeals and revisions in the same suit. 1941 N.L.J. 1=A.I.R. 1941 Nag. 36 (F.B.). There is a distinction between an absolute want of jurisdiction and an irregular assumption of jurisdiction. 36 C. 193. It is a well established rule that where the Court has no inherent jurisdiction over the subject-matter of a suit, its decree is a nullity even though the parties may have consented to the jurisdiction of the Court. The parties cannot,



opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

## NOTES.

by their mutual consent, convert it into a proper judicial process although they may constitute the Judge their arbitrator. 27 C.W.N. 542=1923 C. 619. *See also* 146 I.C. 204=1933 M. 471=38 L.W. 896. Even when objection is not taken, when there is a complete absence of jurisdiction, acquiescence of the parties cannot give the Court jurisdiction in the matter. (41 I.C. 276; 36 I.C. 457 and 70 I.C. 396, Rel.) 142 I.C. 613 (1)=1933 M. 346; 1933 M.W.N. 208; 9 A. 191=13 I.A. 134 (P.C.); 11 M. 26; 14 I.A. 160; 9 Bom. 266; 8 B. 313; 9 B.H.C. 242; 38 C. 639; 1931 A. 454; 33 Bom.L.R. 1364=135 I.C. 170=1932 B. 42; 6 Luck. 697; 31 N.L.R. (Supp.) 57=161 I.C. 877=1936 N. 1 (F.B.). The exception contained in this section cannot be so interpreted as to have a wider application than what is justified by the terms of the section. 27 C.W.N. 542=1923 C. 619. It is only when the Court is competent to try, and the parties join issues and go to trial that this section is applicable, and the defendant cannot subsequently dispute its jurisdiction. 31 N. L. R. (Supp.) 57 (Noted *supra*). But this section does not apply to a case where the objection is not one as to the place of suing, but one going to the nullity of the order of the first Court on the ground of *want of jurisdiction* and it can be taken at any time. The Court of a district subject to the C. P. Code has no jurisdiction under S. 17 to entertain a suit so far as it claims a decree for sale of mortgaged property situated in a scheduled district and the order for sale of the land can be set aside although no objection to the jurisdiction of the first Court was taken. 42 M. 813=37 M.L.J. 11 (P.C.) overruling. 34 I.C. 411. *See also* 152 I.C. 135=35 P.L.R. 482=1934 L. 652; 7 A. 230; 13 M. 25; 2 B.H.C. 40; 12 B. 155; 13 B. 424; 13 M. 273; 33 B. 664; 13 B. 650; 23 B. 22; 97 I.C. 770=1926 C. 1101; 33 Bom. L.R. 1364=135 I.C. 170=1932 B. 42; 6 Luck. 697=9 O.W.N. 847=1932 O. 313. Section cannot apply where the case is one of inherent incompetency of British Indian Court the cause of action arising outside British India. 10 Lah.L.J. 87. Section does not apply to execution of foreign judgments. 86 I.C. 492=1925 M. 788; 120 I. C. 279=1929 L. 449. The section does not apply when the question is whether the suit is triable on the small cause side or regular side (1931 O. 411), or to a case triable in the Original Side of the High Court where part of the cause of action arose outside its jurisdiction and leave to sue had not been obtained therefor. 56 B. 324=34 Bom.L.R. 236=1932 B. 291; 40 C.W.N. 65=164 I.C. 907; 160 I.C. 818=1935 R. 517. (1929 C. 358 Rel. on; 1926 M. 421; 1920 M. 1019; 1925 M. 117, Dist). Section does not modify Cl. 12 of the Let-

ters Patent (Cal.). 56 C. 940. Where the provisions of the Arbitration Act are wholly inapplicable to an award under the Act, it cannot become capable of enforcement under the Act merely on account of the failure to raise any objection in the Court filing the award. This section is not applicable to such a case. 35 P.L.R. 482=152 I.C. 135=1934 L. 652. The section applies where there is want of territorial jurisdiction not merely at the institution of a suit but at any stage during the progress of it. 47 M.L.J. 448=87 I.C. 152; 47 M. L.J. 192=87 I.C. 341=1924 M. 697; 46 M. L.J. 250. As to right of party to challenge jurisdiction of Court chosen by himself, *see* 1937 M. W. N. 1292. Section 21 makes it abundantly clear that non-compliance with the provisions of Ss. 15 to 20 is, in no way, fatal to the jurisdiction of the Court, and does not render the decree passed by a Court of competent jurisdiction a mere nullity so as to empower the executing Court to refuse to execute it on that ground. 190 I.C. 881=A.I.R. 1940 Sind 150.

## CONDITIONS FOR APPLICATION OF SECTION.

—(1) AT THE EARLIEST OPPORTUNITY.—All conditions mentioned in the section must be fulfilled before decree can be set aside. 96 I.C. 544 (1). Objection should be *at the earliest opportunity*. 49 M. 74=50 M. L. J. 161. If the plea as to objection is taken in the original proceedings at any stage thereof the Court should return the plaint for proper presentation. The question of delay mentioned in S. 21 is only applicable to appeals and revisions. 10 I.C. 980=4 S.L.R. 264. *See also* 53 I.C. 331; 8 B. 313; 9 B. 266; 23 B. 679; 10 M. 211; 93 I.C. 103. A question of jurisdiction, as to whether a suit will lie in a British Indian Court, which is a question of law depending upon public documents requiring no proof, can be raised in the appellate Court. Section 21 is no bar to such a question being raised at any stage of the proceedings. But where British Indian Courts have power to deal with the *lis*, S. 21 comes into play and operates as an estoppel. 28 S.L. R. 54=1934 S. 123=155 I.C. 677. Trial Court dismissing suit as against one defendant on ground of want of jurisdiction—On appeal by other defendant, appellate Court passing decree against him. 1935 C. 153. The principle underlying the section is that objection to jurisdiction may be waived and it applies as well to collateral proceedings as to proceedings in appeal or revision. 47 M.L.J. 448. A defendant who objects to the jurisdiction of a Court cannot be said to have acquiesced in the trial of the suit if he does not apply for a transfer. 27 I.C. 232=18 C.W.N. 1340.

(2) FAILURE OF JUSTICE.—A decree passed by Court having no territorial jurisdiction over the subject-matter will not be



## NOTES.

set aside on that account in the absence of proof of prejudice or failure of justice. 149 I.C. 1050=36 P.L.R. 99=1934 L. 233. Where there has been no failure of justice, the plea as to want of territorial jurisdiction cannot be entertained in appeal. 49 I.C. 441; 55 I.C. 442; 36 I.C. 431; 1922 L. 164; 1929 A. 236; 31 P.L.R. 616; 1932 L. 135=32 P.L.R. 874=136 I.C. 17; 131 I.C. 603=1931 A. 556; 32 P.L.R. 50=1931 L. 142=131 I.C. 276. In a suit on a promissory note where defendant on whom onus lay remained *ex parte* and without satisfactory reasons and a decree was passed *without jurisdiction*, neither the appellate nor the revisional Court would interfere if there was no failure of justice. 158 I.C. 252=1935 M. 574. The question cannot be gone into in *second appeal* unless it was raised at the earliest possible moment in the course of the suit. 48 I.C. 465; 41 I.C. 161. An objection as to territorial jurisdiction raised before appellate Court must be determined on merits to ascertain whether there has been a failure of justice. 42 A. 74; 37 I.C. 114=93 P.R. 1916; 87 P.R. 1914=26 I.C. 543; 1922 O. 124; 19 A.L.J. 305=62 I.C. 399; 45 L.W. 616=170 I.C. 279=1937 M. 571. When a suit is instituted in a British Indian Court the Court must determine whether it has jurisdiction to hear the suit or not by the aid of the Code. In case of doubt as to whether a Court had jurisdiction the objection cannot be entertained by the appellate Court unless there has been a consequent failure of justice. 147 I.C. 591=1934 All. 226. *See also* 1933 P. 555=149 I.C. 758. Although the objection was taken at the earliest opportunity before issues were settled the High Court refused to interfere in revision as there was no prejudice to the parties. 44 I.C. 694=22 C.W.N. 517. *See also* 2 Pat.L.R. 74=80 I.C. 745; 40 P.L.R. 234.

**APPLICABILITY OF SECTION 1 TO EXECUTION PROCEEDINGS.**—Though S. 21 does not in terms apply the principle underlying it, being one of general application, applies to execution proceedings. Where an objection to jurisdiction is not taken before the sale of the property in execution, it cannot be raised at a later stage. 40 L.W. 284=152 I.C. 891=1934 M. 573. *See also* 28 L.W. 885=1928 M. 746; 42 P.L.R. 374. An execution sale after confirmation cannot be avoided on the ground that the Court had no territorial jurisdiction over the property. 24 M.L.J. 70. *See also* 43 M. 675=39 M. L.J. 203 (F.B.); 46 M.L.J. 250. The rule of territorial jurisdiction does not apply to execution of mortgage decrees. 49 M. 74=50 M.L.J. 161. The section applies to all objections based on the alleged infringement of the provisions of sections 16 to 18, C.P. Code, as regards the institution of suits relating to immovable property. A Court executing a decree could not entertain an objection on the ground of want of territorial jurisdiction. 43 M. 675=39 M.

L.J. 203 (F.B.). *See also* 50 M. 882=52 M.L.J. 605.

(2) **APPEAL.**—Although section 21 does not in terms apply to appeals, the principle under-lying it is of general application, so as to cover proceedings other than original suits. Hence where an objection as to jurisdiction is not taken in the lower appellate Court, the plea must be deemed to have been waived and cannot be raised in second appeal. [43 M. 675 (F.B.); 55 M. 801 (F.B.); 87 I.C. 152; 87 I.C. 341, Ref.] 29 N.L.R. 342=1933 N. 318. Decree cannot be questioned in an appellate Court when the objection has not been raised in the trial Court. 93 I.C. 103=7 O.W. N. 1079; nor a Court of second appeal. 1930 M. 541. Where first appellate Court upholds objection to jurisdiction and returns plaint for proper presentation, the plaintiff may agitate the matter in second appeal, even though it may not be specifically set forth in memo. of appeal. 131 I.C. 603=1931 A. 556. Respondent to appeal raised preliminary objection based on fact that suit has been overvalued, at a late stage after appellant's arguments had proceeded for some time. *Held*, the Court will not refuse to hear the objection though it may disallow costs to respondent. 14 P. 414=16 Pat.L.T. 103=1935 P. 160. Section 21, is no bar to an appellate Court reversing a preliminary decree for accounts passed by a Court of first instance against a commission agent, when the latter Court has done nothing more than deciding the issue of jurisdiction and passing a preliminary decree as a matter of course on the defendant admitting that he is the accounting party, as the real trial of the suit is to begin only hereafter when accounts are to be taken. 42 P.L.R. 203=A.I.R. 1940 Lah. 171.

(3) **REMANDED CASE.**—Neither S. 21 in terms, nor any principle underlying it is applicable to a remanded case being dealt with by a Court other than the Court specified in the order of remand. 44 M.L.J. 238=72 I.C. 314.

(4) **APPLICATION TO SET ASIDE EX PARTE DECREE.**—Section applies to application to set aside *ex parte* decree. 52 A. 947=1930 A.L.J. 997.

**DECREE WITHOUT JURISDICTION—INDEPENDENT SUIT TO SET ASIDE DECREE—MAINTAINABILITY.**—Section 21 does not provide against the question of jurisdiction being agitated by means of an independent suit. It only bars the raising of the question for the first time in a later stage of the same suit before the appellate or revisional Court. 1931 A.L.J. 240=131 I.C. 248=1931 A. 454; 1923 C. 619=27 C.W.N. 542; 31 N. L.R. 43 (Sup.)=159 I.C. 739=1935 N. 250 (F.B.); 42 C.W.N. 375=174 I.C. 522. *See also* 28 Bom.L.R. 879=98 I.C. 341=1926 B. 481. But *see contra*, 7 P. 216=9 Pat.L.T. 789=1928 P. 324; 43 M. 675=58 I.C. 871=39 M.L.J. 203 (F.B.); 87 I.C. 152=1925 M. 117=47 M.L.J. 448; 120 I.C. 279=1929 Lah. 449.



22. Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made,

Power to transfer suits which may be instituted in more than one Court.

#### NOTES.

SEC. 22:—SCOPE AND APPLICATION.—This section and section 23 do not apply to a case in which the question is whether a suit should be tried by a Court subordinate to a High Court or by a High Court or the Chief Court of Oudh. Such a case is not covered by any specific provision of the Code; and in the absence of a rule of law specifically applicable thereto, it is open to the High Court to exercise powers similar to those contemplated by Ss. 22 and 23. If it appears that the plaintiff has chosen a forum in utter disregard of the convenience of both parties, for some ulterior object and in abuse of his position as *dominus lites* the High Court can, in the exercise of its inherent power, determine which of the two Courts having jurisdiction should try the suit. 1934 A. 14=56 A. 201=1933 A.L.J. 1507. Neither this section nor section 23 applies to Chartered High Courts in exercise of Original Civil Jurisdiction. 56 C. 940=1929 C. 358. Ss. 22 and 23 do not provide for the transfer of a case from a Court subordinate to one High Court to the original side of another Court. 69 I.C. 772. See also 57 I.C. 649=1 Pat.L.T. 389. This section has to be invoked only in cases where option is given to the plaintiff to choose his own forum. (*Vide* sections 16 and 20); 12 A.L.J. 896=24 I.C. 318; 71 I.C. 268=1923 A. 288. The provisions of the section are mandatory. An application for transfer cannot be maintained after the settlement of issues. 78 I.C. 608=1925 L. 175; 11 P.R. 1917=35 I.C. 616; 88 I.C. 531=1925 L. 322. The provision as to notice is mandatory. 107 I.C. 593. Both Courts must have jurisdiction in order that an application can be made under section 22 or section 23. Where jurisdiction is denied, no application for transfer can be made. 24 I.C. 318=12 A.L.J. 896; 71 I.C. 268=1923 L. 288 (2). 24 I.C. 707; 48 I.C. 105=21 O.C. 217. In an application for transfer under sections 22 and 23, the question of want of jurisdiction of the trying Court cannot be raised. 34 I.C. 707; 1 Pat.L.T. 277=56 I.C. 920. In a suit pending before the Original Side of the High Court an application to transfer the case to the Court where the suit ought to be tried should be made under section 22, on the Original Side of the High Court which has seisin of the case. And the Court has power to pass such an order under section 151. 12 R. 548=151 I.C. 573=1934 R. 265 (F.B.).

GROUND FOR TRANSFER.—The plaintiff has always a right to choose his forum. The jurisdiction conferred by sections 22 and 23 must be exercised very cautiously

C. C. M.—57

and only when a clear cause has been shown. The mere fact that it would add to the defendant's convenience is no ground for transferring a case. 73 I.C. 860. See also 13 B. 178; 69 I.C. 772; 69 I.C. 239; 54 I.C. 935=167 P.R. 1919; 34 I.C. 686; 25 I.C. 874; 24 I.C. 707; 57 I.C. 649=41 A. 381; 32 I.C. 613=14 A.L.J. 242; 1928 L. 183; 1927 L. 14=97 I.C. 390; 1928 L. 159=106 I.C. 869. A suit can be transferred only upon two grounds, *viz.* (a) that there will not be an impartial trial by the trying Court, or (b) that there is manifest preponderance of convenience to the petitioner, if the suit is transferred to the other Court. 56 I.C. 920=1 P.L.T. 277. See also 33 I.C. 797; 106 I.C. 870=1928 M. 15; 4 O.W.N. 1114; 97 I.C. 390=1927 L. 14.

BIAS OF JUDGE.—The apprehension that there will not be an impartial trial must be such as a reasonable man might reasonably be expected to have. 1923 L. 564. The fact that a Judge has decided a point of law arising in a case analogous to the case is not a good ground for transferring the case from his file. 67 I.C. 228=1922 L. 369; 15 I.C. 569. Where the Judge merely took an erroneous view in disposing of a certain application but there is nothing to suggest any bias in his mind for or against any party an application for transfer cannot be entertained. 1934 A. 37 (2). Observations injudiciously and thoughtlessly made by the Judge, not a sufficient ground for transfer. 29 I.C. 29. But see 133 I.C. 876 (1).

SECS. 22 AND 23.—Sections 22 and 23, are concerned with a case where a plaintiff has the choice of two or more Courts in which he may properly institute a suit. In cases to which Ss. 22 and 23 apply, the power to transfer is conferred by section 22 and the forum to which the necessary application has to be made is provided by section 23. The High Court has jurisdiction to transfer a suit pending in a Court subordinate to it, to a Court subordinate to another High Court. 1940 N.L.J. 231=1940 Nag. 145. 1941 N. 311; see also 1940 A.L.J. 611.

SECS. 22-24. In cases of transfer, the convenience of parties is indeed a factor which enters into consideration, but the convenience of both parties have to be weighed and the decision would ultimately turn on the balance of convenience. A plaintiff is the *dominus lites* and he has a right to institute the suit at a place of his choice. Where a defendant wants a transfer, it must be seen whether the considerations of convenience are so overwhelming on the side of the defendant as to override the claims of right. I.L.R. (1941) Nag. 311=1940 N.L.J. 231=1940 Nag. 145.

CONVENIENCE OF PARTIES.—Convenience to



after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.

23. (1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under section 22 shall be made to the Appellate Court.

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.

24. (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage—

General power of transfer and withdrawal.

#### NOTES.

the parties and witnesses would be a good ground for transfer. 1924 O. 410. *Balance of convenience* may be considered in deciding an application for transfer. 72 I.C. 592=1923 L. 383; 44 A. 278; 69 I.C. 717. An order of transfer passed without regard to the convenience of the parties and without hearing the other party is illegal. 33 I.C. 797=23 C.L.J. 295. On this section, see also 85 I.C. 852=6 Pat.L.T. 540.

**Sec. 23.**—As to scope and application of section, see 50 A. 201; 56 C. 940 and 69 I.C. 772 noted under section 22, *supra*. Section 23 postulates that the several Courts concerned shall both have jurisdiction. Where a plea of want of jurisdiction is taken by one of the parties in one Court, an application by that party under section 23 (3) cannot succeed. 1941 All. 27=1940 A. L.J. 611. The Original Side of a High Court is not subordinate to the Appellate Side of the High Court within the meaning of section 23 (3), C. P. Code. (11 L. B.R. 446=77 I.C. 408=1923 R. 22, Overr.) 12 R. 548=151 I.C. 573=1934 R. 265 (F. B.); 27 M.L.J. 645=27 I.C. 455; 45 C. L.J. 71=100 I.C. 331=1927 C. 290. But see *contra* 1928 L. 183 (1922 L. 306, Diss. and 1923 R. 22, Foll.). The High Court may order a transfer of a suit pending in a Court subordinate to it to a Court under a different High Court where another suit between the same parties is pending. 35 C. 541. See also 51 B. 26=100 I.C. 154=1927 B. 79; 1928 P. 640=110 I.C. 699. But see also 20 I.C. 758. A Subordinate Judge is nevertheless subordinate to the District Judge, although the appeal in respect of the particular case of which the transfer is sought lay to the High Court and not to the District Judge. 10 C.L.J. 208=3 I.C. 539. The Oudh Chief Court is a High Court. 4 O.W.N. 1114.

**SEC. 24:** SCOPE OF SECTION.—This section controls section 23 (5), Bombay Civil Courts Act, 41 Bom.L.R. 892=I.L.R. (1939) B. 472=1939 B. 485; see 1940 Mad. 9 (Madras City Civil Courts, Act). Section 24 is exhaustive of the judicial power to transfer

suits and no Court has jurisdiction to transfer a suit from one Court to another unless both Courts are subordinate to it. This power is entirely different in character and legal effect from the one in case of an order returning the plaint for presentation in proper Court. 40 I.C. 393=13 N.L.R. 81. Where a Court having really no territorial jurisdiction enquired fully into the case, but when the defect was found out, returned the plaint, *held*, it was a proper case in which the High Court should send it for disposal to the first Court itself. 21 A.L.J. 86=1923 A. 249. Under section 24, a transfer cannot be made from one Court to another unless the suit has in the first instance been brought in a Court having jurisdiction. There is no reason to make a distinction between lack of inherent jurisdiction and lack of pecuniary or territorial or any other kind of jurisdiction in that Court. 185 I.C. 467=15 Luck. 619=1940 Oudh 164; see also 42 Bom.L.R. 1093=1941 Bom. 69. All that is necessary to bring into play the jurisdiction of the High Court or the District Court to exercise the power of transfer and withdrawal given under section 24 is that the suit, appeal or other proceeding sought to be transferred should be 'pending before it' or 'pending in any Court subordinate to it'. The mere fact that the suit, appeal, or other proceeding is pending in a Court not having jurisdiction to dispose of the same cannot oust the jurisdiction of the High Court or the District Court to withdraw or transfer that suit, appeal, or other proceeding from the Court in which it is pending to some other Court competent to try the same. 150 I.C. 942=1934 A.L.J. 345=1934 A. 569. See also 54 A. 824=1932 A. 660; 53 A. 916, Diss. But see 53 I.C. 892=1919 P. 409; 125 I.C. 334; 1930 L. 195; 150 I.C. 839=1934 S. 95; 37 C. 574; 26 S.L.R. 277=139 I.C. 496=1932 S. 215. The word 'suit' where it occurs for second time in subsection (2), must be taken to include a proceeding; for otherwise parts of the subsection would be quite meaningless. 161 I.C. 54=1936 Pesh. 56. This section is wider in scope than section 22 and no notice



(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

## NOTES.

before institution of application for transfer is necessary under this section. 146 I.C. 38=1933 L. 635. The transfer of a case from one competent Court to another is not invalid because it may affect some other order of the Revenue Court. 53 A. 62=133 I.C. 319. This section contemplates transfer of case from one existing Court to another existing Court. Hence where a Small Cause Court has ceased to exist or the officer invested with small cause powers has been transferred and there is no other officer possessing such powers, there would be no Court from which the District Court can transfer the case to another Court. To such contingencies section 35 of Provincial Small Cause Courts Act applies. 54 A. 171=1931 A.L.J. 953=1931 A. 574 (F.B.).

## GROUNDS FOR TRANSFER, WHEN SUFFICIENT.

—Convenience of parties, situation of property and heavy expenses already incurred in engaging Counsel. 101 I.C. 723=1927 N. 219; 27 N.L.R. 307=135 I.C. 402=1932 N. 49; 31 N.L.R. 162; 44 A. 278=65 I.C. 782=1922 A. 65; 160 I.C. 522=1936 Pesh. 5. See also 146 I.C. 38=1933 L. 635. But see 5 A. 60; 41 A. 381=50 I.C. 368. Where a Judge has already expressed an opinion, when deciding another appeal, on one of the questions that have to be decided in the appeal, it is desirable, in the interests of justice, that the appeal should be heard and decided by another Court. 152 I.C. 696 (1)=1934 L. 539=35 P.L.R. 468; 32 P.L.R. 388=133 I.C. 876=1932 L. 291. Transfer of appeal—Judge arriving at findings on evidence—Decree set aside and case remanded on appeal—Transfer to a different Judge desirable. 8 Luck. 347=10 O.W.N. 443=1933 O. 154. Where there are clear indications to justify a party in thinking that the Judge was prejudiced against him. 35 P.L.R. 38=147 I.C. 208=1933 L. 915; 77 I.C. 762=1923 L. 564; 1903 P.R. 88. Relationship of Judge to a party. 1932 S. 206; 1923 L. 564. Pecuniary or other personal interest in the case of the presiding Judge. 10 C. 915. To avoid conflict of decisions, as where one of two appeals involving same question is pending in District Court and the other in the High Court. 147 I.C. 637=1933 L. 1033. But see 163 I.C. 962=1936 P. 345, where in somewhat similar circumstances transfer was refused on the ground that no hardship was likely to be caused by allowing the appeals to be where they were.

GROUNDS FOR TRANSFER, WHEN NOT SUFFICIENT.—That defendant is an influential man of the locality is no ground. 98 I.C. 859=1927 L. 80 (1). Prejudice against pleader, if good ground for transfer. See 90 I.C. 559=1926 M. 359. The mere convenience of the defendant is no ground for transfer of a case and that a strong case should be made out where such transfer is prayed for. 146 I.C.

38=1933 L. 635; such as that the expenses and difficulties of the trial would be so great as to lead to injustice, or that the *forum* has been deliberately chosen by the plaintiff for the purpose of working injustice. 130 I.C. 523=1930 L. 944. The mere fact that in a case of communal nature the presiding Judge of the Court is a member of a rival community is no ground for a transfer of the suit from that Court. It must be shown that there is a reasonable apprehension in the mind of the applicant for transfer that he will not get a fair trial. 150 I.C. 334=36 P.L.R. 29=1934 L. 762. Where the evidence for the parties has been closed and even the arguments have been heard, it would be most inadvisable if at such an advanced stage when the judgment only is to be pronounced, a case is transferred to another Judge who will be handicapped by the fact that he shall have merely to pronounce judgment in a case in which he has taken no proceedings and recorded no evidence. (1926 M. 359, Foll.) 35 P.L.R. 574=1934 L. 593. Application for transfer after Court informs counsel of its order before it is pronounced is not maintainable. 39 P.L.R. 654=175 I.C. 525=1938 Lah. 95. Where a Commissioner passes an order of dismissal of a person from the office of Gatwal and a declaratory suit is filed in the Court of the Subordinate Judge who is also a Deputy Collector, the mere fact that the Subordinate Judge is subordinate to the Commissioner in his executive capacity is no ground for the transfer of the suit from his Court. He has to decide the suit sitting as a judicial officer and an appeal from his decision lies to the High Court. 1933 P. 638=146 I.C. 1087. The fact that the Judge has once decided the point of law is not good ground for transfer. 1930 L. 176=124 I.C. 687; 172 I.C. 910=1938 N. 126. See 133 I.C. 876. But see 8 Luck. 347=144 I.C. 570=1933 O. 154.

## GROUNDS FOR TRANSFER—BURDEN OF PROOF.

—The onus of establishing sufficient ground for transfer lies heavily on the applicant. He must prove that he has a reasonable apprehension that he might not get justice in the Court in which the suit is pending. 35 P.L.R. 574=1934 L. 593; 153 I.C. 386; 41 A. 381=50 I.C. 368.

NOTICE.—Notice should be issued to the parties before a Court passes an order of transfer otherwise than of its own motion. 78 I.C. 614 (1); 58 I.C. 560=18 A.L.J. 351; 40 I.C. 111; 42 I.C. 746; 26 O.C. 62=74 I.C. 249; 1925 L. 189; 90 I.C. 287=23 A.L.J. 948; 84 I.C. 238=1923 L. 444; 1931 A.L.J. 1061; 14 L. 240=34 P.L.R. 540=1933 L. 558; 53 A. 916=136 I.C. 384=1931 A.L.J. 1061. Notice may not be necessary when transfer is made *suo motu* by the District Court without any motion being made to it by any party. 53 A. 916. Party is



(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it. and—

#### NOTES.

entitled to *personal* notice, and notice to pleader in original Court is not sufficient. 14 L. 240. Transfer without notice is ground for setting aside *ex parte* decree. 1923 L. 44; 18 A.L.J. 351=58 I.C. 560; 53 A. 916. But according to Madras and Calcutta want of notice does not render the order of transfer void, but is a mere irregularity which may be waived. 1932 C. 265=137 I.C. 430; 13 M. 211; 21 M.L.J. 829=8 I.C. 7. S. 24 is wider in scope than S. 22 and no notice *before institution of an application* for transfer of case is necessary under S. 24. 146 I.C. 38=1933 L. 635.

AT ANY STAGE.—These words have been inserted in order to avoid the conflict of rulings that existed previously as to whether an order of transfer can be made after the *hearing of the suit had commenced*. See 22 B. 778; 26 M. 595; 7 A. 342; 15 C. 177.

SUIT, APPEAL OR OTHER PROCEEDING.—“Suit” includes execution application. 1926 L. 465; 47 A. 57. See also 49 M. 746=50 M.L.J. 161. Transfer of claim proceedings alone without transfer of execution proceedings, is legal. 175 I.C. 525=1938 L. 95. ‘Other proceeding’ includes an insolvency petition. 22 B. 778; and proceedings in execution, 39 M. 485=29 I.C. 119=29 M.L.J. 172; and a proceeding under Indian Companies Act. 9 A. 180. And claim under U.P. Encumbered Estates Act. 177 I.C. 136=1938 A. W.R. (C.C.) 77. But it does not include a proceeding under S. 476 of Cr.P. Code. 49 A. 460=101 I.C. 247=1927 A. 469. The word ‘proceeding’ in this section covers all proceedings contemplated at the date when C.P. Code, 1908, was passed and not a special proceeding not then in contemplation but established by a subsequent Act, *viz.*, the Cr.P. Code Amendment Act XVIII of 1923. 49 A. 460. No Court other than the trial or appellate Court can file a complaint under S. 476, Cr.P. Code. 49 A. 460. Appeal under S. 476-B to District Judge transferred to Additional Judge—Complaint—Legality. 57 C. 831=34 C.W.N. 80. See also 1941 A.L.J. 46. (Proceedings for enforcement of injunction order).

PENDING.—A suit valued at Rs. 2,500 was filed in the Court of a munsif who had jurisdiction up to Rs. 5,000. He was transferred and his successor had jurisdiction only up to Rs. 2,000. *Held*, that the District Judge had power to transfer the suit to another Court under this section. All that this section requires is that the suit should be pending in a Subordinate Court which had jurisdiction *at the time the suit was filed*. 1936 A.L.J. 452=162 I.C. 903=1936 A. 335. Effect of transfer on interim orders, see 1941 A.L.J. 46.

‘COURT SUBORDINATE TO IT’.—A junior subordinate Judge is not subordinate to a senior subordinate Judge. 1 L. 158=52 I.C. 352;

and so the latter cannot transfer a suit pending before him to the former (*Ibid.*) See also 59 B. 466=37 Bom.L.R. 255=158 I.C. 382=1935 B. 286. The Nagpur Divisional Court was held not subordinate to the Bombay High Court, although it was necessary for a decree for dissolution of marriage under the Indian Divorce Act IV of 1869. required confirmation by the High Court of Bombay. 40 B. 109=31 I.C. 331=17 Bom. L.R. 948. A District Munsiff is subordinate to the High Court, and the latter can transfer a suit from the former even after an application for the purpose has been dismissed by the District Court. 11 C.L.J. 218=5 I.C. 771; 87 I.C. 170; 103 I.C. 456=1927 P. 383; 1926 C. 326.

‘COMPETENT TO TRY’.—A superior Court has no jurisdiction to direct the transfer of a case from a Court subordinate to it to another Court which is outside its jurisdiction. 1924 N. 152. See also 88 I.C. 139=1925 L. 561; 150 I.C. 839=1934 S. 95. The expression ‘competent to try’ refers to competency as regards its pecuniary nature, and the nature and subject-matter of the case, and does not include competency from the point of view of territorial jurisdiction. 6 Luck. 347=10 O.W.N. 443=1933 O. 154; 54 A. 824=1932 A.L.J. 984=1932 A. 660 (1920 P. 29 and 136 I.C. 384, Not Appr.) The expression means ‘of jurisdiction competent to try; and S. 16 of Provincial Small Cause Courts Act is made elastic by this section. A small cause suit pending before a Sub-Court can be transferred to a District Munsiff for purposes of convenience and joint trial, even though the value of the suit transferred may be beyond the small cause jurisdiction of the District Munsiff. 55 M. 960=1932 M. 683=63 M.L.J. 689. But see 56 M.L.J. 649=1929 M. 513; 1927 M. 321; 52 M. 57=55 M.L.J. 671. A District Court cannot transfer a suit from one subordinate Court to another newly created and empowered to try *subsequently instituted suits* 1918 M.W.N. 291=45 I.C. 13. Unless pending cases are expressly transferred by notification effecting change in territorial jurisdiction of a Court, or unless there is specific provision in any enactment to the same effect, the Court in which the suit or appeal was instituted does not cease to have jurisdiction to decide the matter, despite the change in its territorial jurisdiction. 29 N. L.R. 342=149 I.C. 718=1933 N. 318; 58 M. 801 (F.B.). High Court can transfer suit from Presidency Small Cause Court to City Civil Court. 50 L.W. 634=(1939) 2 M.L.J. 841. High Court in Insolvency Jurisdiction cannot withdraw insolvency proceedings pending before a Sub-Judge in the Presidency. 49 B. 788. An insolvency petition under Presidency Towns Insolvency Act, pending in High Court cannot validly



- (i) try or dispose of the same; or
- (ii) transfer the same for trial or disposal to any Court subordinate to and competent to try or dispose of the same; or
- (iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which thereafter tries such suit may subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

#### NOTES.

be transferred to a District Court. 38 M. 472=14 M.L.T. 184=25 M.L.J. 299. An order transferring an application for review to a Court other than the one which decided the case is illegal. 50 I.C. 910. District Judge in whose Court an appeal under S. 476, Cr.P. Code is pending cannot transfer it to a Subordinate Judge, as the latter has no jurisdiction to hear the same. 57 A. 785=1935 A.L.J. 473=157 I.C. 901=1935 A. 440.

**POWERS OF HIGH COURT**—Section applies to Chartered High Courts in their ordinary original civil jurisdiction. 56 C. 940=1929 C. 358. High Court can transfer suit from a District Munsiff's Court, even though the transfer may have been refused by the District Judge, as the High Court has concurrent jurisdiction with the District Court, and the District Munsiff is also subordinate to it. 11 C.L.J. 218=5 I.C. 771; 87 I.C. 170; 103 I.C. 456=1927 P. 383; 1926 C. 326. It is not necessary that a Court to which a suit is transferred in the proper sense of the word (*i.e.*, transferred by the High Court under S. 24) should have concurrent territorial jurisdiction and the High Court may transfer a suit to a Court which has pecuniary jurisdiction though it may not have territorial jurisdiction to try the suit. Hence where mortgage suit or execution proceedings is transferred under S. 24 by the High Court to a Court which has otherwise no territorial jurisdiction, the Court can order sale of the property lying outside its local limits. 189 I.C. 166=1940 Rang. 133. Transfer of suit from Subordinate Court to High Court—Powers of High Court—Right of appeal against order of transfer. 69 M.L.J. 776. See also 54 C. 126. =100 I.C. 797=1927 C. 281. As to the powers of the High Court under Cl. 13 of Letters Patent, see 7 Bom.L.R. 143. (Transfer from Presidency Small Cause Court); 52 M. 57=1928 M. 1091 (Transfer from Provincial Insolvency Court); 4 R. 554=100 I.C. 265=1927 R. 61 (Transfer from one Provincial Insolvency Court to another). See also 156 I.C. 43=1935 A. 750. A Judge in Chambers can transfer a proceeding under S. 317, Succession Act to his own Court at any stage and he can *suo motu* examine the accounts filed under that sec-

tion so as to pass an order under Cl. 4 of that section. 41 P.L.R. 872=1939 Lah. 463.

**POWERS OF A DISTRICT JUDGE**.—A District Judge can transfer a case pending before him to the Additional District Judge. 13 I.C. 6=14 P.L.R. 1912. A District Judge cannot transfer a case to a Court not competent for any reason to try the same. 5 P.L.J. 588=57 I.C. 522=1 Pat.L.T. 637. See also 32 I.C. 788; 37 C. 574. Where an Appellate Court remands a suit for fresh disposal on the merits by the Court which first decided it, the District Judge can transfer it to his own file and decide it. 19 I.C. 552=9 N.L.R. 40 (21 A. 230, Dist). A District Court to which a case has been remanded by the High Court has power to transfer it to the Court of the Additional District Judge, unless the terms of the High Court's order expressly limited those powers. 44 A. 211; 12 A.L.J. 1094=25 I.C. 141. If a District Judge transfers a case remanded by the High Court to a Sub-Judge who disposes of it without objection being taken as to his jurisdiction, the irregularity would not affect the decision on its merits. 23 I.C. 425=15 M.L.T. 304; 19 C.W.N. 143=23 I.C. 69=19 C.L.J. 408; 12 A.L.J. 1094=25 I.C. 141. Suit relating to trust—District Judge's power to transfer to Subordinate Court—Government Notification authorising Subordinate Judges to hear such suits—Legality—If *ultra vires*. 59 B. 412=1935 B. 172=37 Bom.L.R. 120. Transfer of case from Munsiff to Sub-Judge who acts as Small Cause Court is within the District Judge's power, though a party is thereby deprived of his right of appeal. 36 I.C. 881. S. 16 of Provincial Small Cause Courts Act is no bar to the exercise of powers of transfer of the District Judge under this section. 37 P.L.R. 177=154 I.C. 112=1934 L. 901; 151 I.C. 385=1934 A. 530; 147 I.C. 334=1935 A. 350. The District Court can withdraw a transmitted execution proceeding to its own file and dispose of it. 39 M. 485=29 M.L.J. 712.

**DELEGATION OF POWERS BY THE DISTRICT JUDGE**.—The power of transfer under S. 24 can be delegated by the District Judge, but when so delegated it must be exercised in accordance with law. It can only be exercised in cases pending in a Court subordinate to the Court exercising the power. 52



(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

25. (1) Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the Provincial Government,<sup>1</sup> [which] may, by notification in the official Gazette, transfer such suit, appeal or proceeding to any other High Court :

#### LEG. REF.

<sup>1</sup> Substituted for the word "who" by A. O., 1937.

#### NOTES.

I.C. 352=1 L. 158; so a Senior Subordinate Judge to whom the District Judge had delegated the power, cannot transfer a suit from the file of the Junior Subordinate Judge, as the latter is not subordinate to him. 1 L. 158. Ss. 37 and 44 of the Punjab Courts Act provided for such a delegation in the Punjab. 40 I.C. 111=33 P.W. R. 1917.

SEC. 24 (4): COURT OF SMALL CAUSES.—A Court of Small Causes under S. 24 (4) includes Courts vested with Small Cause Jurisdiction as well as the Special Courts constituted under the Provincial Small Cause Courts Act. 39 A. 214=37 I.C. 809; 40 A. 525=46 I.C. 893; 38 M. 25=17 I.C. 425; 31 B. 314=9 Bom.L.R. 327 (F.B.); 56 C. 588; 1 P. 696=69 I.C. 681=1928 P. 49; 27 C.L.J. 461=44 I.C. 881; 56 B. 387=34 Bom.L.R. 931=139 I.C. 194=1932 B. 486. A small cause suit may be transferred to another Court which is not a Small Cause Court, nor one exercising small cause powers. 27 N.L.R. 307=135 I.C. 402=1932 N. 49; 31 N.L.R. 162; 151 I.C. 385=1934 A. 530; 147 I.C. 334=1935 A. 350; 1935 A.L.J. 511=157 I.C. 122=1935 A. 690; 55 M. 960 (noted *supra*); 50 L.W. 634=(1939) 2 M.L.J. 841 (Transfer from Madras Small Cause Court to Madras City Civil Court). 1940 Mad. 9=I.L.R. 1940 (Mad.) 251. A small Cause suit may therefore, be transferred to a regular Court irrespective of the small cause powers of the Court to which the suit is transferred. Suit in a Small Cause Court for Rs. 900 may be transferred to sub-Court even though small cause jurisdiction of Sub-Court was only up to Rs. 300. 56 B. 387=34 Bom. L.R. 931=139 I.C. 194=1932 B. 486 (56 M.L.J. 649=29 L.W. 810=121 I.C. 481=1929 M. 513, Diss.); 55 M. 960=36 L. W. 479=1932 M. 683=63 M.L.J. 689. Such suit must be tried by the Court having no competent small cause jurisdiction, as a regular suit, and an appeal will lie from the decree passed therein. 55 M. 960 (noted *supra*). See also 151 I.C. 385=1934 A. 530; 1936 L. 983; 29 L.W. 810=121 I.C. 481=1929 M. 513=56 M.L.J. 649. But see 54 A. 171=136 I.C. 357=1931 A. 574 (F. B.); 31 N.L.R. 170=156 I.C. 151=1935

N. 42; 40 A. 525; 36 I.C. 317=14 A.L.J. 705; 38 M. 25; 27 C.L.J. 461; 31 B. 314 (F.B.); 1 P. 696; 56 C. 588; 50 A. 810; 120 I.C. 412; 23 M.L.J. 373=43 C.W.N. 440=183 I.C. 264=1939 C. 345; 1939 A.L.J. 335=183 I.C. 426=1939 A. 452; 168 I.C. 785=1937 Oudh 398. It was however held in 54 A. 171, that when the transfer is not or could not be made under this section, an appeal would lie; as in the case where an officer without possessing small cause powers hears a case which was pending before his predecessor in office exercising small cause jurisdiction. (38 A. 425 *appr.*; 13 A. 324 overruled). A District Judge cannot transfer a case of a small cause nature to a subordinate Court not invested with the powers of a Small Cause Court so long as the Small Cause Court capable of trying it is in existence. 43 I.C. 314. But see 55 M. 960; 1934 L. 901; 147 I.C. 334; 56 B. 387. The section does not apply to cases transferred from a Court of Small Causes to Honorary Munsiff's Courts in U.P. and the decrees passed by the latter Courts in such cases are appealable. 54 I.C. 435; 50 I.C. 648.

Small cause suit transferred to Honorary Munsif—Re-transfer to Munsiff without small cause powers—Inapplicability of section. 1935 A. 765. See also 145 I.C. 701=1933 A.L.J. 1196=1933 A. 662.

APPLICATION FOR TRANSFER.—Where there are numerous suits pending, which are sought to be transferred, an application should be made separately in respect of each suit. 49 I.C. 208=4 P.L.J. 13. Same judgment governing several suits—Appeal filed in some to High Court and in others to District Court—Application for transfer of all appeals to High Court—Separate application and vakalat for each appeal not necessary. I.L.R. (1939) 2 C. 264=43 C.W. N. 836.

APPEAL.—An order of transfer made by the High Court under this section, not being a judgment either under this Code or under any other express enactment, is not subject to appeal. 13 R. 457=157 I.C. 1107=1935 R. 267 (F.B.).

REVISION.—Where a case is transferred under this section no revision lies from the order of transfer. 175 I.C. 525=1938 Lah. 95=39 P.L.R. 654.

SEC. 25—Cf. S. 527 of Criminal Procedure Code, 1898. The Governor-General in Coun-



<sup>1</sup>[Provided that no suit, appeal or proceeding shall be transferred to a High Court without the consent of the Provincial Government of the Province in which that High Court has its principal seat.]

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case.

#### INSTITUTION OF SUITS.

Institution of suits.

26. Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

#### SUMMONS AND DISCOVERY.

Summons to defendants.

27. Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed.

Service of summons where defendant resides in another province.

28. (1) A summons may be sent for service in another province to such Court and in such manner as may be prescribed by rules in force in that province.

(2) The Court to which such summons is sent, shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto.

29. Summonses <sup>2</sup>[and other processes] issued by any Civil or Revenue Court

#### LEG. REF.

<sup>1</sup> This proviso was added by A.O., 1937.

<sup>2</sup> Inserted by Act XXXIV of 1940.

#### NOTES.

cil alone has jurisdiction to pass orders binding on High Courts. 40 M. 835. As to whether parties are entitled to be heard in the matter, see 44 C. 595.

REASONABLE GROUNDS FOR OBJECTION.—As to what would constitute reasonable grounds, see 25 Bom.L.R. 713=82 I.C. 352=1924 B. 90.

SEC. 26: SUIT.—See O. 4, R. 1, *infra*. Any proceeding which does not commence with a *plaint* cannot be deemed a suit. 23 C. 723; 6 A. 269 (P.C.); 22 M. 256; 13 L. 672=33 P.L.R. 508=1932 L. 374. It is not sufficient that the proceeding is capable of terminating in a decree or an order having the force of a decree. (*Ibid.*) An application to file in Court an agreement to refer to arbitration under para. 17 of Sch. II of the Code is not a suit. (*Ibid.*) The essentials of a suit are (i) opposing parties, (ii) a subject in dispute, (iii) a cause of action, (iv) and a demand of relief. 31 B. 393=9 Bom.L.R. 530.

PRESENTATION.—Presentation must be by delivery to the Court or to its officer either personally or by a pleader. 15 M. 137. Sending by post is not sufficient. (*Ibid.*) See however 8 M. 411. For valid presentation neither time nor place is essential. A Judge may validly accept a plaint presented at his private residence or at any other place, and after office hours. 65 I.C. 674=1922 N. 167; 47 M. 312=79 I.C. 1017=1924 M. 448;

34 A. 482 (Memo. of appeal). But the Judge is not bound to receive the same. (*Ibid.*) Plaint returned for presentation to proper Court and re-presented is not continuation of the old suit but filing of a fresh suit. 52 B. 548=1928 B. 421=30 Bom.L.R. 970. But not so where plaint is returned *merely for amendment* and re-presented. 2 A. 832.

SEC. 27: SUIT DULY INSTITUTED, MEANING OF.—Where a suit is dismissed for non-payment of deficit Court-fee, review without notice to the other side is not illegal. Until the suit was registered, the suit could not to have been said to be duly instituted 26 C.W.N. 391=70 I.C. 43=1922 C. 234. See also 52 B. 548. Where a suit has been duly instituted the Court should issue summons to defendant whether he be adult or minor. 22 B. 971. See also 14 C. 204. As to the manner prescribed for service, see O. 5, *infra*.

SEC. 28.—See in this connection O. V, R. 23, *infra*. As to sufficiency of service, the transmitting Court should presume the correctness of the return made by the serving Court, although the presumption is not irrebuttable. 10 B. 202; 33 A. 649=11 I.C. 39. But see 22 C. 889, where it was held that the transmitting Court should not act upon any such presumption.

SEC. 29: WITNESS IN NATIVE STATE—FAILURE TO APPEAR—PROCEDURE.—There is no law by which witnesses in Native States which have made arrangements for mutual service of processes with British India can be compelled to obey the processes, *i.e.*, punished if they fail to do so. If the witnesses so



Service of foreign summonses.

situate beyond the limits of British India may be sent to the Courts in British India and served as if they<sup>1</sup>[were summonses] issued by such Courts :

<sup>2</sup>[Provided that the Courts issuing such summonses<sup>3</sup>(or processes) have been established or continued by the authority of the Central Government or of the Crown Representative, or that the Provincial Government<sup>4</sup>(of the Province in which such summonses or processes are) to be served has by notification in the official Gazette declared the provisions of this section to apply to<sup>4</sup>(such Courts.)]

Power to order discovery and the like.

30. Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,—

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence ;

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid ;

(c) order any fact to be proved by affidavit.

31. The provisions in sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects.

32. The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purposes may—

(a) issue a warrant for his arrest ;

(b) attach and sell his property ;

(c) impose a fine upon him not exceeding five hundred rupees ;

(d) order him to furnish security for his appearance and in default commit him to the civil prison.

### JUDGMENT AND DECREE.

33. The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.

### LEG. REF.

<sup>1</sup> Substituted for " had been " by Act XXXIV of 1940.

<sup>2</sup> Substituted by A.O., 1937.

<sup>3</sup> Inserted by Act XXXIV of 1940.

<sup>4</sup> Substituted by Act XXXIV of 1940 for " by whose Courts a summons is " and " Courts of the province " respectively.

*N.B.*—The amendments made by Act XXXIV of 1940 shall be deemed to have taken effect on the 1st day of April, 1937—See Act XXXIV of 1940, S. 2, Cl. (2).

### NOTES.

summoned fail to appear, the only way to take their evidence is by commission. The rule as to 200 miles is not applicable in such a case. 142 I.C. 201=1933 M. 366=65 M. L.J. 334.

SEC. 32.—See 1929 A. 850. Section does not apply to a person who has been merely ordered to produce documents. 58 I.C. 281=5 P.L.J. 550.

SEC. 33: HEARD.—Judgment passed without opportunity given to parties for being heard is illegal and liable to be set aside on appeal. 91 P. R. 1904; 159 P.W.R. 1906;

and it is not a mere irregularity that could be condoned under section 99. 57 I.C. 34. Where case is transferred after hearing arguments, it is illegal for the transferee Judge to pass judgment without giving fresh opportunity for parties to be heard. 57 I.C. 39. So also where Judge who heard the case was succeeded by another. 110 P.R. 1886. Section requires only hearing and does not insist that any part of the proceedings should have taken place before the Judge passing judgment. 87 P.L.R. 1905.

DECREE.—It is the duty of Court to draw up the decree. 52 I.C. 479=66 P. R. 1919. And party is not bound to apply to Court to do so. 78 I.C. 996=20 N.L.R. 131; 38 B. 331. A mere paragraph in the judgment not drawn up in form of a decree and not embodied in a separate form, does not amount to a decree. 1 L. 223=54 I.C. 913. Omission or neglect to draw up a decree following judgment does not deprive party of his right to appeal. 52 I.C. 479 (*supra*). In cases requiring succession certificate, decree cannot be passed without production of the certificate. 57 I.C. 650. But Court cannot stop drawing up of decree for deficit Court-fee. 11 P. 532.



## INTEREST.

34. (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

## NOTES

SEC. 34: SCOPE AND OBJECT OF SECTION.—This section has no application to interest antecedent to the date of suit, but is concerned only with interest during pendency of suit and after decree. 60 I.C. 288=32 C. L.J. 239. Court has no power to award interest merely because money due is withheld—Facts must be alleged and proved which would make the Court hold that it is payable under a provision of law or a settled principle. 1941 N.L.J. 371. As to object of section, see 106 I.C. 270. Courts are entitled to give interest in their discretion, and this can be given under this section, and also under section 73, Contract Act. 162 I.C. 352=1936 R. 141. Decree cannot be amended for granting interest. 15 A. 121; 35 I.C. 218. Nor can executing Court grant it. 23 C. 357; 3 Bur.L.J. 58=82 I.C. 427=1924 R. 275. Where decree conforms to the judgment, omission to award interest in the judgment even when it is due to an accidental slip or omission, decree cannot be amended to include interest. 50 L.W. 719=(1939) 2 M.L.J. 751=1940 Mad. 29.

FOR PAYMENT OF MONEY.—A decree for sale in enforcement of a mortgage or charge is not a decree for the payment of money. 24 C. 766; 21 M. 364; 19 A. 174; 29 M. 65. A decree for maintenance even when amount is charged on immovable property, is one for payment of money. 47 L.W. 327=178 I.C. 414=1938 M. 522=(1938) 1 M.L.J. 437. Section does not apply where the decree is not for a definite sum of money, but only for partition and accounts. 49 B. 282=94 I.C. 686=1925 B. 406. Decree for money must be construed as including a claim to unliquidated damages. 51 M.L.J. 243. But see 60 I.C. 288=32 C.L.J. 239. The word "money" in the section should not be understood in the limited sense of an ascertained sum of money. The expression "decree for payment of money" is very general and must be construed as including a claim to unliquidated damages, and cannot be restricted in its operation to a claim to liquidated damages. The section leaves the question of granting or refusing interest on damages to the discretion of the Court. 42 Bom.L.R. 750=A.I.R. 1940 Bom. 369. Judgment-debtor depositing decretal amount in Court and applying not to pay to decree-holder without security during pendency of his appeal. In appeal amount of decree was reduced. Decree-holder cannot claim interest since date of deposit, nor judgment-debtor on surplus amount deposited by him. 1929

C. C. M.—58

Lah. 316=120 I.C. 423.

INTEREST DURING PENDENCY OF SUIT.—In money suits, question of interest after institution of suit passes from domain of contract into that of judgment, and plaintiff cannot as a matter of right claim interest. 161 I.C. 862=1936 P. 191. The Court has a discretion as to the rate of interest to be awarded after the institution till judgment, and where the Courts below had awarded 8 per cent., the Privy Council refused to interfere. 43 M.L.J. 66. See also 32 C. 582; 42 A. 230; 12 C. 569; 3 B. 202; 18 C. 164; 17 I.A. 201; 26 I.C. 402; 25 I.C. 658; 96 I.C. 310; 1930 L. 733; 61 C. 711. It is a judicial discretion to be exercised on proper judicial grounds. 26 C. 39 (P.C.). Though award of interest pending suit is discretionary, it should not be refused in the absence of proper reasons. 50 I.C. 862=23 C.W.N. 336. See also 143 I.C. 43=14 P.L.T. 133=1933 P. 207; 106 I.C. 270. The Court must award interest generally at the contract rate, unless it would be inequitable to do so in which case it must give reasons. 61 C. 711; 36 A. 220; 3 A. 91; 28 I.C. 429 (M.); 34 L.W. 843; 143 I.C. 43=1933 P. 207. The fair rate at which interest *pendente lite* should be awarded to the plaintiffs would be 9 per cent. per annum simple from the date of the suit. A.I.R. 1941 Pat. 276. Where the delay in filing a suit for money is due to the assurances given by the defendant to pay interest from date of institution to date of decree should not be disallowed on ground of delay. 148 I.C. 964=1934 L. 93. Mere hardship is no ground for disallowing the contract rate unless there is evidence of undue advantage taken by lender. 60 I.C. 733; 60 I.C. 693. See also 1935 Pesh. 58. The Court has a discretion to award interest on damages for breach of contract from the date of suit up to the date of decree. 39 C. L.J. 77=80 I.C. 87=1924 C. 637. See also 27 Bom.L.R. 1168=1925 B. 547; 51 M.L.J. 243. But see 1931 Sind 121. The Court has discretion to grant interest not specifically asked for in the plaint. 2 L. 256; 55 B. 657; 1932 B. 319=161 I.C. 862=1936 Pat. 191. Interest at 6 per cent. will be allowed in a restitution suit from the date of withdrawal by decree-holder till date of repayment to judgment-debtor. 21 C.W.N. 564. See also 1933 L. 1011 (*Post diem* interest at 6 per cent.). Interest awarded under this section is no part of the claim or relief granted, as in the case of mesne profits. 33 C. 1232. No additional Court-



(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date

#### NOTES.

fee is required on account of the claim for interest from the date of suit until realization. 17 B. 41. See 34 C. 1252.

**FUTURE INTEREST.**—Award of future interest is in the discretion of Court. 14 L. 591=142 I.C. 408=1933 L. 352. See also 145 I.C. 725=1933 L. 440; 61 C. 711. Where a just claim has been unnecessarily prolonged by defendant it is just and equitable to award interest from date of suit till realization. 156 I.C. 836=1935 L. 307. Section 141 of the Oudh Rent Act does not control the discretion possessed by the Court under section 34, C. P. Code, to allow future interest at such rate as the Court deems reasonable. 148 I.C. 1207=11 O.W.N. 763=1934 O. 239. So also in suit for profits by co-sharer under section 225, Agra Tenancy Act, 1926. 1935 A.L.J. 557=155 I.C. 943=1935 A. 505 (F.B.).

**INTEREST IN MORTGAGE DECREES.**—This section applies also to mortgage decrees governed by O. 34, C. P. Code, and authorises the allowance of interest upon the decretal amount from the expiry of the date of grace fixed in the preliminary decree until the date of realisation. O. 34 does not in any way exclude the discretion of Court to allow such interest on the decree. Even in a case to which old r. 4 (1) of O. 34, before its amendment in 1929 applies, the Court has got such power. Rule 11 of O. 34 as amended in 1929, which in clause (b) specifically allows "subsequent interest up to the date of realisation" only gives effect to previous judicial decisions. 63 I.A. 111=15 P. 210=40 C.W.N. 328=70 M.L.J. 355 (P.C.). In the case of mortgage the question as to the rate of interest is to be determined by O. 34, r. 11 and not under section 34. 8 Luck. 315=144 I.C. 983=1933 O. 128. The date referred to in O. 34, r. 2 is the date fixed by Court for payment of money. The Court must ascertain the amount of interest due on the mortgage up to that date according to the contract rate, unless the Court, for some legal reason, sees fit to decrease that rate. 36 A. 220; 33 M.L.J. 679; 17 C.L.J. 120=18 I.C. 747=17 C.W.N. 457. See also 26 C. 39; 34 C. 150; 20 C. 360; 20 B. 744; 21 M. 364; 29 C.W.N. 118=1925 C. 268; 1925 N. 193. The date cannot be extended by an unsuccessful appeal by the mortgagor or mortgagee. 17 C.L.J. 120=18 I.C. 747=17 C.W.N. 457. The Appellate Court can extend time for redemption and the mortgagee would be entitled to interest at the contract rate up to the extended date. 29 I.C. 289. Where there is no express stipulation for the payment of interest after the due date, the mortgagee would be entitled to damages for non-payment of the debt on the date. The measure of damages would be *prima facie* but not necessarily the contract rate. 4 L. 406. [17 A. 511 (P. C.); 3 L. 200 (F.B.), Ref.] See also 44 A. 772. Where the trial Court did not pro-

vide for interest on the mortgage money after the date of filing of a suit for redemption it must be deemed to have declined to award any interest for the period. 37 B. 326=25 M.L.J. 101 (P.C.). Interest from the date fixed for payment to the date of realisation is to be calculated on the principal, interest and costs found to be due on the date fixed and not on the principal alone. Such further interest is to be calculated at 6 per cent., but the Court has a discretion. 42 M. 465=36 M.L.J. 288. See also 47 I.C. 701; 27 I.C. 522; 26 I.C. 177; 34 C. 150; 21 M. 364; 29 M. 176. A Court may in its discretion allow *post diem* interest though not allowed in the mortgage deed. 36 I.C. 685; 30 I.C. 323. See also notes under O. 34, rr. 2 and 4.

**INTEREST IN CASE OF NEGOTIABLE INSTRUMENTS.**—In suit on promissory note which expressly specifies interest payable, Court cannot reduce such rate to be paid up to date fixed by it after institution of suit, unless it is exorbitant or penal or otherwise against the law. 154 I.C. 470 (L.). At the same time it is not necessary that the Court should allow stipulated rate of interest up to date of realization. (*Ibid.*)

**INTEREST ON COSTS AWARDED BY PRIVY COUNCIL.**—The costs of the Privy Council do not carry interest, unless such interest is specially mentioned. 13 P. 21=15 P.L. T. 513=1934 P. 192. But where parties have agreed to have the matter of costs submitted to the discretion of executing Court, the latter can grant it. 3 C. 602=5 I.A. 78 (P.C.). Interest is awardable on costs realized but subsequently ordered to be refunded on reversal of decree. 4 C. 229; 8 A. 262.

**COMPOUND INTEREST.**—The Court has jurisdiction to award compound interest under section 34. [3 A. 91 (P.C.), Rel. on.] 150 I.C. 467=36 Bom.L.R. 68=1934 J. 86. An order allowing interest up to date of decree and compounding it with the principal on the date of the decree and allowing interest thereon at the Court rate is sanctioned by section 34. But where there is no contract, implied or express, and the interest *ante litem* as well as *pendente lite* has been allowed at a rate considered by the Court to be fair, there is no point in compounding the principal and the interest due up to the date of the decree and making interest to run on the aggregate sum at the same rate. Section 34 or its principle is not intended to be used as a means for providing for compound interest but to relieve the debtor of a harder rate of interest. 61 C. 711=1935 C. 39.

**DAMDUPAT.**—The rule of *damdupat* is not applicable after suit even in cases where it is otherwise applicable. 40 C. 710; 22 B. 86; 33 C. 1869; 78 I.C. 632; 1925 N. 193. As regards application of rule to mortgage, see 134 I.C. 274=1931 N. 161=27 N.L.R.



of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefore shall not lie.

### COSTS.

35. (1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

(3) The Court may give interest on costs at any rate not exceeding six per cent. per annum, and such interest shall be added to the costs and shall be recoverable as such.

### NOTES.

116. See also 42 C. 826; 35 B. 199. But see 26 M. 662.

SEC. 34 (2).—Where a decree is silent with respect to interest, the Court must be deemed to have refused it. 45 M.L.J. 687 = 18 L.W. 606 = 75 I.C. 566 = 1924 M. 102. There is no inherent power under section 151, to award interest in such a case. 82 I.C. 427 = 1924 R. 275. As to the object of the rule, see 106 I.C. 270.

SEC. 35: AWARD OF COSTS, PRINCIPLES REGARDING.—The ordinary rule is that costs should follow the event; but the Court has a discretion to depart from this rule and such discretion is to be exercised on well-recognised principles. 145 I.C. 376 = 1933 R. 160; and not arbitrarily. 27 M. 341; 7 C.W.N. 647; 58 I.C. 421 = 24 C.W.N. 352; 90 I.C. 577. See also 1926 O. 35; 5 O.W.N. 35. The Privy Council or any Court of appeal will not interfere with the discretion exercised by the lower Courts. 59 I.A. 1; 35 Bom.L.R. 569; 142 I.C. 656 = 1933 M. 224; 1933 O. 455; 1933 A. 311; 1933 N. 49; 149 I.C. 901 = 11 O.W.N. 754 = 1933 O. 259; 144 I.C. 76 = 1933 A. 311. Costs by way of disciplinary measure not permissible. But costs against non-parties are awardable. 52 A. 619 = 1930 A. 225 (F.B.); 53 M. 708 = 58 M.L.J. 318. Under section 35, Courts have in certain cases power to make persons who are not parties liable for costs. (1930 A. 225, Foll.) 1934 N. 250 (1). Court's power to award costs is not confined only to amount of costs incurred after filing of suit. In certain cases, as where Receiver applies for leave to sue, Court can include in suit also the costs of application for leave to sue. 40 C.W.N. 762. Where both parties make false allegations costs may not be allowed to either side. 31 I.C. 862. In deciding the question of costs, a Court is entitled to consider not merely the conduct of the parties in the actual litigation but also matters which led up to the litigation. 13 C. L.J. 404 = 10 I.C. 90 = 16 C.W.N. 805; 116 I.C. 717 (2). See also 148 I.C. 523 = 1934 M. 183; 1934 A. 746. Where the suit has been caused by the conduct of the returning offi-

cer, each party may be ordered to bear his own costs. 24 C.W.N. 189 = 53 I.C. 741 = 30 C.L.J. 270. Where the litigation was due to vagueness of testamentary directions, costs of all parties should come out of testator's estate. 19 S.L.R. 220. See also 8 P. 419. The plaintiff in a suit claimed mesne profits for two years, but the Court by an oversight awarded him profits for three years instead of for two. The defendant appealed, and the appellate Court, while reducing the period for two years, allowed the plaintiff only proportionate costs. Held, in second appeal, that the defendant could have had the mistake corrected without an appeal, and that the plaintiff should not be made to suffer for the mistake of the trial Court and that he should be awarded full costs. 152 I.C. 180 = 11 O.W.N. 1165 = 1934 O. 449. Unless there is a specific reference to any personal order for payment of costs, a decree for costs should not be interpreted to imply a personal decree for costs. 1930 O. 167. Order awarding costs personally against party and making same a first charge on sale proceeds of specific property—whether personal liability is taken away. 1937 M.W.N. 292. Section does not empower Court to direct defendant to put plaintiff in funds for the suit or even to secure plaintiff's costs. 34 C.W.N. 319. Costs ordered to be paid by creditor to debtor on setting aside adjudication cannot be set off to the prejudice of solicitor's lien against the debt due by debtor. 32 Bom.L.R. 1076. Where there are several parties, a decree for costs ordinarily imposes a joint and several liability. 13 Pat.L.T. 619. As to the propriety of award of costs against *ex parte* defendants only, when the suit was contested by some other defendants, see 18 N.L.J. 323. A solicitor can enforce in execution costs awarded to him. 1932 B. 378. Once a solicitor is on record, the opposing party is entitled to look to him if successful for his costs, if it turned out that the so-called plaintiff is a non-existent person. 145 I.C. 641 = 35 Bom.L.R. 554 = 1933 B. 317. In insolvency proceedings, an order for costs against Receiver imports a personal liability. 54 A. 444. Parties are



## NOTES.

the recipients of costs and not their pleaders. The duty of an advocate is to file an execution application on behalf of his client. Though he has to sign it in the course of his duties, it is only on behalf of his client. The execution must be in the name of the person to whom costs have been awarded (*i.e.*) the client. 1940 A.M.L.J. 18.

**COSTS OF SUCCESSFUL PARTY.**—As a rule costs should be awarded to the successful party. It is not necessary that he should be wholly successful, and substantial success is enough. 18 B. 474; 3 C. 473; 24 C.W.N. 352; 40 C.L.J. 504=1925 C. 297; 1923 L. 513 (2); 54 M.L.J. 603; 1923 L. 302 (1); 1936 C. 277. No matter how *bona fide* the defence may be, the plaintiff cannot be deprived of his costs unless he has done something which would warrant the Court depriving him of it. 145 I.C. 376=1933 R. 160. *See also* 162 I.C. 837=1936 Sind 52 (Case where defendant succeeds). 170 I.C. 9=1937 Sind 159. The fact that questions of law raised are not easy of solution is not a good ground for not allowing the costs of a successful litigant. 23 M. L.J. 638. Plaintiff finding difficulty in valuing claim—Right to full costs. 51 A. 509. Mere variation in appeal as to method of computing compound interest in a mortgage suit, would not deprive respondent of his costs in the appeal. 1935 M.W.N. 408=157 I.C. 232=1935 M. 468.

**FULL COSTS.**—Where full costs are not awarded to the successful party, reasons ought to be recorded. 14 L.R. 92 (Rev.)=17 R.D. 164. Plaintiff who declines to accept a tender of *part payment* is nevertheless entitled to full costs. I.L.R. (1938) 2 C. 337=42 C.W.N. 1023.

**COSTS OF SUCCESSFUL PARTY, WHEN MAY BE DISALLOWED.**—In a proper case the Court may deprive the successful party of costs. 59 I.A. 318=56 B. 374=63 M.L.J. 623 (P.C.); 30 C. 213; 25 A. 287; 31 C. 332 (P.C.); 1929 R. 148 (2); 1929 B. 267; 148 I.C. 246=1934 O. 10; or even saddle him with costs of the other party. 9 C.W.N. 844; 21 C.W.N. 1137 (P.C.); 40 A. 558. But if it does so, it must give reasons in writing. 30 C. 536. For other cases regarding conduct of parties determining the award of costs, *see* 24 C.W.N. 110=30 C.L.J. 417; 17 L.W. 358=73 I.C. 329=1923 M. 485; 53 B. 178; 145 I.C. 376=1933 R. 160; 1929 M. 493 (Costs disallowed owing to the vindictive nature of the proceeding launched by the client against his pleader for professional misconduct); 58 I. C. 421=24 C.W.N. 352; 62 I.C. 812; 21 I. C. 944=16 P.L.R. 1914; 38 I.C. 695=5 L.W. 672 (*Bona fide* mistake of a temple committee in instituting proceedings); 1939 N.L.J. 421=1939 N. 274 (*Bona fide* suit by executors instituted under legal proceedings—Executors cannot be made personally liable for costs.) 67 M.L.J. 787 (Personal liability of trustee for costs); 40 I.C. 614 (Tender of rent due before suit); 65 I.C.

709 (Delay in the final disposal of the suit due to the laches of the plaintiff). *See also* 61 M.L.J. 623 (P.C.); 85 I.C. 445=1925 O. 561 (Vague and loose drafting of grounds of appeal). A successful appellant may not get his costs, because his case was not properly represented in the lower Court. 104 I.C. 325 or where his appeal has succeeded on a technical ground not pleaded in lower Court. 1939 N.L.J. 525=1940 Nag. 8. Costs disallowed where proceedings could have been taken in a cheaper Court. 45 B. 1236. Where suit is overvalued, costs will be allowed on proper valuation. 87 I.C. 1002. Costs disallowed to the successful party for raising inconsistent pleas regarding effect of document whose construction was in issue. 38 I.A. 104=33 A. 344 (P.C.); for putting in confused pleadings. 18 R.D. 516=15 L.R. 652 (Rev.); for failure to prove exclusive title set up by successful party. 19 I.A. 48=19 C. 253 (P.C.) *See also* 1940 M.W.N. 14. Costs were awarded to the respondent against the successful appellants in view of special difficulties in construction of will and nature of contentions. 38 B. 399=26 M.L.J. 647 (P.C.). The Court can disallow costs where suit was based on a state of law, which since has been overruled. 43 M. 61=37 M.L.J. 271; 47 B. 559. *See also* 1930 A. 167.

**PRACTICE AS TO AWARD OF COSTS.**—*See* 39 Bom.L.R. 820 as to the duties of mufassil Courts and of parties and advocates in the matter of costs if interlocutory proceedings in the matter of compulsory winding up of companies under the Indian Companies Act. On a dismissal of suit several defendants should not be awarded separate costs where they are represented by the same advocate and their case is practically identical. 152 I.C. 71=1934 R. 259. Excessive costs should not be allowed where a plaint is rejected at an early stage. 35 P.R. 1914=25 I. C. 435. The Court-fee paid on part of the claim subsequently withdrawn cannot be recovered. 23 I.C. 231. Withdrawal of suit—Court's discretion to award costs is not restricted by the use of the word "shall" in O. 23, R. 1. 2 O.W.N. 901=1925 O. 699. Suit not pressed—Defendant not to be deprived of costs because he refused to disclose the details of his defence to plaintiff before suit. 1930 B. 152. Where the appellate decree is silent as to costs, the decree of the trial Court is the guide to determine the costs. 62 I.C. 299=13 Bur.L.T. 173. Travelling expenses of witnesses can be recovered. 67 I.C. 277=1923 C. 315 (1). Where a party had actually paid diet money to the witnesses on certain occasions when the Court could not examine them, there is no justification for disallowing costs incurred in that manner, especially when the summoning of those witnesses had been necessitated by a false plea raised by the opposite party. 42 P.L.R. 263=A.I.R. 1940 Lah. 182. It is not the law that it is only the expenses of the



## NOTES.

witnesses summoned through the Court, that can be included in the costs of the party. The costs of the witnesses not summoned through Court are allowable if the party satisfies the Court that he has brought the witnesses from another district and he had paid the expenses and further satisfies the Court that the expenses are reasonable. 1928 L. 800. In awarding costs, the Court should not include costs of witnesses who were summoned but were not examined in Court. 164 I.C. 689 (1)=38 P.L.R. 219=1936 L. 681. On a question of pleaders' fees, the Court will not interfere with the opinion of the Taxing Master unless it is wrong on principle or very clearly wrong in detail. 45 B. 1234. The words "*abide the result*" are equivalent to the words "*costs in the cause*". 39 M. 476=28 M.L.J. 441. As to proper order as to costs that should be passed when suit is remanded for trial on merits, see 164 I.C. 133=1936 R. 316. Order for costs in an interlocutory application to be costs in the cause, cannot be varied by the trial Judge. 50 B. 430. Taxation of costs in third party proceedings, see 59 I.C. 18=21 Bom.L.R. 808 at p. 816. As to costs incurred before the arbitrator or umpire, see 54 M.L.J. 580; 54 A. 122. District Court can decide even after an appeal has been disposed of by High Court, whether its own order of taxation is right or not. 28 Bom.L.R. 550=95 I.C. 515=1926 B. 367. The costs of an application for stay of execution pending appeal should ordinarily be costs in the appeal. 56 C. 276.

**SEPARATE SETS OF COSTS.**—In the case of several plaintiffs only one set of costs is generally permissible. 1938 Rang. L.R. 252. Different sets of costs can be awarded when there are several defendants raising various defences. 31 I.C. 312=1915 M. W.N. 1021; 1929 O. 536. When the suit of a reversioner against various alienees is decreed with costs, each set of defendants are liable only for the costs proportionate to their interest. 1928 M. 16. Where plaintiff's suit is dismissed each defendant is entitled to costs taxed on the basis of the suit valuation and not on the basis of what each defendant's interest might be in the suit itself. 27 Bom.L.R. 692=89 I.C. 211=1925 B. 432. When a defence is common and not separate only one set of costs should be awarded. 9 A. 205; 4 M. L.J. 281. And it is not material that separate counsel have been engaged. 1936 A.M.L.J. 63. See also 11 Bom.L.R. 158 (P.C.). Where a suit was brought by the plaintiff against two defendants claiming relief against them in the alternative and his suit was dismissed as against both of them, two sets of costs, one set to each of the defendants, may be properly awarded. 144 I.C. 703=1933 A.L.J. 796=1933 A. 466. Award of costs on

abatement of suit, see 37 M.L.J. 596=43 M. 284; 22 M.L.J. 439.

**APPORTIONMENT OF COSTS.**—As to rule for apportionment of costs in England and in India, see 4 P. 510. See also 88 I.C. 141. The expression "*costs will follow the event*" means that where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. So where in a suit praying for sale as well as a personal decree, the plaintiff was given only a mortgage decree and not a personal decree, the Court, if it deprives the defendant of his costs on the issue relating to the personal decree, should, under S. 35 (2), state its reasons for so doing. If it failed to do so, the appellate Court can interfere with the order. 141 I.C. 262=29 N.L.R. 8=1933 N. 49. See also 95 I.C. 446 (2); 142 I.C. 835=1933 R. 38; 144 I.C. 738=1933 L. 329; 1936 A.M.L.J. 63. Case disposed of on a preliminary point—Scale of costs to be awarded. See 1933 R. 337. A party succeeding on a particular issue must ordinarily get his costs of that issue unless there is special reason to deprive him of it or the issues are closely and inseparably connected with each other. 45 I.C. 738=27 C.L.J. 78. Where alternative relief was claimed against either of two defendants who were disputing their liability, the unsuccessful defendant should be made to bear the costs of the successful defendant. 42 I.C. 636.

**COURT'S DISCRETION TO AWARD INTEREST ON COSTS.**—The power to award interest on costs is discretionary and can be inserted after judgment while framing the decree. 35 I.C. 218; but see also 60 I.C. 345. Where a decree does not allow interest on costs, it cannot be allowed in execution. 6 Bom. L.R. Ap. 33; 3 C. 351.

**NO SEPARATE SUIT FOR COSTS.**—No separate suit for costs is maintainable when the Court has made no order as to costs. 2 B. 360. Contribution for costs among several defendants. See 145 I.C. 250=1933 L. 960.

**COSTS IN MORTGAGE SUITS.**—Where provisions of O. 34, r. 10 apply as to costs in mortgage suits, this section has no application. 49 L.W. 525=1939 M. 654=(1939) 1 M.L.J. 687. A mortgagor is ordinarily entitled to costs in a redemption suit unless he forfeits his right by laches. 38 I.C. 655. A mortgagee is ordinarily entitled to costs of suit, unless he is guilty of grave misconduct. 19 I.C. 474. Or he denies the mortgagor's right to redeem. 91 I.C. 943=1926 M. 405. As to the circumstances in which a puisne mortgagee may be called upon to pay costs, see 10 R. 308. The Court has jurisdiction in a mortgage suit to make a party other than the mortgagor personally liable for the costs of the litigation, if in the opinion of the Court, the conduct of such party justifies it. 40



## NOTES.

L.W. 576=1934 M.W.N. 321. On this point *see also* 56 M. 469=1933 M. 411=64 M.L.J. 489. In the ordinary way a puisne mortgagee is not made liable for costs in the mortgage suit; if the puisne mortgagee, by his conduct, makes himself liable for the contest, in certain circumstances it may be legitimate to make him pay the costs apart from the costs given in the mortgage decree, but the utmost that he can be made liable for is the extra cost, caused by his unnecessary contest. 1933 R. 335. *See also* 17 L. 520=38 P.L.R. 1024=1936 L. 607. Where the transferee of the equity of redemption raised several pleas for which there was no foundation, he may be personally liable for costs. 144 I.C. 738=34 P.L.R. 171=1933 L. 329; 48 M.L.J. 213 (Costs in redemption suit) 38 P.L.R. 896=1936 L. 705 (Costs in suit for sale). In an unsuccessful appeal by the mortgagor, the mortgagee is entitled to add to the security the costs of the appeal. 40 A. 473. Mortgage decree with costs, how to be realized. *See* 93 I.C. 364=1925 C. 1135; 129 I.C. 554; 30 N.L.R. 331=1934 N. 264.

**COSTS IN PARTITION SUITS.**—Costs in a partition suit up to the preliminary decree ought not to be given to plaintiff but to be borne by all the parties. 42 C. 451; 11 L. W. 5. Where in a suit for partition the defendant pleaded prior partition which was eventually proved against, the Court could direct the defendant to pay the costs of the suit. 35 C.W.N. 151. *Costs in arbitration proceedings*, *see* I.L.R. (1940) Kar. 34; *costs in land acquisition proceedings*, (1940) 2 M.L.J. 753.

**COSTS IN MAINTENANCE SUITS.**—While awarding costs Courts have to see whether there was any *prima facie* excessive or exaggerated claim made in the plaint. 1930 M. 479; where exaggeration of claim is due to defendant's conduct full costs can be awarded. 54 M.L.J. 530. Order conditional on payment of costs—Appeal against order for costs only—Not maintainable. 32 Bom. L.R. 406.

**COSTS IN A REPRESENTATIVE SUIT.**—*See* 42 B. 566; 60 I.C. 362. Costs of all parties in a scheme suit may be directed to be paid out of the trust funds. 25 M.L.J. 199 (P.C.). Trustees ought to have their costs out of the trust estate in legal proceedings concerning the estate, unless they have unreasonably carried on or resisted such proceedings. 39 I.C. 388=21 C.W.N. 339. Where a litigation is caused by the language of a will, its costs should be borne by the estate and not by the trustees. 39 M. 476; 24 I.C. 96. Costs in pre-emption suits. *See* 71 P.R. 1915=30 I.C. 517. Costs of intervenor in administration proceedings. *See* 134 I.C. 274; 48 C. 352. In an unsuccessful litigation, the Secretary of State is liable to pay costs like any other unsuccessful party. 5 P.L.J. 321=56 I.C. 507. Receiver suing or being sued is per-

sonally liable for costs like any other litigant. 1931 N. 143. As to costs in arbitration, *see* 54 A. 122. The Court has discretion to refuse costs to plaintiff for preferring unnecessary appeal. 1932 M. 779=63 M.L.J. 868. As to costs against co-plaintiff financing litigation, *see* 32 P.L.R. 540.

**COSTS IN SUIT. BY OR ON BEHALF OF MINORS.**—Next friend or guardian of minor litigants can be made liable for costs. 1929 M. 782; 58 M.L.J. 623. *See also* 42 L. W. 542=158 I.C. 831=1935 M. 886. But *see* 50 A. 733. The Court has the power to order an unsuccessful infant plaintiff to pay the defendant's costs or to direct it to be paid out of minor's estate and *vice versa*. The Court can also order the next friend or guardian *ad litem* to pay the costs personally. 61 C. 227=59 C.L.J. 9=1934 C. 474.

**COSTS IN INCOME-TAX CASES.**—Income-tax reference—Costs of application of assessee to High Court—Made payable by Commissioner who wrongly refused to state a case on assessee's request. 8 R. 209 (F.B.). Income-tax reference—Successful assessee is entitled to recover his deposit. 52 A. 991=1931 A. 23.

**PRIVY COUNCIL COSTS.**—Where a party lodged a case but did not appear at the hearing and the appeal was dismissed with costs, the costs should be paid to respondent. 49 M.L.J. 238 (P.C.). Appeal to Privy Council presented but not prosecuted—Respondent entitled to costs on petition for leave to appeal. 27 Bom.L.R. 699=89 I.C. 213=1925 B. 471.

**APPEAL AS TO ORDER FOR COSTS.**—Appeal does not lie under Clause 15 of the Letters Patent against an order relating merely to costs but an appeal would lie when such order is incidental to a judgment. 26 M.L.J. 356. *See also* 27 Bom.L.R. 692=89 I.C. 211=1925 B. 432 (Appeal lies from order directing how costs are to be taxed). An appeal raising only a question of costs is incompetent where it does not contain a question of law. 47 C. 67; 39 I.C. 388=21 C.W.N. 339. An appellate Court will interfere when there is patently erroneous order. 26 M.L.J. 356=1937 O.W.N. 165=166 I.C. 928=1937 Oudh 282. Appellate Court can interfere if satisfied that the discretion has not been judicially exercised by the lower Court. 40 A. 558. *See also* 45 I.C. 738=27 C.L.J. 78; 44 I.C. 870=22 C.W.N. 372; 20 C.W.N. 929=36 I.C. 655; 122 I.C. 102; 7 O.W.N. 1055. Also where there has been a misapprehension of facts and violation of principle. 42 B. 327. *See also* 24 C.W.N. 352; 16 B. 676. Also where discretion exercised by lower Court was based on an erroneous view of the law. 166 I.C. 928=1937 O.W.N. 165. Second appeal lies on a question of costs only where an important question of principle has been decided. 41 A. 254; 35 C.L.J. 156; 46 I.C. 544; 12 C. 197; 12 C. 171. *See also*



<sup>1</sup>[35-A. (1) If in any suit or other proceeding, not being an appeal, any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter,

Compensatory costs in respect of false or vexatious claims or defences.

as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court, if the objection has been taken at the earliest opportunity and if it is satisfied of the justice thereof, may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector by the party by whom such claim or defence has been put forward, of costs by way of compensation.

(2) No Court shall make any such order for the payment of an amount exceeding one thousand rupees or exceeding the limits of its pecuniary jurisdiction, whichever amount is less :

Provided that where the pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887, and not being a Court constituted under that Act, are less than two hundred and fifty rupees, the High Court may empower such Court to award as costs under this section any amount not exceeding two hundred and fifty rupees and not exceeding those limits by more than one hundred rupees :

Provided, further, that the High Court may limit the amount which any Court or class of Courts is empowered to award as costs under this section.

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him.

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence.]

#### LEG. REF.

<sup>1</sup> Inserted by S.2 of Act IX of 1922.

#### NOTES.

119 I.C. 449 (F.B.). As to revision by High Court, see 24 M.L.J. 212. Order conditional on payment of costs—Appeal against order for costs only—Not maintainable. 32 Bom.L.R. 406.

SEC. 35 AND O. 7, R. 10.—The Court, when passing an order under O. 7, R. 10, C.P.Code, returning a plaint for presentation to the proper Court, has no jurisdiction to impose a condition that the plaintiff whose plaint is returned shall, before presenting it to that Court, pay the costs of the defendant as a condition precedent. Though under section 35, the fact that a Court has no jurisdiction to try a suit is no bar to the exercise of the power to award costs, there is no power to make payment of costs a condition precedent to the filing of the suit in the proper Court. 54 L.W. 817=(1941) 2 M.L.J. 450.

SEC. 35-A.—This section does not apply to revision applications in the High Court. 42 C.W.N. 658. The framing of specific issue as to compensatory costs is not an essential condition under section 35-A, C.P. Code. The non-framing of such an issue is not therefore a material irregularity

meriting interference in revision. 1941 R. D. 383. Compensation under section can be awarded only after objection by the opposite party. 94 I.C. 78 (2)=1926 L.472 (2). See also 94 I.C. 790=1926 A. 554. Where the Court finds that the defendant has been harassing the plaintiff over a plot of land and repeatedly refusing to obey the orders of the Courts, the Court may award punitive costs against the defendant. 14 L.R. 145 (Rev.)=17 R.D. 227. See also 15 L.R. 115 (Rev.)=18 R.D. 29. What is awarded under section 35-A is nothing but "costs" covered by section 35 and can be awarded against next friend of minor. 52 A. 907=1930 A. 577 (2). Costs allowed are compensatory and not penal. 1931 L. 509=131 I.C. 377. See also I.L.R. (1938) All. 370=176 I.C. 118=1938 A. 266. The Collector has no power in hearing an appeal to award penal cost on the ground that the claim was false and vexatious. 15 L.R. 115 (Rev.)=18 R.D. 29. See also 14 L.R. 145 (Rev.)=17 R.D. 227. Insolvency Court in exercise of its original civil jurisdiction can award exemplary costs under this section. 31 N.L.R., 365=158 I.C. 394=1935 N. 207. It is not material whether this section was in existence when Provincial Insolvency Act came into force. (*Ibid.*)



## PART II. EXECUTION.

### GENERAL.

36. The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.

37. The expression "Court which passed a decree," or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,—

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

#### NOTES.

SEC. 36.—Section 36 is not limited to orders made only under the Code, but applies to all orders which can be included in the definition of the term "order" as defined in section 2 (14). An order made on a notice of motion for contempt is an order within the section. 36 Bom.L.R. 992=1934 B. 452. Order under O. 21, R.11 (2) can be executed as if it were a decree. 2 R. 673. Order under section 34, Guardian and Wards Act, 1890, directing guardian to pay amount for expenses of marriage of a person dependant on the ward, is not within section (2) (14) of the Code; and hence this section will not apply. 41 M.241=6 L.W. 526=41 I.C. 341. As to orders under the Guardian and Wards Act capable of being executed by proceedings under the Act itself, *see* 23 A.L.J. 428=88 I.C.165=1925 A. 457. Decree passed in favour of and against dead man—Distinction between. 1929 C. 527=120 I.C. 459. Partial decree in favour of plaintiff—Unsuccessful appeal—Application for mesne profits—Appellate decree as the starting point. 1930 C. 308=33 C.W.N. 904.

SEC. 37: SCOPE AND APPLICATION.—The section embodies an inclusive definition and cannot be construed against the decree-holder. 137 I.C. 183=34 L.W. 27=1932 M. 260=61 M.L.J. 307. The section is permissive. If after a Court has passed a decree, the local jurisdiction in respect of the suit is transferred to some other Court, the Court which passed the decree may still execute it. 28 C. 238; 35 C. 974; 25 C. 315. *See also* the Full Bench decision in 42 M. 821=37 M.L.J. 284, overruling 37 M. 462=26 M.L.J. 189; 1928 M. 746=28 L.W. 885; and 61 M.L.J. 307=137 I. C. 183. Section applies to cases where the territorial jurisdiction of the Court is changed, as also to cases where the status of the parties is changed and the ceasing of the jurisdiction is due to either of these causes. 17 B. 162. As to effect of transfer of suit on interim orders, *see* 1941 A.L.

J. 46. *See also* 49 M. 746=50 M.L.J. 161; 7 P.L.T. 333=92 I.C. 900=1926 P. 209. On this section, *see also* 41 C.L.J. 166; 1925 C. 679; 4 P. 688.

SEC. 37 (a).—It is only the original Court and not the High Court that has to execute the appellate decree of even the Privy Council. 38 M. 382=23 I.C. 235=26 M.L.J. 185.

SEC. 37 (b): CEASED TO EXIST.—The power to execute a decree is vested in the Court which passed the decree. But in the event of the Court ceasing to exercise jurisdiction, it would be exercised by the Court which would have power to try the suit at the time when the application was filed. 49 I.C. 958 (P.); 48 I.C. 107=3 P.L.J. 435. A Court does not cease to be Court which passed the decree merely by reason that the headquarters of such Court are removed to another place or merely because the local limits of the jurisdiction of such Court are altered. 6 C. 513. Nor because the pecuniary limits of its jurisdiction has been altered. 2 P.L.J. 113=39 I.C. 63. Nor by alter of its name. 30 I.C. 205. Nor by change of Judge. 4 P. 688=7 P.L.T.333=92 I.C. 900=1926 P. 209. Change of territorial jurisdiction—Abolition of Court—Original execution petition filed in wrong Court—Subsequent confinement of jurisdiction—Effect. *See* 57 M. 995=148 I.C. 1088=1934 M. 283=66 M.L.J. 492. A Court can be said to have 'ceased to exist' only when it has been abolished and not revived. 7 P.L.T. 333 (*supra*); or when any special jurisdiction (*e.g.*, small cause powers) has been withdrawn after passing of decree. 19 M. 445; 49 I.C. 958 (P.) (Land Acquisition).

CEASING TO HAVE JURISDICTION.—A Court which passed a decree does not lose jurisdiction to execute the same merely because subsequent to the decree its pecuniary jurisdiction has been curtailed. Where the Judge passing the decree had jurisdiction to pass a decree for the amount but his successor before whom the execution application was made had only a more limited



## COURTS BY WHICH DECREES MAY BE EXECUTED.

38. A decree may be executed either by the

Court by which decree may be executed.

Court which passed it, or by the Court to which it is sent for execution.

## NOTES.

jurisdiction so that he could not entertain such suit, *held*, that the succeeding Judge was competent to entertain the application for execution. 37 C.W.N. 679=1933 C. 684. Where subsequent to the passing of a money decree the area is transferred from the jurisdiction of the Court which passed the decree to that of another Court the latter Court can execute the decree. 45 M.L.J. 210; 61 M.L.J. 307. *See also* 49 I.C. 958 (P.); 48 I.C. 107=3 P.L.J. 435. Decree passed by Sub-Court of Berhampore and confirmed by Madras High Court before constitution of Orissa Province—Where execution application to be filed—Order in Council, section 20. 49 L.W. 338=1939 M. 463=(1939) 1 M. L.J. 340. When the Court which passed a mortgage decree is in existence, no other Court has jurisdiction to execute the decree, though the hypotheca may be within its jurisdiction unless and until the decree was transferred to it for execution. 42 M. 461=36 M.L.J. 199. Where the Court passing a decree loses jurisdiction, the new Court cannot execute the decree without transmission of the decree by the first Court. 55 M. 801 (F.B.). Though a defendant did not object to jurisdiction at the time of the final decree he could do so in execution. 50 M. 882=52 M.L.J. 605.

SEC. 38: SCOPE.—Section not exhaustive. 47 A. 57; 20 Pat.L.T. 585=1939 Pat.532. Particular execution application may be transferred. (*Ibid.*) Court can call back transferred decree. 50 B. 439=28 Bom. L.R. 381; 62 M.L.J. 687 (F.B.). Equitable execution—Calcutta High Court original side—Decree creating charge on moffusil property—Appointment of Receiver with power to sell — Jurisdiction. 34 C. W. N. 238=57 C. 964. 'Court' includes also Court of Dy. Commissioner of the Garo Hills, 41 C.W.N. 1243=1937 C. 557, although it is in a Scheduled District and the whole of the C.P.Code is not in operation there but only a portion. (*Ibid.*) This section does not control section 63, and the power of the Superior Court to call up proceedings from inferior Court and sell up property attached by the inferior Court. 48 L.W. 664=1938 M.W.N. 1098.

TERRITORIAL JURISDICTION.—Territorial jurisdiction though not necessary for the trial of suits is necessary for the executing Court apart from the special and exceptional procedure by precept. 33 M.L.J. 750; 35 C.W.N. 77=58 C. 832. On this section, *see* 80 I.C. 901=1925 P. 139. Under section 38 a Court which passes the decree is competent to entertain an execution application even though it may be incompetent to execute the same owing to the fact that the property to be attached or the judgment-debtor to be arrested is outside the

Court's jurisdiction. 1941 O.A. (Supp.) 789=1941 A.W.R. (Rev.) 915. Territorial jurisdiction is a condition precedent to the execution of a decree. The Court having jurisdiction over the property which is the subject-matter of the suit in which the decree is passed has alone the power to execute the decree. 48 I.C. 107=3 P.L.J. 435; 6 C. 201; 35 I.C. 96; 31 M.L.J. 22. [But *see also* the cases cited under section 37 as to loss of territorial jurisdiction after the passing of decree.] So the decree must be transferred to the Court within the local limits of whose jurisdiction the property sought to be attached is for the time being. 4 P.L.J. 141. *See also* 50 M. 882=52 M.L.J. 605; 55 M. 801=62 M.L.J. 687 (F.B.). But in cases of decrees for sale of mortgage property, an exception has been recognised and a Court can order sale of properties comprised in the mortgage though some of them are situated in another district. 80 I.C. 901. *See also* 14 C. 661; 15 C. 667; 19 C. 13; 21 C. 689; 22 C. 871; 107 I.C. 195; 29 I.C. 745 (M.). In the execution of a mortgage decree the executing Court has power to order the sale of the property mortgaged, even though the property may be situated beyond the local limits of its jurisdiction. (14 C. 661; 21 C. 639; 15 C. 667; 49 M. 746; 80 I.C. 901, Foll.) 14 L. 457=143 I.C. 574=1933 L. 687. If two Subordinate Judges have the same local jurisdiction assigned to them, it is certainly competent for the District Judge to distribute the business among the two officers, but that would not empower the District Judge to make any order in contravention of section 38, and direct that the decree passed by one of the officers could be executed by the other. 73 C.L.J. 351. The Court executing the decree must be of a grade competent to entertain the suit itself. The words 'of competent jurisdiction' in section 39, mean, of jurisdiction pecuniarily competent to try the suit in accordance with the provisions relating to the pecuniary jurisdiction of Courts and territorially competent to deal with the execution application in accordance with the rules relating to the execution of the decree. 1940 N.L.J. 244. The transferee Court contemplated by section 39 must be a Court of competent jurisdiction, that is, a Court which has the same pecuniary jurisdiction as the transferee Court. 70 C.L.J. 438=A.I.R. 1940 Cal. 161. There is nothing in the C. P. Code which makes it necessary that the Court to which the decree is transferred for execution should be a Court having a limit of pecuniary jurisdiction which would include the original valuation of the suit. When once a decree has been passed the question of execution of one decree is the same as the execution of another of the same amount and no question of the original valuation of the suit has any real bearing on the question of execution of a decree. It is the value of the de-



39. (1) The Court which passed a decree may, on the application of the  
 Transfer of decree. decree-holder, send it for execution to another  
 Court,—

## NOTES.

cretal amount which determines the importance of the case for the limits of pecuniary jurisdiction. I.L.R. (1940) All. 318=1940 A.L.J. 381=A.I.R. 1940 All. 331.

**PECUNIARY JURISDICTION.**—As to pecuniary jurisdiction of the Court to which a decree is sent for execution, see the cases cited under section 39. Jurisdiction is not lost in execution, because the interest which accrued after decree has raised the amount due. 10 B. 200. Also where the pecuniary limits of the jurisdiction of the Court are exceeded by the amount of rent or mesne profits ascertained for a period subsequent to the institution of the suit. 21 C. 550; 40 C. 56.

**CONCURRENT EXECUTION.**—There is nothing in law against a decree being simultaneously executed in more places than one against the property of the judgment-debtor. 34 I.C. 302=3 L.W. 336; 4 M.L.A. 529; 8 C. 687; 1929 B. 418. Where a decree is transferred to another Court for execution, concurrent execution of it is permissible in the Court from which the decree has been transferred. 39 I.C. 729=15 A.L.J. 532; 1939 R. 433; 1940 Sind 11; 41 Bom.L.R. 481. But see also 37 M. 231 and 39 M. 640, *infra*; 1930 L. 199; 55 M.L.J. 545=55 I.A. 227 (P.C.); 1936 A.L.J. 237=162 I.C. 51=1936 A. 655. An application for execution has to be made to the Court to which the decree has been transferred and not the Court which passed the decree, so long as the former Court has the seisin of execution proceedings. An application to the latter Court is not a step-in-aid of execution. 39 M. 640=31 M.L.J. 300 (P.C.) affirming 37 M. 231. But see 58 C. 832=35 C.W.N. 77. See also 2 P. 247.

**APPLICATION FOR SUBSTITUTION OF LEGAL REPRESENTATIVES.**—Application by legal representatives for substitution must be made to the Court which passed the decree and not to the Court to which it is transferred for execution. 55 I.C. 156; 1926 M. 411. This is a matter of procedure and non-compliance with it may be waived. Where the decree-holder applied to the transferee Court for substitution of legal representative, and if the legal representative added acquiesced, he is deemed to have waived the objection. 55 M.L.J. 545=55 I.A. 227 (P.C.).

**EXECUTING COURT, IF CAN REFUSE TO EXECUTE.**—An executing Court cannot refuse to execute a decree passed against a minor not properly represented in a suit. (1928 M.W.N. 227; 15 C.W.N. 725, foll.) Decree being a nullity—Single man firm—Suit against firm—Death of person carrying on business—Decree passed after death—Nullity—Power of executing Court not to give effect to it. 34 C.W.N. 36=57 C. 931=126 I.C. 118.

**SEC. 39: SCOPE AND APPLICATION.**—The section is only directory and not mandatory. 19 C. 13; 15 C. 667; 1937 C. 570; I.L.R. (1939) 1 C. 493=184 I.C. 786=1939 C. 403. But the discretion of Court should

be exercised in a judicial manner. 1939 C. 651. A Court has no power to take away the decree-holder's legal right to execute his decree in such manner as he chooses, having regard to his facilities and convenience. 1 O.W.N. 409. It is not proper to transfer decree when the decree-holder makes no allegations necessitating the transfer, and the Court does not record any other grounds. 41 P.L.R. 186. Subordinate Court has no right to order transfer of decree *suo motu* or at bidding of another Subordinate Court. 41 Bom.L.R. 997=1939 B. 468. Section 39 only contemplates that the entire decree and not a part of it is to be sent for execution to another Court or Courts. There is no provision in the Code under which a decree-holder can divide a decree into several parts and execute them piece-meal in different Courts or in the same Court. 1935 C. 118=38 C.W.N. 1053; 43 I.C. 186=3 Pat. L. W. 247. Also a decree cannot be transferred for a limited purpose only. 39 I.C. 737=1 Pat.L.W. 582. To make this section applicable, it is necessary that the provisions of the Code should regulate the procedure of both the Courts. 34 C. 576. Section is not applicable to decrees passed under the Presidency Small Causes Courts Act. 1928 C. 265; 1939 C. 600. Decree in suit exempted from cognizance of Pro. S. C. Court, may nevertheless be transferred to it for execution. I.L.R. (1939) 1 C. 233=1939 C. 600.

**JURISDICTION OF TRANSFERRING COURT.**—It is only for limited purposes, *e.g.*, for dealing with applications for recording assignment of decrees under O. 21, r. 16 or to deal with applications against the legal representatives of the judgment-debtor under O. 21, r. 22 that the transferring Court retains jurisdiction. 60 I.C. 1176=37 C.W.N. 1167=1933 C. 906. See also 39 C.W.N. 129=1935 C. 99; 37 C.W.N. 679=1933 C. 684; 162 I.C. 777=1936 C. 267. Transferring Court to decide questions relating to execution. 123 I.C. 881=1930 O. 305; 1929 M. 199=116 I.C. 113. On application for transfer to another Court by an assignee of the decree, the Court cannot go into the question of equities under section 49. 1937 C. 570. The transferee Court cannot question the power of the transferring Court to order the transfer of a decree for execution. 1934 M. 266=66 M.L.J. 418. Where a decree is transferred for execution without any reservation, the original Court has no longer the power to execute the decree until and unless the decree is returned by the transferee Court with a certificate of non-satisfaction. It is however open to the original Court to re-transfer the proceedings to itself or to some other Court. If the application for execution is made to the original Court when the transferee Court is seized of the execution, it cannot be said to have been made to the proper Court. 152 I.C. 128=35 P.L.R. 751=1934 L. 728. See also 39 C.W.N. 129. The words "competent juris-



(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

### NOTES.

diction" in section 39 (2) refer to territorial and pecuniary jurisdiction to deal with the decree and do not mean competency to try the original suit. 41 P.L.R. 774=A.I.R. 1939 Lah. 258. The word 'may' in section 39 does not mean 'must', but implies a discretion in the Court. Sub-section (1) (c) of that section does not, therefore, oust the jurisdiction of the Court which had passed a decree for sale in a mortgage suit to sell any portion of the mortgaged property or any independent item situated outside its territorial jurisdiction, it having had jurisdiction to entertain the suit and to pass the decree by reason of part of the mortgaged property or some other items of mortgaged property being within its territorial limits. I.L.R. (1939) 1 Cal. 493=43 C.W.N. 453=1939 Cal. 403.

**JURISDICTION OF THE COURT TO WHICH A DECREE IS SENT.**—The Court to which a decree is sent must be one having jurisdiction and competent to execute the decree, having regard to the amount or the value of the subject-matter. 16 C. 457 at 465; 12 B. 155; 1939 Cal. 600. See also section 6. It must be one having pecuniary jurisdiction to try the suit in which the decree was passed. The provision in sub-section (2) does not mean that under sub-section (1) a decree may be transferred for execution to any Court, irrespective of its pecuniary jurisdiction. 1 P. 651. See also 1933 S. 128; 16 C. 457; 37 C. 574. But the Madras High Court has held that the question of competency does not arise where the decree is sent to another Court on the application of the decree-holder. 7 M. 397; 17 M. 309; 1914 M.W.N. 97=22 I.C. 275. See also 12 I.C. 27 (Bur.). As to non-finding nature of sale by executing Court of property outside its territorial jurisdiction, on another attaching creditor, even when the judgment-debtor had not raised any objection to the sale, see 18 Pat. 670=182 I. C. 610=1939 Pat. 532. The execution Court can substitute legal representatives. 1931 A. L.J. 160=1931 A. 320 (2); but cannot entertain any question as to the transferee's right to the execution sought. 11 P. 94; 1931 L. 690. But the Court passing decree has, even after the transfer of the decree for execution, the power to entertain an application for recognition of the assignment of the decree and for concurrent execution. 63 M.L. J. 788=140 I.C. 591. See also 1939 R. 433; 1937 N. 305. Section 39 indicates that the Court which passed the decree must apply its mind to the matter when an application has been made by the decree-holder for transfer of the decree to another jurisdiction for execution, and exercise its discretion vested in it by that section in a judicial manner. A.I.R. 1939 Cal. 651.

**NATURE OF ORDER AND LIMITATION.**—An order transmitting a decree for execution is one of a quasi administrative nature. 78 I.C. 1001. It can be made even without there

being a formal application. 157 I.C. 971 (1)=1935 P. 485. It would not be a nullity even when made *ex parte* and without notice or without appointment of any guardian to a minor judgment-debtor. 42 L.W. 943=159 I.C. 762=69 M.L.J. 862. Application for transfer of a decree for execution is a step-in-aid. 33 I.C. 523=14 A. L.J. 415, but is not an execution application within the meaning of O. 21, r. 10. 94 I.C. 482=1926 A. 473. As to proper form of application for transfer, and effect on limitation where there is clerical error in application, see 1937 A.L.J. 278=169 I.C. 225=1937 A. 397. Application made to the Court which passed the decree for executing it in respect of property outside its jurisdiction saves limitation and transfer of decree to the proper Court for execution may be ordered. 35 C.W.N. 77. An order transferring a decree for execution should not be made so as to evade the provisions of the Limitation Act or to validate an invalid application. 42 M. 461=36 M.L.J. 199. An order for transfer cannot be held to be an order for execution which can give rise to the bar of constructive *res judicata* against the judgment-debtor in respect of a latter application, on the ground that he did not raise the plea of limitation, though served with notice of application on which transfer order was passed. 157 I.C. 971 (1)=1935 P. 485; 1939 Rang. 433.

**SIMULTANEOUS EXECUTION.**—A Court has jurisdiction to execute its decree and at the same time send it to another Court for simultaneous execution. The fact that execution is pending before it is no bar to send the decree for execution. 39 C.W.N. 165=156 I.C. 522=1935 C. 268. See also 1940 Sind 11. An order for transfer of decree to another Court for simultaneous execution without giving notice to the judgment-debtor and without hearing him is not proper. 1935 Cal. 268; 41 Bom.L.R. 481=183 I.C. 333=1939 B. 258.

**CONCURRENT EXECUTION IN SEVERAL COURTS.**—A Court has power to send its decree for execution to several places. 14 M.L.A. 529; 8 C. 687. See also notes under the heading under section 38. Execution case once transferred—Certificate under section 41 not received—Court passing decree cannot transfer it again to different Court. 29 O.C. 84=1925 O. 428.

**PRACTICE AND PROCEDURE.**—A certificate of transfer of decree need not be signed by Judge who passed it. 38 P.L.R. 1101=162 I.C. 489=1936 L. 369. A decree-holder need not make a second application for execution to the Court to which a decree has been transferred, when he has already made one application to the Court transferring the decree. 2 P. 909; 162 I.C. 777=1936 C. 267. When a Court passes a decree and there is a decree in appeal therefrom and thereafter a petition for execution to the first Court, there is only one decree



(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

40. Where a decree is sent for execution in another province, it shall be sent to such Court and executed in such manner as

Transfer of decree to Court in another province. may be prescribed by rules in force in that province.

#### NOTES.

to be executed, *viz.*, the original decree as amended by the appellate Court. When in such circumstances a petition for transfer of execution is made and granted it would refer to the decree as amended on appeal, because in the eye of law, there is only one decree, even though the appellate decree is not mentioned in the petition. 38 L.W. 877 = 1933 M. 872 = 147 I.C. 386. Questions regarding who are the legal representatives and plea of limitation, if raised, should be decided before transfer. 91 I.C. 1056 = 23 L.W. 92 = 1926 M. 411. *See also* 60 C. 1176 = 37 C.W.N. 1167 = 1933 C. 906. An order of transfer of a decree takes effect from the date on which the order is made and the Court to which the decree is so transferred for execution can from that date entertain an application for execution even though a copy of the decree has not been received by the executing Court. (35 M. 588, Appr.; 55 M.L.J. 120, Overr.) 56 M. 692 = 144 I.C. 923 (2) = 1933 M. 627 = 65 M. L.J. 137. Where proceedings in respect of a transferred decree have terminated in transferee Court, an application for execution may be made in Court which passed the decree even though the certificate of the transferee Court has not been received. 39 C.W.N. 129 = 154 I.C. 731 = 1935 C. 99. In applying for transfer the mode of execution in the transferee Court need not be stated. 1929 C. 529. Award under Arbitration Act—Transfer to subordinate Court for execution—Legality. *See* 151 I.C. 860. A District Munsif receiving by transfer a decree of a Village Court for execution or withdrawing execution of a decree to his own file cannot transfer the decree to another District Munsif's Court. 46 M. 734 = 44 M.L.J. 643.

SEC. 39 (b).—Where the condition justifying transfer is that set out in this clause, the execution should be limited to that judgment-debtor who satisfies that condition. Execution against another judgment-debtor who does not satisfy that condition is not proper. 1936 C. 521.

SEC. 39 (c).—If after a Court passes a decree for the sale of property mortgaged, the District within which the property is situate is transferred to another Court, the Court which passed the decree can still sell it. 15 C. 667; 19 C. 13; 21 C. 639; 22 C. 871.

Transfer under this clause is not mandatory but only discretionary. So Court passing mortgage decree which includes also property outside its territorial jurisdiction can order sale of such property. I.L.R. (1939) 1 C. 493 = 184 I.C. 786 = 1939 C. 403. For the distinction in the case of execution of money decrees, *see* 1929 C. 818 = 57 C. 67.

SEC. 39 (d).—A Court which passed a decree in its Small Cause jurisdiction may transfer it to the other branch of the same Court. The two branches may be regarded as different Courts. 8 B. 230; 9 B. 237; 6 A. 243 (F.B.); 76 I.C. 548 = 1923 B. 371. This sub-cl. (d) does not enable the Court to proceed in execution in a matter which is not otherwise permitted by law. Thus a S. C. Court by transferring execution to its regular side cannot proceed against immovable property. 178 I.C. 127 = 1938 Pesh. 70. *See also* 43 P.L.R. 1. In 18 B. 61 the question whether a Sub-Judge can transfer a decree for execution to a Court of Small Causes, when the property attached was situated within the local limits of his jurisdiction was raised, but not decided. The provisions of this clause have not to be considered at all where the decree directing sale is to be executed not only by sale of property but also by removal of obstruction. 30 S.L.R. 290 = 161 I.C. 524 = 1936 S. 11.

SEC. 39 (2).—'Competent jurisdiction' refers to territorial and pecuniary competency to deal with the decree and does not mean competency to try the original suit. Thus award under Arbitration Act may be transferred for execution to a Court to which the Act may not apply. 41 P.L.R. 774 = 183 I. C. 241 = 1939 Lah. 258. *See also* 1938 A.L. J. 1128 = 1939 A. 57 = I.L.R. (1939) A. 97.

SECS. 39 AND 42.—*See* 1939 Cal. 600. Where the same Judge holds the office both of the Judge, Small Causes, and as a judge on the regular side, he can, on an application of the decree-holder or otherwise, transfer a Small Cause Court decree to the regular side for the purpose of obtaining attachment and sale of the immovable property. 43 P.L.R. 1 = I.L.R. (1941) L. 670 = 1941 L. 109.

APPEAL.—An appeal lies from an order rejecting an application for transfer. 8 C. W.N. 575.

SEC. 40.—*See* I.L.R. (1938) Lah. 264 = 177 I.C. 487 = 1938 Lah. 126. Section applies



41. The Court to which a decree is sent for execution shall certify to the Court, which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure.
- Result of execution proceedings to be certified.
42. The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself.
- Powers of Court in executing transferred decree.
- All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree

## NOTES.

only when both transferor and transferee Courts are regulated by the Code. 34 C. 576; 12 B. 230. The law of limitation applicable for execution of a decree transferred to another Province would be the law in force in the transferring Court. 17 C. 491; 24 C. 473; 36 M. 108.

SEC. 41: SCOPE AND APPLICABILITY OF THE SECTION.—It is only when the Court to which a decree is sent has executed it or has wholly failed to execute it that the Court is bound to send a certificate under section 41. It does not matter if one application fails. 25 Bom.L.R. 453=74 I.C. 149=1923 B. 396. *See also* 20 A. 129. After the issue of a certificate and return of the copy of the decree, the Court to which the decree is transferred ceases to have jurisdiction. 22 A.L.J. 1039=1925 A. 179; 26 Bom.L.R. 345=1924 B. 359; 5 P. 398; 1930 L. 508; 11 P. 513. *See also* 28 O.C. 169=1933 L. 149. Even when the certificate of non-satisfaction is sent to the central Court for communication to decretal Court and not directly to the latter Court, and the central Court fails to communicate. 43 C.W.N. 412. When the result of the execution is not certified, execution by Court which passed the decree, if competent. *See* 39 C.W.N. 129=1935 C. 99=154 I.C. 731. Certificates as to result of each application sent under the executive orders of the High Court cannot put an end to the jurisdiction of the Court to execute the decree. 18 N. L.R. 178=68 I.C. 657=1922 N. 210. As to the applicability of the section to a Court executing its own decree on Small Cause Side, in the Original Side, and entering satisfaction in the Small Cause Register, *see* 76 I.C. 548=1923 B. 371. On this section, *see also* 1926 L. 113.

CERTIFICATE OF NON-SATISFACTION.—As to what amounts to a certificate under this section, *see* 1938 A.L.J. 553=176 I.C. 412=1938 A. 412; 1937 A.L.J. 1168=172 I.C. 753=1937 A. 766. *See also* 41 C.W.N. 1243=1937 C. 557. As to effect of sending premature and erroneous certificate, *see* 1937 A.L.J. 393=170 I.C. 228=1937 A. 474. It is only the Court which has passed the decree that is competent to grant a certificate of non-satisfaction to the decree-holder to enable him to execute the decree in another Court but not the Court to which a decree is transferred for execution. The Court can only execute the decree itself and certify the result of execution before it to the original Court. 150 I.C. 905=1934 L. 330.

SEC. 42: SCOPE AND APPLICATION.—Section

42 does not override O. 21, r. 16, but is subject to it. 1934 L. 648. Hence, an application by the assignee of a decree for execution can be properly made only to the Court which had transferred the decree, even though the transfer was before the assignment. 1934 L. 648. Where a decree is already transferred for execution by the Court which passed it, an application for further transfer should be made to the Court where execution is pending. 47 B. 56. But *see* 1927 N. 367. Section not applicable to execution proceedings of a decree of Madras Small Cause Court transferred to a mofussil Court, but applicable to execution proceedings in the Madras Small Cause Court. 49 M.L.J. 104. Award filed in Court may be transferred for execution. 1931 N. 170=27 N.L.R. 386. Where a decree-holder obtains an order for the transfer of a decree but the decree is not actually sent, the Court which passed the decree has jurisdiction to execute it. 1 P. 328.

POWERS OF COURT IN EXECUTING TRANSFERRED DECREE.—The powers given to executing Court under this section are not in any way limited or restricted by anything contained in section 39. 46 L.W. 565=(1937) 2 M.L.J. 602. The same territorial jurisdiction which the transferring Court had is transferred to the transferee Court by the very order of transfer. 1941 O.A. 865=1941 A.W.R. (Rev.) 949=1941 O.W.N. 1138. Objections to the execution of the decree should be raised before the Court to which it is transmitted for execution. 78 I.C. 1001; 5 R. 775. In executing a decree against a firm, Court can determine whether a person is a partner or not. 98 I.C. 855; 131 I.C. 376. The executing Court has power to consider an objection that the decree-holder's demand must be deemed to have been satisfied under section 18 of the U. P. Court of Wards Act. 46 A. 560. Under Sections 37 and 42 the Court to which a decree is transferred has powers to stay execution of a decree under O. 21, r. 29. 60 C. 1119=37 C.W.N. 846=57 C.L.J. 444. But *see contra* 162 I.C. 865=1936 R. 184. Transfer for execution—Power of Court to order attachment. 91 I.C. 1043. Transferee Court can order removal of obstruction under O. 21, rr. 95 and 97, even though it had not passed the decree or sold the property. 30 S.L.R. 290=161 I.C. 524=1936 S. 11. The transferee Court is not debarred from taking cognizance of objections as to jurisdiction of which the Court which transferred the decree could take cognizance. 152 I.C. 135 (2)=35 P.L.R. 482



shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

43. Any decree passed by a Civil Court established in any part of British India to which the provisions relating to execution do not extend, or by any Court established or continued by the authority of <sup>1</sup>[the Central Government or the Crown Representative] in the territories of any foreign Prince or State, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in British India.

#### LEG. REF.

<sup>1</sup> Substituted for words 'the Governor-General in Council' by the Government of India (Adaptation of Indian Laws) Order, 1937.

#### NOTES.

=1934 L. 652. An executing Court can refuse to execute a decree when it finds that the decree is against a dead person and therefore a nullity, just as the Court passing a decree can do. 1934 L. 117 (2). Where a Small Cause Court decree is transferred for execution to a Subordinate Judge having small cause powers, and the application for execution is primarily an application to execute the decree against the immovable property of the judgment-debtor, the Subordinate Judge in dealing with it acts in the exercise of ordinary jurisdiction and not in the exercise of his small cause jurisdiction, and his order is, therefore, subject to the ordinary rules in respect of appeals as provided by section 42. 44 C.W.N. 587.

**POWERS NOT POSSESSED BY EXECUTING COURT.**—The Court to which a decree is sent cannot question the propriety of the order transmitting the decree to such Court. 21 B. 456. *See also* 7 A. 330; 8 M.L.J. 1; 1930 L. 118. It cannot refuse execution on the ground that questions are raised between the parties that cannot properly be dealt with in execution. 11 B. 528. The executing Court cannot call the legality of a decree in question. 8 C. 687; 31 C. 922; 23 A. 181; 7 Bom.L.R. 659; 4 M. 324; 11 B. 528; 7 B. 481; 10 B. 65. But *see* 28 B. 378. It can decide whether or not the execution was barred by limitation. 23 C. 39. But it has no such power when the Court which passed the decree makes an order for execution and then transmits the decree for execution to another Court. 15 B. 28. Section 42 deals simply with the manner of execution and leaves the matter of limitation to be governed by Limitation Act. Where a decree passed by one Court is sent for execution to another Court, the period of limitation applicable to the execution of that decree concerned depends upon the character of the Court which passed the decree and not upon the character of the Court executing it. 7 Cut.L.T. 45. As to proper procedure to be adopted when judgment-debtor desires to question the order transferring the decree on the ground of limitation, *see* 14 R. 550=163 I.C. 403=1936 R. 271; 1937 R. 477. Court cannot vary decree. *See* 4 I.A. 137; 8 C. 332; 15 B. 644; 7 A. 194; 22 C.L.J. 561; 34 I.C. 362; 39 I.C. 537; 99 I.C. 535=27

Punj.L.R. 750; 123 I.C. 531 (L.). Nor can it pass an order which has the effect of amending, altering or varying the decree itself. An order for payment of a decree by instalments, which is made after the decree has been passed, undoubtedly has the effect of altering or varying the terms of the original decree, and consequently it is not within the competence of the transferee Court to make such an order. 12 R. 320=151 I.C. 937 (2)=1934 R. 165. Transferee Court has no power to entertain and decide application under O. 21, r. 50 for executing decrees against third parties alleged to be liable. 177 I.C. 779=1937 Pesh. 96. Transferee Court can execute decree against surety under section 145, but should first give notice to him before so doing. I.L.R. (1938) L. 624=177 I.C. 879=40 P.L.R. 530. Section 34 of Provincial Small Cause Courts Act contemplates as legal, the transfer of an execution application by a Small Cause Court's Judge acting in that capacity to a Court of ordinary civil jurisdiction also presided over by himself. He could also transfer it to a Court of a subordinate judge. Small Cause Courts are no doubt to execute decrees against movable property, but once a decree has been passed by the Small Cause Court judge, it is of the same relative value as any other money decree passed by any other Court of competent jurisdiction. 1940 A.M.L.J. 133.

**APPEAL.**—Although no appeal lies from the orders of a Small Cause Court, still under section 42 an appeal lies from an order passed in execution of a Small Cause decree transferred to a Court on its Original Side. 33 I.C. 523=14 A.L.J. 415; 27 I.C. 10=20 C.L.J. 129; *also* 103 I.C. 344=1928 B. 534 (2). Only one appeal lies against such orders. 12 I.C. 959; 25 C. 872. Where a decree of a Small Cause Court is transferred for execution to the regular side of another Court and executed, the orders passed in the execution of the decree by such Court are appealable and no revision under section 20 of the Provincial Small Cause Courts Act is competent. 7 Cut.L.T. 33. *See also* I.L.R. 1941 L. 670. Transfer of decree—Subsequent affirmation in appeal—Fresh order of transfer not necessary. 9 P. 829.

**SEC. 43.**—The section is applicable to decrees passed by Courts in the Scheduled Districts. 15 C. 365. The Court of the Political Agent at Sikkim is a Court established by authority of Governor-General. 38 C. 859. *See also* cases noted under section 1. *supra*.



<sup>1</sup>[44. The Provincial Government may by notification in the Official Gazette declare that the decrees of any Civil or Revenue Courts in any Indian State, not being Courts established or continued by the authority of the Central Government or of the Crown Representative, or any class of such decrees, may be executed in the Province as if they had been passed by Courts of British India.]

Execution of decrees passed by Courts of Indian States.

<sup>2</sup>[44-A. (1) Where a certified copy of a decree of any of the superior Courts of the United Kingdom or any reciprocating territory has been filed in a District Court, the decree may be executed in British India as if it had been passed by the District Court.]

Execution of decrees passed by Courts in the United Kingdom and other reciprocating territory.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.

*Explanation I.*—‘Superior Courts,’ with reference to the United Kingdom, means the High Court in England, the Court of Session in Scotland, the High Court in Northern Ireland, the Court of Chancery of the County Palatine of Lancaster and the Court of Chancery of the County Palatine of Durham.

*Explanation II.*—‘Reciprocating territory’ means any country, or territory, situated in any part of His Majesty’s Dominions <sup>3</sup>[\* \*] which the Central Government may, from time to time, by notification in the Official Gazette declare to be reciprocating territory for the purposes of this section; and ‘superior Courts,’ with reference to any such territory, means such Courts as may be specified in the said notification.

#### LEG. REF.

<sup>1</sup>Section has been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, in the place of the old section which ran as follows:—

The Governor-General in Council may, by notification in the *Gazette of India*, declare that the decrees of any Civil or Revenue Courts situate in the territories of any Native Prince or State in alliance with His Majesty and not established or continued by the authority of the Governor-General in Council, or any class of such decrees, may be executed in British India as if they had been passed by the Courts of British India.

<sup>2</sup>Added by Act VIII of 1937.

<sup>3</sup>The words “or in India” were omitted by A.O., 1937.

#### NOTES.

SEC. 44: SCOPE OF THE SECTION.—(See also notes under section 13.) The concluding words of this section ‘as if they had been passed by Courts in British India’ do not in any way control the operation of the provisions of section 13 (a). 37 P.L.R. 240=158 I.C. 232=1935 L. 551. A suit does not lie in British India on decrees of the Courts of Native States; such decrees are made executable by Notification by Governor-General in Council under section 44. 39 M. 24=27 M.L.J. 535 (F.B.); 1931 A. 689=53 A. 747. As to effect of notification see 40 C.W.N.

591. The expression “may be executed” gives a discretion to the Court to refuse execution. This discretion is not limited to sections 13 and 14. 21 L.W. 330=86 I.C. 492=1925 M. 788. These words refer only to the mode of execution. 1925 M. 788. As to powers of Court executing decree of foreign Court, see 41 C.L.J. 508=1925 C. 955. As to the mode of executing foreign decrees, see 2 M. 237. Notice to judgment-debtor is essential. 1925 M. 788. The Law of Limitation governing the execution of foreign decrees in British India is the law in force in British India. An order for transmission of a decree to British Court cannot be treated as an order for execution. 40 B. 504; 14 C. at p. 571. The section does not remove the decree of a Native State from the category of foreign judgments. 15 B. 216 at p. 219. If the foreign decree has been obtained by fraud, a British Court is not bound to execute it. (*Ibid.*) A British Court executing a foreign decree can enquire whether the foreign Court had jurisdiction to pass it. 40 B. 551; 40 C.W.N. 591. See also notes under section 13. An application for execution under section 44 may be resisted on any of the grounds mentioned in section 13. 39 M. 733=30 M.L.J. 148; 1931 A. 689=53 A. 747. Decree of Native State—Execution in Burma after separation, law as to, see 1938 R. 352.



*Explanation III.*—‘Decree,’ with reference to a superior Court, means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, and

(a) with reference to superior Courts in the United Kingdom, includes judgments given and decrees made in any Court in appeals against such decrees or judgments, but

(b) in no case includes an arbitration award, even if such award is enforceable as a decree or judgment.]

<sup>1</sup>[45. So much of the foregoing sections of this Part as empowers a Court to send a decree for execution to another Court shall

Execution of decrees in foreign territory. be construed as empowering a Court in any Province to send a decree for execution to any Court established or continued by the authority of the Central Government or of the Crown Representative in the territories of any foreign Prince or State to which the Provincial Government has by notification in the Official Gazette declared this section to apply.]

46. (1) Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree :

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree, or unless before the determination of such attachment

#### LEG. REF.

<sup>1</sup>This section has been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, in place of the old section which ran as follows:—

“So much of the foregoing sections of this Part as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in British India to send a decree for execution to any Court established or continued by the authority of the Governor-General in Council in the territories of any foreign Prince or State to which the Governor-General in Council has, by notification in the *Gazette of India*, declared this section to apply.”

#### NOTES.

SEC. 45.—Neither section 44 nor section 45 sanctions the transmission of a decree of British Indian Court to a Court in a Native State. 40 M. 1069=33 M.L.J. 130 (F.B.); 32 M.L.J. 487. *See also* 12 B. 230; 29 C. 400; 39 M. 648; 1929 S. 45; 39 M. 733 (F.B.); 2 M. 237 (337, 338); foreign decrees. 1933 M. 112; 1934 M. 434=57 M. 824=67 M.L.J. 187.

SEC. 46.—An indefinite order stating that an attachment is made permanently is not one contemplated by this section. 163 I.C. 374=1936 L. 486. Unlike in the case of a regular attachment, an attachment by precept can have force only for 2 months unless extended. Therefore payment of money attached under precept may be validly paid over

to a subsequent attaching creditor after the said period of 2 months. 163 I.C. 374=1936 L. 486 (Reversing 161 I.C. 418=1935 L. 914). An application under the section should be made to the Court which passed the decree. The period of two months may be extended after it has expired. *See* section 148. An order extending the period of attachment relates back to the date of the petition and the attachment would be effective though the order was passed after the expiry of two months if the application for extension was put in within the period. 34 I.C. 302=3 L.W. 336. Court to which decree is transferred cannot issue precept. 1926 S. 157=92 I.C. 621. The Court which passed the decree can issue a precept even after the decree is transferred to another Court for execution. 31 C.W.N. 653=102 I.C. 513=1927 C. 581; 9 R. 561=1931 R. 279. It is not open to the Court issuing the precept to attach such property itself. The Court to which it is issued must attach the property and wait for an application for execution being made by the attaching creditor. 146 I.C. 991=1933 A.L.J. 902=1933 A. 844. Court to which precept is issued has power to accept money or security. *See* 94 I.C. 119=1926 L. 433=27 Punj.L.R. 757. Application for precept is a step-in-aid of execution under Limitation Act, Art. 182 (5). 146 I.C. 991=1933 A.L.J. 902=1933 A. 844. Application for attachment, if sufficient to entitle applicant to rateable distribution. *See* 90 I.C. 527.



the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.

#### QUESTIONS TO BE DETERMINED BY COURT EXECUTING DECREE.

47. (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

#### NOTES.

SEC. 47: SCOPE AND APPLICATION.—There are important differences in legal consequences between an application under section 47 and an application under O. 21, r. 58, in respect of further remedies open to the applicant. If the application is only under section 47, the applicant's remedy in the event of an adverse order on that application is to appeal against that order whereas if the application is really one under O. 21, r. 58, the applicant's remedy will be by a regular suit. 158 I.C. 410=1935 M. 923. See also 1935 Lah. 549; 1940 Rang. 161; (1940) 2 M.L.J. 305; (1940) 2 M.L.J. 860. Section should be interpreted liberally. 3 P.L.T. 613; 19 C. 683; 15 P. 545=17 P.L.T. 434=1936 P. 289; 21 Pat.L.T. 227 (Duty of Court to work out rights of parties finally in execution). In considering whether an application is under section 47 of the Code or not, the substance of the application should be examined in order to find out its true nature. The heading given to it by applicant is not conclusive. 140 I.C. 779=1933 M. 130; 161 I.C. 21=1936 L. 725. Section 47 (1) is mandatory and in regard to a matter that properly falls under that section, Court is bound to decide it in execution and has no discretion whether or not to refer parties to a separate suit. 1933 M. 825=66 M.L.J. 263=57 M. 49. (56 M. 447, Foll.) See also 56 C. 462; 1929 C. 247. Section draws no distinction between the functions of a Court executing a simple money decree and one executing a decree under O. 34. 15 L. 772=1934 L. 438; 127 I.C. 12=1929 L. 762. Application for personal decree in mortgage suit, if falls under this section. 62 C. 28=158 I.C. 1074=1935 C. 596. Section applies only to matters arising subsequent to passing of the decree. 67 I.C. 753; 25 Bom.L.R. 440, and not to events subsequent to execution sale—Separate suit lies. 119 I.C. 881=1929 P. 559. Judgment-debtor's objection that he has no saleable interest is matter to be decided before the decree and not in execution of a mortgage-decree for sale. 1929 R. 275 (1). As to whether application for personal decree in mortgage suit may be treated as one under this section. See 62 C. 28=1935 C. 596. An objection by the judgment-debtor that a scheme sanctioned by the Court under section 153 of the Companies Act has superseded the decree which has, therefore, become incapable of execution, relates to the execution or discharge of the decree and consequently comes within section 47, C. P. Code. 41 C.W.N. 406=I.L.R. (1937) 1 Cal. 781=1937 Cal. 211. Section applies to ejectment

proceedings under Tenancy Acts. 1931 A.L.J. 529. An application under section 173 (3) of the Bengal Tenancy Act to set aside a sale falls under section 47, C. P. Code, and an appeal therefore lies against the order on such application. 60 C.L.J. 36=1935 C. 89=154 I.C. 347. See also 45 C.W.N. 379; 1940 M. 131=(1939) 2 M.L.J. 853 (application under sections 19 and 20 of Mad. Argi. Relief Act). This section applies to execution proceedings of rent decree. 16 P.L.T. 443=156 I.C. 881=1935 P. 227. See also 193 I.C. 274=1940 Nag. 372=1940 N.L.J. 473. Question of priority as between rival heirs claiming to be entitled to execute decree falls under this section. 59 B. 417=37 Bom.L.R. 150=1935 B. 298. (But see 151 I.C. 473=1934 A. 730.) But not dispute between rival decree-holders regarding attachment or distribution of assets. 1936 O.W.N. 559=163 I.C. 175 (2)=1936 O. 277.

Section does not apply where one of the persons was not party to the decree and the question raised should be decided in separate suit and not in execution. 143 I.C. 843=1933 O. 146. But where the party to the suit is bound by the decree he cannot evade the rule that disputes in execution must be settled under section 47 and not by a separate suit, by joining with a stranger. 147 I.C. 526=37 L.W. 346=1933 M. 340. O. 21, r. 103 is not restricted by the general provisions of section 47. 52 I.C. 928. O. 21, r. 103 only applies to cases where persons concerned are parties to the suit or their representatives. 63 I.C. 730=41 M.L.J. 54. Application to draw out amount deposited by defendant in setting aside an *ex parte* decree is not an execution application. 54 M.L.J. 452=1928 M. 296. Application under O. 20, r. 12 for enquiry into mesne profits directed by decree is not an execution application and section 47 does not bar a fresh suit in the absence of such application 57 M.L.J. 515=1929 M. 785. Suit for possession on basis of a barred redemption decree is barred by section 47. 119 I.C. 225 (1)=1930 L. 74. Applicability to proceedings under Arbitration Act. See 115 I.C. 536=1929 L. 228; 151 I.C. 881=1934 L. 49. Section 47 does not apply to a decree of a foreign Court. 1913 M.W.N. 605. Nor to a decree which is a nullity, the defendant having been dead at the time of the decree. 148 I.C. 418=11 O.W.N. 416=1934 O. 167. Order allowing decree-holder to withdraw execution proceedings is outside the section. 19 I.C. 904=18 C.L.J. 53. Section does not apply to application made by a mere garnishee who is not party to suit or to execution proceedings.



## NOTES.

13 R. 722. Section no bar to setting up by way of defence matters relating to execution. 41 M.L.J. 261; 27 C.W.N. 280; 56 C. 467=1929 C. 247. But see 33 C.W.N. 795=1929 C. 374 (F.B.); 49 M.L.J. 407; 59 C. 1242=1932 C. 825; 9 R. 305; 130 I.C. 154=1931 N. 27 where plea of judgment-debtor that decree was satisfied prior to sale was held to be barred in defence to a suit for possession by decree-holder auction-purchaser.

**PRE-DECREE AGREEMENT.**—Where a payment made prior to a decree, is pleaded in bar of execution, the executing Court cannot go into that question as it is not one relating to execution, discharge or satisfaction of a decree. In putting forward such a claim the judgment-debtor is asking the Court to embark on an enquiry whether the decree to be executed is the decree as passed by the Court or as modified by parties. 1938 N.L.J. 148=A.I.R. 1938 Nag. 265. See also (1941) 2 M.L.J. 344. The executing Court can only go into matters relating to the execution, discharge or satisfaction of the decree which arise after the decree came into existence and result in its discharge or satisfaction and not into a pre-decree compromise which is not embodied in the decree and which practically nullifies the decree. Such a compromise could not, therefore, be pleaded as a bar in execution proceedings and a separate suit for declaration of rights on the basis of the compromise is maintainable. 18 L. 171=A.I.R. 1937 Lah. 507. See also 54 L.W. 159=(1941) 2 M.L.J. 349; I.L.R. (1941) Kar. 223. The C. P. Code contains no general restriction of the parties' liberty of contract with reference to their rights and obligations under the decree and if they do contract upon terms which have reference to and affect the execution, discharge or satisfaction of the decree the provisions of section 47 involve that questions relating to such terms may fall to be determined by the executing Court. A fair and ordinary bargain for time in consideration of a reasonable rate of interest, cannot be regarded as an attempt to give jurisdiction to a Court to amend or vary the decree. It has its effect on the parties' rights under the decree and the executing Court under section 47, has jurisdiction to ascertain its legal effect and to order accordingly. It is not possible to regard O. 20, r. 10 as excluding any possibility of the parties coming to a valid agreement for time, to which the Court under section 47, will have regard. Such agreements or bargains may take different forms. If it appears to the Court acting under section 47 that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce it in execution proceedings but will leave the creditor to bring a separate suit on the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to

be dealt with under section 47. In such a case to say that the creditor may perhaps have a separate suit is to misread the Code, which by requiring all such matters to be dealt with in execution discloses a broader view of the functions of an executing Court. 66 I.A. 84=14 Luck. 192=43 C.W.N. 501. See also 1939 Sind 343; A.I.R. 1939 P.C. 80=(1939) 1 M.L.J. 652=66 I.A. 84=14 Luck. 192 (P.C.).

**JURISDICTION AND POWERS OF EXECUTING COURT.**—A Court which cannot try original case it not competent to execute decree in the suit. 151 I.C. 860=1934 Pesh. 107. Executing Court is not entitled to go behind decree and say that on the mortgage the Court had no jurisdiction to pass the decree because the mortgage was invalid. 149 I.C. 457 (1)=1934 P. 426. See also I.L.R. (1941) Kar. 79. 15 Pat.L.T. 661 (F.B.); 1934 A. 1027; 151 I.C. 730=35 P.L.R. 400=1934 L. 609; 15 L. 772 (Sons objecting that mortgage by father was void as being without necessity and as being immoral). Where, after the death of a judgment-debtor in a mortgage decree, his sons are brought on record as his legal representatives, it is not open to the latter to attack the validity of the decree itself on the ground that the property was their personal property and was not liable to be sold. Neither section 47, nor O. 21, r. 58, will allow such a question to be gone into execution in such a case. 37 P. L.R. 123=1935 L. 549. See also 1940 Rang. L.R. 402=1940 Rang. 161; I.L.R. (1939) Lah. 403=186 I.C. 168; (1940) Mad. 881=(1940) 2 M.L.J. 305; (1940) 2 M.L.J. 860; (1940) Sind 191; 194 I.C. 45. For the purpose of deciding a claim under O. 21, r. 58, the Court is bound to find who was in possession at the time of the attachment. It is not bound to find who had the title to the land or property attached and can refer parties to a suit for determining title. For the purpose of deciding a claim under section 47, it is necessary to go into all the contentions of the parties including the contention as to title. The scope of the enquiry cannot be restricted merely to the question of possession at the time of the attachment. The difference between the two enquiries is, therefore, not a difference in procedure so much as a difference in the scope of the enquiry. A.I.R. 1940 Mad. 881=(1940) 2 M.L.J. 305. Though executing Court is not entitled to go behind decree, it has nevertheless power to see whether decree is capable of execution. 14 L. 230=1933 L. 41. As to whether executing Court can inquire into plea of adjustment of decree, see 37 Bom.L.R. 230=1935 B. 303. As to executability of decree after compromise by parties varying terms of the decree and recorded under O. 21, r. 2, see 144 I.C. 721=1933 Pesh. 53 (Case-law discussed). See also 1939 Sind 343; 143 I.C. 228=1933 Pesh. 63. As to executability of the scheme decree as regards portion not embodying the scheme, see 1933 M.W.N. 183. The decree-holder need not be a party to the decree. 61 M.L.J. 904. E.g., in a scheme decree, the new trustee can enforce the decree. 54 M. 345=60 M.L.J. 173; 61 M.L.J. 904;



## NOTES.

60 M.L.J. 178. *See also* 73 C.L.J. 532. Executability of decree—Decree declaring charge in respect of unpaid purchase-money—Execution by sale of properties charged—Necessity for separate decree for sale. 69 M.L.J. 854. A puisne mortgage against whom a personal decree has been passed, behind his back, when there was no prayer for a personal decree in the plaint, can in execution take an objection to the executability of such a decree under section 47. 162 I.C. 867=1936 P. 303. Executing Court has no power to discuss validity of terms of the decree which it is ordered to execute. 13 P. 17=151 I.C. 368 (2)=1934 P. 203. *See also* 1938 O.W.N. 779=1938 Oudh 213; 142 I.C. 487=1933 N. 211; 58 M. 752=1935 M. 236=68 M.L.J. 318. The executing Court has no option but to execute the decree as it stands, however erroneous the decree might be. 156 I.C. 145=42 L.W. 254=1935 M. 598. A decree beyond inherent jurisdiction of the Court is a nullity and it cannot be executed and executing Court is competent to decide the question whether decree is or is not a nullity. 1934 L. 623. *See also* I.L.R. (1941) Kar. 79; 1940 Rang. 27. It is not open to an executing Court to sit in judgment over the Court which passed the decree which has to be executed. It cannot, except in certain limited cases, conduct inquiries as to whether the decree was properly passed. If on the face of the record it is clear that some illegality has been committed the executing Court can refuse to execute the decree. But where there is nothing to show that there has been such illegality, the executing Court has to presume that the decree was properly made, and take the decree as it stands and execute it. 48 L.W. 285=(1938) 2 M.L.J. 186. The fact of the Court having no jurisdiction to pass decree ought to appear on the face of the decree or must be capable of being gathered without necessity of an enquiry into facts. 142 I.C. 487=1933 N. 211; 142 I.C. 643=37 L.W. 358=1933 M. 362. A decree passed by a Court on a compromise and relating to a matter extraneous to the suit is not a nullity and can be executed. 1934 L. 623. The objection that one of the terms of a compromise decree was "outside the scope of the suit" is therefore not one for the executing Court to consider. If the Court had no power to pass the decree the matter should have been raised either by way of review or by way of appeal, but the executing Court cannot go behind it. 13 P. 17. Where certain persons obtain possession of certain properties on relinquishment by a female limited owner, expressly agreeing to pay certain decretal debt due against her, they are, upon the principles of justice, equity and good conscience, bound to pay the decretal debt in execution of the decree. There is no necessity on the part of the decree-holder to take recourse to a separate suit to establish the contractual liability in view of the scope of section 47. They can proceed by way of an application under section 47. 40 C.W.N. 601=63 C.L.J. 25=1936 C. 67. *See also* 1941 A.L.J. (Supp.) 103=1941 O.W.N. 848 (Set-

ting aside ejection order under section 61, Oudh Rent Act). Section 74, Contract Act, does not apply to a compromise decree and it is open to a Court executing such decree to go behind it so as to interfere with a stipulation by way of penalty contained in the compromise. 55 A. 334=1933 A.L.J. 132=1933 A. 252 (F.B.) overruling 46 A. 571. It is open to the executing Court to which an award is sent for enforcement, to go into the question whether the award could legally be filed and enforced as a decree under section 15 of the Arbitration Act. 152 I.C. 135 (2)=35 P.L.R. 482=1934 L. 652. A suit for a declaration of right of maintenance and for arrears was filed in *forma pauperis*, and due to oversight no valuation was put. The suit was beyond the pecuniary jurisdiction of the Munsif but no objection was taken by the defendant; and when the decree was sought to be executed, objection was raised that the Munsif had no jurisdiction to pass the decree. *Held*, that it was a case of undervaluation, and as no objection was taken in the trial Court, the objection which was taken at the time of execution should fail. 13 P. 290=150 I.C. 373=1934 P. 240. The execution Court has under section 47 power to correct a mistake in the final decree in a partition suit in awarding an excess share to one party. 78 I.C. 1039; 41 M.L.J. 120; but not to correct mistake due to negligence of plaintiff. 33 C.W.N. 739=1929 C. 670. No order passed in execution can amount to an amendment of the decree or to an alteration of its terms to the extent of disabling the decree-holder from executing it according to its tenor. 41 L. W. 594=1935 M. 429=68 M.L.J. 593. Where decree for costs is against minor plaintiff, executing Court cannot inquire whether minor was only benamidar for father, who acted as his next friend in the suit, and order costs to be paid by father. 1935 A.L.J. 383=158 I.C. 1113=1935 A. 359. *See also* (1938) 2 M.L.J. 186. Where a plot of land is described in a decree for possession as a particular survey number, that cannot be altered into another number in execution. To do so would be going behind the decree. 60 C.L.J. 286=1935 C. 245. *See also* 18 Pat. 719. As to power of amendment of decree, *see* 103 I.C. 673=1927 L. 651; after more than three years from passing of decree. 18 Pat. L.T. 18=1937 P. 316=16 P. 290. Where the question of splitting up the mortgage debt as among the several properties is refused by the decree the executing Court has no power to decide the question of rateable distribution. 14 Pat.L.T. 371. A puisne mortgagee who was one of the defendants in a suit in which a mortgage decree was passed cannot in execution proceedings be allowed to attack the decree on the ground of paramount title. 144 I.C. 472=38 L.W. 199=1933 M. 569. An executing Court can entertain a claim to set off, even if the case does not fall under O. 21, r. 19; it has inherent power to give effect to such a claim. 39 C.W.N. 106=1936 C. 409. Application under O. 21, r. 22 can be enquired into by executing Court. 178 I.C. 118=1938 Rang.



## NOTES.

292. Under the proviso to O. 21, r. 52, when a dispute as to title or priority arises between the decree-holder and a third party as regards the custody of a Court other than the executing Court, then the custody Court shall determine that dispute. When, however, the dispute is between the decree-holder and the judgment-debtor, the matter has to be decided by the executing Court under section 47, and not by the custody Court. 19 N.L.J. 287. Where a preliminary decree for partition is sought to be sold in execution of a money-decree, an objection based on r. 178, Madras Civil Rules of Practice, to the sale of the decree in execution can be validly raised by a party other than the judgment-debtor. 152 I.C. 789=1934 M. 692 (2)=67 M.L.J. 669. The executing Court must consider the question whether the person sought to be proceeded against in execution is or is not a member of Co-operative Society or a person claiming under him, because if he is a stranger, the award of the Registrar of Co-operative Societies is as against him a nullity. 148 I.C. 730=15 Pat.L.T. 111=1934 P. 145 (2). Where a decree made on an award in arbitration against a minor contains nothing on the face of it to show that the minor was not served or properly represented in the arbitration proceedings, the executing Court has no power to hold an inquiry as to whether the minor was served or represented, and cannot refuse to execute the decree on the ground that he was not served or properly represented or on the ground that the minor cannot be made liable. If the minor is not really liable his remedy lies elsewhere. A.I.R. 1938 Mad. 809=(1938) 2 M.L.J. 186. The executing Court cannot ignore the plain provisions of section 16 of the Punjab Alienation of Land Act and order the sale of the property of a member of the agricultural tribe in execution, even though a decree has been obtained against him. 141 I.C. 634=34 P.L.R. 523=1933 L. 397; 151 I.C. 730=35 P.L.R. 400=1934 L. 609. So also the jurisdiction of the Civil Court being excluded in all matters relating to any valuation, assessment, liability to assessment or taxation by a Cantonment Board, a decree granting an injunction against the Board in respect of any such matter, is wholly without jurisdiction and *ultra vires* and cannot be put into execution. 144 I.C. 1016=1933 A.L.J. 162=1933 A. 163. Where an order of injunction is issued to an executing Court restraining the sale of a certain share of a property claimed by the plaintiff in a suit, there is no objection in principle to the executing Court proceeding with the sale of the remaining part of that property. 61 C. 568=152 I.C. 35=1934 C. 781. Where a decree declares the plaintiff's right to certain hereditary offices in a temple, and grants an injunction restraining the defendants (trustees) from interfering with the exercise of those rights, though the decree does not specifically say what those rights are, the question whether any particular act

or acts of the defendants constitute an interference with the rights declared in the decree is one which has to be dealt with and decided by the executing Court alone and not in a separate suit. 156 I.C. 125=1935 M.W.N. 879=1935 M. 576. Where after a decision that a wall is a party wall, and before an appeal is preferred therefrom a party makes alterations thereto without the knowledge or consent of the other side it is an obstruction raised during the pendency of the suit and it should be ordered to be removed on application made, by the executing Court under section 47. 1940 A.M.L.J. 120. A decree awarding future maintenance can be executed for arrears of such future maintenance and no fresh suit is necessary. Where the decree contains an express provision that certain property would be earmarked for future maintenance and that arrears of future maintenance can be realised by sale of that property, it is not a mere money decree, but is itself a decree for sale, and future maintenance when falling due can be recovered in execution without further suit. It can be executed against a purchaser of the property with notice, though he is not a party to the suit itself. 1941 Pat. 95=21 Pat.L.T. 783=1940 P.W.N. 818. As to the powers of Executing Court the following further cases may be referred to:—182 I.C. 208=1939 Pat. 534 (Application to set aside decree on the ground of death of plaintiff before hearing and decision of the suit); 41 P.L.R. 288=1939 Lah. 256 (objection to attachability of property by legal representative of deceased debtor sued as such); 41 P.L.R. 436=1939 Lah. 256 (objection under section 60, C.P.Code after sale and before confirmation); see also 1938 Nag. 558; 41 P.L.R. 175=1939 Lah. 405 (Objection after confirmation of sale not maintainable); 1939 Sind 161 (order under O. 21, r. 50, cl. 2); 1939 Lah. 256 (question whether attached property belongs to deceased debtor or his son, where decree was obtained against the son as representing the estate of the deceased father); 50 L.W. 775=1940 Mad. 296 (plea that suit on mortgage should have been for whole amount and not merely for overdue instalments—should be raised in suit—and not in execution); 1939 Nag. 147 (what constitute questions relating to execution, see also 1939 A.M.L.J. 25; 1939 Nag. 183). 1939 Cal. 651 (objection by judgment-debtor to *ex parte* order transferring decree to another Court for execution; see also 70 C.L.J. 438=1940 Cal. 161; 179 I.C. 692=1939 Sind 22 (Question whether property held by judgment-debtor is wakf property or one in which he has a beneficial interest); 41 Bom.L.R. 1170=1940 Bom. 10 (Rectifying incorrect description of mortgaged property in the decree) Decree-holder taking possession of property not covered by decree—Application by judgment-debtor for restoration of possession—Is competent. 173 I.C. 563=1938 Nag. 193.



## NOTES.

**PARTIES TO SUIT, WHO ARE NOT.**—Sub-section (1), section 47, should not be restricted to parties ranged against each other on opposite sides. It also applies where the parties are both judgment-debtors and decree-holders. A.I.R. 1937 Lah. 592. Questions or disputes between judgment-debtors *inter se* in which the decree-holder has no interest are not questions between the parties to the suit. 31 M.L.J. 44; 70 I.C. 329=32 M.L.T. (H.C.) 118 (2); 6 A. 12; 1929 A. 292. So also disputes between co-decree-holders. 70 I.C. 329=32 M.L.T. (H.C.) 118 (2); 8 M. 495; 11 C.W.N. 433; 6 P. 386; 113 I.C. 776; 1932 P. 329=140 I.C. 97; 41 C.W.N. 1248=1937 Cal. 730. So also where dispute is as to which of two rival claimants to a decree is entitled to execute. 157 I.C. 73=37 P.L.R. 145=1935 L. 384; or as regards distribution of assets between rival decree-holders. 1936 O.W.N. 559=163 I.C. 175 (2)=1936 O. 277. Also questions between a party to a suit and his own representative. 20 I.C. 329; 25 B. 631. See also 37 C.W.N. 909=1933 Cal. 809. Also questions between persons claiming to be the heirs of the deceased judgment-debtor. 151 I.C. 473=1934 A. 730; see also 43 P.L.R. 435. Or between representatives of deceased decree-holders. 152 I.C. 776=1934 P. 627. Section 47, does not apply where the dispute arises between a party and his own representative or between two persons who both represent the same party. 53 L.W. 27=(1941) 1 M.L.J. 45 (F.B.). In order to determine whether the parties to a proceeding arising in execution are "parties" within the meaning of section 47, the governing factor is not whether the disputants were parties to the decree but whether the disputants were parties to the suit in which the decree was passed. A personal decree arising out of a mortgage suit is a decree passed in the mortgage suit, and though a party has not been given notice of an application for a personal decree, if he was a party to the suit in which such decree is passed. Section 47, would govern the investigation of a claim preferred by him in relation to the execution of such personal decree. The personal decree is not a distinct decree nor the proceeding for a personal decree a separate proceeding from the trial of the suit; and therefore O. 21, R. 58, is not applicable to a claim preferred to property attached in execution of the personal decree by a person who was a party to the mortgage suit but who was not party to the personal decree proceedings. The fact that he drafts his claim as one under O. 21, R. 58, does not make section 47 inapplicable. A.I.R. 1940 Mad. 881=(1940) 2 M.L.J. 305. See also 1939 M.W.N. 1229 (Decree against Kar-navan of Malabar tarwad—Power of executing Court to determine whether it can be executed against tarwad property). See

also 43 P.L.R. 435=1937 A.M.L.J. 80. A defendant whose name is struck off the record cannot be said to be a party to the suit. 80 I.C. 470; 1933 N. 246. A party to a suit exonerated on the ground of mis-joinder ceases to be a party after such exoneration. 40 M. 964=32 M.L.J. 532 (F.B.); (40 M. 964, Appr.; 49 M. 494, Disappr.); 54 M. 81 (F.B.); 143 I.C. 476=37 L.W. 582=1933 M. 435 following 54 M. 81 (F.B.). But see 37 I.C. 673=5 L.W. 701; 23 M. 361 (F.B.); 45 I.C. 671; 54 M.L.J. 721; 1932 A.L.J. 1036; 1937 M. 268. As between the plaintiff who succeeded in obtaining a decree for rent against the tenant and defendant 1, a co-sharer landlord who is joined as a party defendant in the suit for rent for satisfying the requirements of law as contained in section 148-A, B.T. Act, there can be no question relating to the execution of the rent decree. 38 C.W.N. 43; see also 45 C.W.N. 379 (Order refusing stay of proceedings under section 174, Beng.Ten.Act). A Hindu son who has been impleaded as one of the defendants in a suit for recovery of a sum of money but subsequently excluded from the suit and exempted from the decree is not a party to the suit. 52 I.C. 187. See 1930 C. 586. A party to a mortgage suit, who sets up a paramount title and is discharged from the suit, no decree being passed either in his favour or against him, is not a party within section 47. 52 I.C. 736. The minor sons of a deceased judgment-debtor brought on record but not properly represented, cannot be considered parties to the proceedings. 67 I.C. 547=1922 L. 447. A bidder at an execution sale is not a party to the suit or his representative within section 47. 42 M. 776=37 M.L.J. 274. A garnishee is not a party to the suit. 120 I.C. 565=1929 M. 850.

**PARTIES TO SUIT, WHO ARE.**—Section 47 is not confined only to cases arising between parties who are opposed to each other in the suit. 45 M.L.J. 478; 151 I.C. 776=1934 P. 627. Persons may be parties opposed to each other without necessarily being arranged as plaintiff and defendant in the suit. 70 I.C. 329; 24 M.L.J. 477; 5 R. 418. Parties unnecessarily impleaded are still parties to the suit within section 47. 67 I.C. 6=34 C.L.J. 477. So also one joined as a *pro forma* defendant. 148 I.C. 901=1934 L. 105. A person impleaded as a defendant in a suit on a bond on the ground that there had been a partition between him and the plaintiff in which the bond had fallen to the share of the plaintiff and that consequently he had no right to the amount due under the bond, is not a mere *pro forma* defendant but a party within section 47. 1934 A. 699. 42 C.W.N. 87=1938 Cal. 113; 41 P.L.R. 126=1939 Lah. 207 (Party against whom no relief is claimed or granted). Where party was impleaded in one capacity and objection (claim) is raised by him in execution in another capacity, it will not fall under this section. 1936



## NOTES.

M. 733. But *see also* 43 C.W.N. 371. The only exception to this rule is the case of a legal representative. 1936 Mad. 733. Person dismissed as unnecessary party to suit—Subsequent addition in execution as legal representative of judgment-debtor — Claim in his own right to property sold in execution falls under this section and should be determined by the executing Court. 44 L.W. 698=71 M.L.J. 725. Where a suit is dismissed against a defendant, the plaintiff abandoning his case against him, he is still a party to the suit within section 47, Expl. The proper course in such a case is to strike out the name of the defendant, instead of dismissing the suit as against him. 41 M. 418=34 M.L.J. 17 (F.B.). *See also* 78 I.C. 225=1924 A. 313; 98 I.C. 726=1927 M. 253; 43 C.W.N. 371; 5 R. 110; 1928 M.W.N. 601; 8 P. 717; 1929 P. 472; 143 I.C. 476=1933 M. 435; 1934 L. 737; 150 I.C. 703=1934 P. 281; 1933 N. 246. A question which arises between the judgment-debtor and the auction-purchaser, who is also the decree-holder is one which arises between parties to decree. 1935 N. 30=156 I.C. 995=31 N.L.R. 217. *See also* I.L.R. 1937 A. 92=1937 All. 742 (F.B.); 41 P.L.R. 288=1939 Lah. 256; 43 C.W.N. 1100 (attaching decree-holder purchasing property); 43 C.W.N. 1091 (Purchaser from judgment-debtor during attachment). A surety for the judgment-debtor should be deemed to be a party by virtue of S. 145. 9 R. 434; 152 I.C. 693=35 P.L.R. 466=1934 L. 538; 1935 N. 30; 155 I.C. 511=1935 R. 39. Decree-holder-purchaser continues to be party to suit, and his remedy to recover possession of property purchased is only by application under this section and not by separate suit. 1936 Pesh. 85.

REPRESENTATIVES, WHO ARE.—The term 'representatives' occurring in section 47, includes not only legal representatives in the sense of heirs, executors or administrators, but also representatives in interest, that is, any transferee of the decree-holder's or judgment-debtor's interest, who so far as such interest is concerned is bound by the decree. A legal representative is not a mere figure head as the shebait is. He is one to whom the rights and obligations of the deceased are transmitted. He is a real party to the suit, though he represents the rights and liabilities of a deceased person. A shebait on the other hand is a nominal party who is in Court as the representative of an ideal person, namely, the idol. The idol, it is that is the real party in the eye of the law. I.L.R. (1939) Nag. 548=1939 Nag. 183. The expression "representative" has been construed in a wider sense than the expression "legal representative" and includes also representative in interest. The two tests to be applied in determining whether a person is a representative within section 47 are (i) whether any portion of the interest of the decree-holder or of the judgment-debtor which was originally vest-

ed in one of the parties to the suit has by act of the parties or by operation of law vested in the person who is sought to be treated as representative and (ii) if there has been devolution of interest whether so far as such interest is concerned that person is bound by the decree. The purchaser of the equity of redemption is a 'representative' of the judgment-debtor within the meaning of section 47. 14 L. 591=142 I.C. 408=1933 L. 352; 1935 S. 214. *See also* 1940 Sind 251. The word "representatives" in section 47, is not limited to legal representatives of a deceased person but includes persons on whom an interest has devolved by assignment, transfer or otherwise. 186 I.C. 786=A.I.R. 1940 Pat. 615. A "representative" is a person in whom the interest of a party to the suit has vested either by an act of the party, *i.e.*, a transferee from the party, or by an operation of law. Operation of law would ordinarily mean and include cases of a testamentary and intestate succession upon the death of the party to the suit or upon his insolvency or cases of forfeiture. 42 Bom.L.R. 1123. Where the mortgagor transfers the mortgaged property pending the suit for foreclosure on the mortgage and the transferee takes actual possession of the same, the mortgagee decree-holder on the making of the final decree can proceed to execute the decree against the transferee for recovery of possession of the property transferred to him inasmuch as the transferee is on account of the transfer *pendente lite*, a representative in interest of the mortgagor judgment-debtor and is bound by the decree passed (1937) 2 M.L.J. 359 (P.C.). *See also* 44 C.W.N. 1162=1937 Cal. 565; 1937 Mad. 580. Where a person has been a principal party in a suit brought under O. 21, R. 63 that person too is regarded as representative of the judgment-debtor. 158 I.C. 229=1935 L. 306. The term includes any transferee of the decree-holder's interest or any transferee of the judgment-debtor's interest who, so far as such interest is concerned, is bound by the decree. 24 C. 62; 26 A. 447; 151 I.C. 683=1934 P. 413. A purchaser of a portion of non-transferable holding from a raiyat is a representative of the judgment-debtor within section 47 and can apply to set aside a sale of holding in execution of a decree for arrears of rent on the ground of fraud. 42 C. 172 (F.B.). Mortgagee who purchases property of mortgagor at a sale in execution of decree on his mortgage is representative of his judgment-debtor; and when he is impleaded as party to proceedings in execution of rent decrees against mortgagor, the order passed in execution is open to appeal and second appeal. 18 N.L.J. 274. Auction-purchaser in execution of simple money-decree during pendency of mortgage suit is representative of mortgagor. 1936 A.L.J. 541=163 I.C. 926=1936 A. 479. *See also* 21 Pat.L.T. 783=1940 P.W.N. 818; 42



## NOTES.

Bom.L.R. 1123; 1941 Pat. 95; 53 L.W. 27 = (1941) 1 M.L.J. 45 (F.B.); 15 P. 545 = 17 P.L.T. 434 = 162 I.C. 830 = 1936 P. 289. A Court auction-purchaser at a sale in execution of a decree who is a stranger is not a representative of either the judgment-debtor or the decree-holder so far as Bombay is concerned. There is also a distinction between the position of a voluntary transferee from a judgment-debtor or a decree-holder and a Court purchaser. 42 Bom. L.R. 1123; *see also* 21 Pat.L.T. 783 = 1940 P.W.N. 818. Where undivided interest of judgment-debtor was attached, and the execution fell through but was subsequently revived, the effect of revival would be to render the surviving nephews of the judgment-debtors his legal representatives. 160 I.C. 119 = 1936 P. 126. *See also* 64 I.C. 124; 27 I.C. 431. But *see* 3 P.L.J. 579 = 43 I.C. 969. A mortgagee of judgment-debtor is his representative for the purposes of section 47. 56 I.C. 646 = 1 P.L.T. 267. So also a puisne mortgagee. 35 C.W.N. 877 = 59 C. 117. A mortgagee whose mortgage was subsequent to a mortgage decree on property is a representative of the judgment-debtor. 41 C. 418. A transferee of the decree is a representative of the decree-holder. 24 C. 62; 26 A. 447; 1934 L. 328. Whether a person who attaches money lying in Court is a representative of the person entitled to it or not, must be decided on the facts of each case. 1935 S. 214. A purchaser of the interest of the judgment-debtor after a decree for sale on a mortgage has been passed against him is a representative of the judgment-debtor. 16 A. 286 (private sale); 72 I.C. 862; 26 A. 447; 24 C. 62 (execution sale). *See also* 18 N.L.J. 274. So also a purchaser from a judgment-debtor under O. 21, R. 83. 23 A. 116. *See also* 1940 Sind 251. Whether the assignee of interest pending suit can execute decree passed in suit. *See* 1927 S. 78. A transferee pending a foreclosure suit of a mortgagor is a representative of the latter, and any question between him and the mortgagee-decree-holder, is one falling within the scope of section 47. 55 A. 235 = 1933 A.L.J. 113 = 1933 A. 201. Where a transferee *pendente lite* from a defendant obstructs delivery of possession in execution to the decree-holder and the Court orders it to be removed, the order is one under section 47, the transferee being the representative of the defendant. 66 I.C. 722 = 1921 M.W.N. 698. *See also* 22 A. 243; 37 C.W.N. 1015 = 58 C.L.J. 229. But *see also* 151 I.C. 683 = 1934 P. 413. Purchaser of property prior to the decree in a rent suit is bound by the decree. 54 C. 1064. Transferee from Court auction-purchaser. 36 L.W. 844. Universal donee of judgment-debtor is his representative. 1930 O. 268 = 7 O.W.N. 523. Whether Receiver in insolvency of judgment-debtor is or is not representative

of the latter for the purposes of section 47, depends on purpose and nature of the application made by Receiver. An application by Receiver to have a sale in execution declared null and void, purporting to act as the legal representative of the judgment-debtor and for purpose of having the property escaped from execution, is within section 47, and an order thereon is subject to second appeal. 62 C. 457 = 39 C.W.N. 424 = 1935 C. 503. *See also* 30 S.L.R. 288.

REPRESENTATIVES, WHO ARE NOT.—Purchaser of property prior to attachment is not a representative. 99 I.C. 989 = 1927 M. 450. *See also* 19 Pat.L.T. 820 = 1938 Pat. 478 (Purchaser); 1939 Nag. 183. So also purchaser after attachment in pursuance of contract to purchase entered into before attachment. 1936 N. 163; *see also* 43 C.W.N. 1091. Purchaser of property not mentioned in and not affected by decree. 3 L.W. 289 = 33 I.C. 84 = 44 L.W. 444 = 1936 M. 870 = 71 M.L.J. 385. The purchaser from the decree-holder auction-purchaser is not a representative of the decree-holder *qua* decree-holder. 64 I.C. 68; *see* 1930 C. 586; 43 C.W.N. 1091; 1939 Mad. 944 = (1939) 2 M.L.J. 415. A transferee of the interest of a party before a decree is passed against him or in his favour is not a representative of that party within the meaning of section 47. Where a Hindu widow pending a suit against her by a creditor of her husband to recover the debt from the estate in his hands, surrenders the entire estate in favour of her daughters and a decree is subsequently passed against the widow, the daughters are not the representatives of the widow within the meaning of section 47, so as to bar a suit by them for a declaration that the property is not liable to attachment and sale in execution of the decree against the widow. 41 Bom.L.R. 1007 = A.I.R. 1939 Bom. 496. Purchaser of entire occupancy holding at a certificate sale under Public Demands Recovery Act for arrears of rent is not representative of occupancy tenant. 15 P. 414 = 17 P.L.T. 650 = 165 I.C. 574 = 1936 P. 561. Where person impleaded in mortgage suit as attaching creditor of mortgaged property died, and no steps were taken to implead his legal representatives, they cannot be added in execution proceedings. 159 I.C. 1073 = 1936 P. 110. Benamidar for a party is not his representative within section 47. 44 B. 352; 46 I.C. 748; 18 C.W.N. 184. That a recognised transferee decree-holder was only a benamidar could not be pleaded. 48 M. 553 = 48 M.L.J. 419. But after the death of the benamidar transferee decree-holder, the real owner will be entitled to plead in execution his right. 51 M. 219 = 53 M.L.J. 568. 1931 R. 24; 55 C.L.J. 82; *see also* 1937 Oudh 365. An interim receiver making an application under section 52, Provincial.



## NOTES.

Insolvency Act, cannot be said to represent the judgment-debtor and the order passed on such an application cannot be treated as falling within section 47, or as amounting to a decree within the meaning of the Code and is therefore not appealable. 56 M. 453 = 141 I.C. 817 = 1933 M. 152 = 64 M.L.J. 119. No hard and fast rule can be laid down regarding the position of the receiver in insolvency in whom the estate of a judgment-debtor has vested. The facts of each case have to be taken into consideration in order to find out whether the Official Receiver is a representative of the judgment-debtor or not. Where the Official Receiver objects to an attachment contending that all the property of the insolvent judgment-debtor had vested in him with effect from the date of the insolvency petition, he is in the position of a third party objecting to attachment under O. 21, r. 58, and when his objection is disallowed, he has no right of appeal but has the right of filing a suit under O. 21, r. 63. 52 L.W. 810 = 1941 Mad. 262 = (1940) 2 M.L.J. 860. Official Receiver in insolvency cannot be regarded merely as the representative of the creditors. He represents the insolvent and the debtor's interest in the properties of his estate devolves on him. Where in execution of a decree against certain insolvent debtors, properties belonging to them are sold without impleading the Official Receiver or serving a notice on him under O. 21, r. 22, an application by the Official Receiver to have the sale set aside on the ground of non-observance of O. 21, r. 22, falls under section 47. The dispute being one between the decree-holder and the representative of the judgment-debtors, section 47 has full application and an appeal therefore lies against an order rejecting the application of the Official Receiver. 53 L.W. 498 = (1941) 1 M.L.J. 569. Person appointed by Court under section 37, Provincial Insolvency Act and vested with property on annulment of adjudication is not representative of the insolvent. 40 C.W.N. 1229 = 1936 C. 573. A liquidator is not a representative of the judgment-debtor within the meaning of section 47. 148 I.C. 714 = 1934 N. 207. See also 1930 N. 199. So also a Receiver of Estate of judgment-debtor. 30 S.L.R. 288. Section 47 should be construed liberally. A decree-holder purchasing the property sold in execution of his decree with the permission of the Court retains his character of a party to the suit and continues to be a party to the suit till the delivery of possession to him of the property purchased by him and if any question is raised by the judgment-debtor at the time of delivery of possession relating to the nature of the rights purchased and resistance to delivery of possession is offered, the question will be one relating to the execu-

tion, discharge and satisfaction of the decree, arising between the parties to the suit and falling under section 47 and an appeal would lie from an order passed in relation to the question. The case is not governed by O. 21, r. 103. 177 I.C. 643 = A.I.R. 1938 Nag. 212.

AUCTION PURCHASER, STRANGER, IF REPRESENTATIVE.—See 41 Mad. 403 (P.C.). The rulings on the question whether purchaser is a representative within the meaning of this section and if so whether of the judgment-debtor or of the decree-holder or of both, are conflicting in the different High Courts, and sometimes in the same High Court also. The various rulings on the point are collected hereunder:—(A) *The stranger auction-purchaser in execution of simple money-decree is a representative of the judgment-debtor.* 24 C. 62 = 1 C.W.N. 36 (F.B.); 32 C. 1031 = 9 C.W.N. 824; 11 C.W.N. 495; 13 C.W.N. 98; 32 C. 332; 26 A. 447 (F.B.); 28 A. 337; 53 L.W. 27 = (1941) 1 M.L.J. 45 (F.B.); 1937 Lah. 347; 1937 Nag. 59; 27 A. 155; 29 A. 275; 30 A. 379; 43 M. 107 = 54 I.C. 209 = 38 M.L.J. 32 (F.B.); 12 L.W. 350 = 59 I.C. 894; 11 L.W. 349 = 38 M.L.J. 441; 20 L.W. 864 = 47 M.L.J. 720 = 84 I.C. 265; 1 S.L.R. 158; 17 S.L.R. 73 = 80 I.C. 1002 = 1924 S. 101; 72 I.C. 862 = 1924 P. 367. (But see *contra* 2 Pat.L.J. 361 = 39 I.C. 763; 14 O.C. 89 = 10 I.C. 722; 3 Luck. 719 = 1928 O. 442. But see *contra* 5 Oudh L.J. 551 = 48 I.C. 39; 2 Oudh L.J. 57 = 27 I.C. 570; 68 I.C. 693 = 1922 N. 189. But see *contra* 68 I.C. 429 = 1923 N. 161 (2). *He is a representative of the decree-holder*, 91 I.C. 218 = 1926 N. 68; 79 I.C. 636 = 20 N.L.R. 170 = 1924 N. 328. *He is not representative of either the decree-holder or judgment-debtor.* 25 Bom.L.R. 147 = 72 I.C. 256 = 1923 B. 214; 44 B. 451 = 22 Bom. L. R. 759 = 57 I.C. 440; 42 B. 411 = 20 Bom.L.R. 495 = 46 I.C. 113; 25 B. 631; 79 I.C. 57 = 1925 L. 176; 49 I.C. 140 (L.); 4 Bur.L.T. 28 = 9 I.C. 472; 3 Bur.L.T. 5 = 3 I.C. 713. (B) *In the case of mortgage decree, stranger auction-purchaser is representative of both mortgagor and mortgagee*, 44 A. 488 = 20 A.L.J. 337 = 67 I.C. 29 = 1922 A. 495; 24 A.L.J. 519 = 96 I.C. 137 = 1926 A. 457; 16 M. 121; 20 B. 390; 59 C. 117 = 35 C.W.N. 877 = 1932 C. 126. But see *contra*, 12 O.C. 45 = 2 I.C. 57; 14 L.W. 92 = 63 I.C. 200 = 41 M.L.J. 120; 134 I.C. 1 = 1931 A. 466 (F.B.). *Whether he is to be deemed representative of decree-holder or judgment-debtor depends upon the nature of the dispute.* See 26 A. 447; 27 A. 155. (C) *In the case of decree-holder auction-purchaser, he retains his character of a party to the suit*, 3 Luck. 182 = 110 I.C. 83 = 1928 O. 199 (F.B.); 31 C. 737; 27 C. 34; 1938 Nag. 212; 53 C. 781 = 30 C.W.N. 649 = 1926 C. 798; 97 I.C. 697 = 1927 C. 57; 44 I.C. 563; 978 (Nag.); 18 S.L.



## NOTES.

R. 34; 78 I.C. 930=1925 S. 171; 21 M. 416=8 M.L.J. 54; 25 M. 529=12 M.L.J. 1; 26 M. 740=13 M.L.J. 237; 28 M. 87=14 M.L.J. 474; 28 M.L.J. 642; 23 L.W. 744=69 I.C. 657=1926 M. 857=51 M.L.J. 126; 41 M. 403=22 C.W.N. 553=44 I.C. 855=34 M.L.J. 463 (P.C.). But *see contra* 31 A. 82=6 A.L.J. 71; 47 A. 304=22 A.L.J. 1119=84 I.C. 746; 50 A. 670=26 A.L.J. 498=1928 A. 368; 50 A. 686=26 A.L.J. 716=1928 A. 363; 45 A. 96; 44 B. 352=22 Bom.L.R. 296=56 I.C. 349; 44 B. 977=22 Bom.L.R. 1101=59 I.C. 366; 120 I.C. 593=1930 L. 363; 8 P. R. 1918=44 I.C. 169; 53 I.C. 460 (Lah.); 1 Pat.L.J. 232=20 C.W.N. 829=35 I.C. 468; 9 Pat. 775=11 Pat.L.T. 331=1930 P. 311; 10 P. 670=12 Pat.L.T. 423=1931 P. 241 (F.B.). *See however* 4 P. 726; 1938 Rang. 250. *See also* notes under heading 'Delivery of properties sold in execution, questions relating to.'

OBJECTION TO ATTACHMENT, QUESTIONS RELATING TO.—Objection by the judgment-debtor that the property is not saleable comes under the section. 19 B. 328; 27 C. 187. *See also* 66 C.L.J. 57=1937 All. 97; 1939 Cal. 113=42 C.W.N. 87. Also an objection on the ground of want of saleable interest. 1 O.W.N. 857. *See also* 76 I.C. 316. The question whether the property attached before judgment is attachable or not can be raised in a proceeding under section 47. 58 C.L.J. 289=37 C.W.N. 978=1933 C. 757. Where property is claimed not under or in execution of a decree, but the claim is for delivery of property on the ground that the decree is not binding on the claimant the question is one that cannot be tried in execution, and therefore section 47 has no application. 1937 Mad. 268. An objection by the judgment-debtor to an attachment of property in his possession on the ground that he is in possession as a shebait of a deity falls under O. 21, rr. 58 and 60 and not under section 47. 39 C. 298 (F.B.); 12 I.C. 411; 42 C. 440. But *see contra* 2 Luck. 145. So also an objection that the property sought to be attached is wakf property. 3 Pat.L.T. 432=67 I.C. 438. *See also* 23 M. 195; 23 B. 237; 31 M. 125. An objection by the legal representative of a deceased judgment-debtor that the property attached is his own falls under section 47 and not under O. 21, r. 58. 3 Pat.L.T. 613=68 I.C. 369; 28 A. 51; 26 M. 501; 27 C. 34; 34 B. 546; 2 R. 168; *also* 54 C. 1064; 5 R. 659; 100 I.C. 786=28 Punj.L.R. 121; 1935 A.W.R. 39=1935 A.L.J. 74; 1929 O. 21; 53 B. 46; 60 C.L.J. 251; 58 B. 513=36 Bom.L.R. 608=1934 B. 296; 151 I.C. 227=1934 R. 127; 1934 P. 188; 158 I.C. 410=1935 M. 923. Where a person was added as legal representative and he objected to a certain attachment as being a legatee, the question falls under the section. 5 R. 393; 1931 R. 314. *See, however*, 9 R. 305. But where the legal representative sets up title on behalf of a third person, the case does

C. C. M.—61

not fall within section 47. 31 I.C. 393 (M.); 23 M. 195; 23 B. 237; 31 M. 125; 39 C. 298; 15 I.C. 353; 1930 N. 293. But *see* 67 M.L.J. 317=152 I.C. 293=1934 M. 621. (Objection by son that a certain sum of money should not be attached in execution of a decree against him for his father's debt on the ground that it was trust money in which he had a beneficial interest). Objection by a member of a tarwad that a property attached in execution of a decree passed against a karnavam of a tarwad in his representative capacity does not belong to the tarwad but to a separate *tavazhi* to which the claimant belonged could not be enquired into under this section. 51 M. 46=53 M.L.J. 824 (F.B.) overruling 30 M. 512 and 24 M. 658. If two persons one of whom is a party to the suit and one not a party, prefer a claim under O. 21, r. 58, the party to the suit must proceed by way of appeal by virtue of section 47 and the non-party by way of suit by virtue of O. 21, r. 63. 57 M. 822=1934 M. 435 (1)=67 M.L.J. 36. Where objection is wrongly filed under O. 21, r. 58 instead of under section 47, and order is passed, suit under O. 21, r. 63 is barred. 1935 A.L.J. 74=1935 A. 183. *See also* I.L.R. (1939) All. 354=1939 A.L.J. 221=1939 A. 264; 7 B.R. 148; 194 I.C. 45; (1940) 2 M.L.J. 305.

SETTING ASIDE OF EXECUTION SALE, QUESTIONS RELATING TO.—The question of the validity or otherwise of a sale held in execution of a decree is one relating to execution arising between parties to the suit. 13 I.C. 133=1912 M.W.N. 44; 1928 R. 215=144 I.C. 679; I.L.R. (1940) Cal. 334=72 C. L.J. 66. The fact that the auction-purchaser is interested in the result, does not matter. 19 C. 683. *See also* 34 M. 417; 34 B. 546. Section 47 applies to a case where the question raised concerns the auction-purchaser as well as parties to the suit, *e.g.*, an application to set aside the sale for irregularity. 41 M. 403=34 M.L.J. 463 (P.C.). *See also* 150 I. C. 611=1934 N. 21. But *see* 149 I.C. 445=35 P.L.R. 375=1934 L. 508, holding that proceedings for setting aside a sale are not proceedings in execution. *See also* 151 I.C. 244=1934 A.L.J. 859=1934 A. 314; 43 C.W.N. 419=1939 Cal. 334. An order made under O. 21, r. 97 between the decree-holder-auction-purchaser and another person who had been impleaded as a defendant in the suit is appealable because the dispute comes under section 47. 150 I. C. 313=38 C.W.N. 497=1934 C. 541. A petition objecting to the whole execution procedure in a case and not merely to the actual irregularity in conducting or publishing the sale may be dealt with under section 47 and is not fettered by the 30 days' rule for presentation under O. 21, r. 90. 37 I. C. 827=10 Bur.L.T. 249. *See also* 145 I.C. 113=1933 L. 570 as to limitation. Where property claimed by a person in his personal capacity is sold in execution of a decree to which he was a party in a representative capacity, he can apply under section 47 to have the sale set aside and a separate suit will be barred by that section. 46 I.C. 458=



## NOTES.

27 C.L.J. 572; 1931 R. 314. *See also* 38 C.W.N. 906; 151 I.C. 227=1934 R. 127, following 2 R. 168. An application to set aside an execution sale as illegal falls under section 47. 22 A.L.J. 413. So also an application on the ground of want of notice under O. 21, r. 22. 5 Pat.L.T. 61. *See also* 142 I.C. 658=1933 M. 224; or suppression of processes. 27 C.L.J. 528. Where an execution sale is challenged on the ground that no notice was issued under O. 21, r. 22, but the Court finds, that no such notice was necessary the order is not one under section 47. 2 P. 916. Where notice under O. 21, r. 22 is held necessary but was not issued, *see* 7 R. 110. A sale in execution of property which is subsequently found not to belong to the judgment-debtor is not void. The only course open to a decree-holder purchaser in such a case is to apply under O. 21, r. 91 to have the sale set aside. If that remedy is barred by limitation, he loses his remedy altogether. The sale cannot be set aside by any other means, and if the sale stands, the order recording satisfaction of the decree also stands and cannot be set aside by the executing Court. 41 L.W. 422=1935 M. 340. An order on an objection that the properties could not be sold subject to encumbrances as notified in the sale proclamation is one relating to execution within section 47. 72 I.C. 860. An order on an application by a judgment-debtor objecting to the sale of certain property falls under section 47. 31 I.C. 102 (M.). Such an order is appealable. 17 A.L.J. 802. So also an order declining to proceed with execution for the sale of the property, in view of section 63. 26 C.L.J. 42=42 I.C. 466. So also where it is objected that the property sold is not liable to attachment and sale under section 60. 6 A. 448; 8 A. 146; 34 M. 417; 34 B. 546; 148 I.C. 200=1934 N. 28. *See also* 46 L.W. 544=1937 Mad. 918. The objection may be made even after sale and before confirmation. 158 I.C. 202=1935 A. L.J. 1137=1935 A. 1016; also where it is alleged that before sale the decree was adjusted and that consequently the sale was illegal. 22 A. 86. *See also* 33 C.W.N. 795=1929 C. 374 (F.B.). So also an objection that certain lands sold in execution are not saleable being inam lands. 1935 N. 30; 31 N.L.R. 217=156 I.C. 99. The section, however, does not bar a suit to set aside a decree and execution sale thereunder as having been obtained by fraud. 42 C. 244=27 M. L.J. 100 (P.C.). *See also* 24 C. 695; 26 C. 326; 27 C. 197; or as having been a nullity, the legal representative of the deceased defendant not having been brought on record. 21 A. 316. *See also* 148 I.C. 418=1934 O. 167. The proper remedy for a plaintiff to set aside a sale held in contravention of O. 34, r. 14 is by an application under section 47 and not by a separate suit. 45 B. 174. But an order setting aside confirmation of sale does not fall under the section. 100 I.C. 800=1927 L. 337. Where a mortgage decree is not passed in accordance with

law but the properties are purchased by the mortgagee in execution sale, the sale is not void but irregular. The remedy of the aggrieved party is to apply under the section before confirmation of the sale and not by a subsequent suit for redemption treating the execution sale as void. 41 M. 403=34 M.L.J. 463 (P.C.). An application by a receiver of an insolvent's estate to annul a sale on the ground of a prior adjudication of the debtor is one under section 47 to which O. 21, r. 90 is not applicable and hence a second appeal lies to the High Court. 30 M.L.J. 611. *See also* 1 K. 533. An objection by a Hindu widow who is a party to the suit to the sale of a certain house without reserving rooms for her residence, can be inquired only under section 47 and not by a separate suit. 19 I.C. 926 (2) (Punj.).

DELIVERY OF PROPERTY SOLD IN EXECUTION, QUESTIONS AS TO.—Proceedings as to delivery of possession of property sold in execution where the auction-purchaser is a stranger are not covered by the section. 14 C. 644; 31 M. 177; 53 L.W. 27=(1941) 1 M.L.J. 45 (F.B.). *See* 177 I. C. 692. *See also* cases cited under the heading "AUCTION-PURCHASER WHETHER A REPRESENTATIVE OF A PARTY". Where on an application for removal of obstruction to delivery, applicant is referred by the final order to a suit, a subsequent suit is maintainable and S. 47 cannot be pleaded in bar. 69 M.L.J. 139. Where the decree-holder is himself the auction-purchaser, the question is one relating to execution, arising between the parties to the suit, the decree-holder not ceasing to be a party by becoming the auction-purchaser. 35 B. 452; 10 P. 670; 27 C. 34; 31 C. 737; 31 A. 82; 26 M. 740; 13 M. 504; 25 M. 529; 39 M.L.J. 603; 38 P.L.R. 621; 10 I.C. 51=13 C.L.J. 467; 44 I.C. 563; 78 I.C. 930 overruling 35 B. 452; 1935 N. 30. But *see* 48 B. 550; 5 O.W.N. 108=1928 O. 199 (F.B.) (*Contra*). Questions relating to the possession of property after sale has taken place are not questions connected with the execution, etc., of a decree within S. 47 and a separate suit for recovery of possession by the decree-holder auction-purchaser is not barred. 33 I.C. 367; 3 Pat. L.J. 571; 48 B. 550; 53 I.C. 460; 10 P. 670; 1929 P. 559; 1931 P. 296 (Partition suit). Even if they are questions relating to execution, the decree-holder cannot be treated as a party to the suit after he has become the purchaser. 31 A. 82; 6 C.L.J. 749. *See also* 49 I. C. 137=29 C. L. J. 48; 4 Pat.L.J. 716. The question of delivery of possession arising between the decree-holder and defendant against whom no relief is granted is one under S. 47. 29 M.L.J. 629. A suit for possession lies by the decree-holder auction-purchaser who is resisted in obtaining possession of the property by the judgment-debtor as well as by a third person claiming to have an interest in the property. 44 B. 977. But *see* 28 N.L.R. 250. A suit lies by a decree-holder who purchases his judgment-debtor's



## NOTES.

rights in joint property, for partition against the judgment-debtor and other co-owners. 28 M.L.J. 642; 1 L. 134; 1927 M. 955. Where the decree was for *khas* possession of lands jointly owned with the defendants, a separate suit for partition and possession would be barred. 54 C. 524. Where, after sale of the properties in execution of a mortgage decree, a puisne mortgagee who had been impleaded as one of the defendants in the suit applied to the executing Court that he had certain rights in the property by way of easement and as co-sharer and that therefore the possession of the property should not be given, *held*, the application was one under S. 47 and not under O. 21, R. 100. 144 I.C. 472=38 L.W. 199=1933 M. 569. A plaintiff who was obtained a decree for possession on the basis of a lease and obtained delivery through Court, cannot bring a second suit in respect of the same property praying for demolition of a building which had been built during the period of the lease. S. 47 applies to such a case and bars a separate suit. The fact that another person, the son of the judgment-debtor has been impleaded to the subsequent suit does not remove the bar, unless he has got a separate cause of action against that person. 155 I.C. 268=1935 P. 222.

ADJUSTMENT OUT OF COURT, QUESTIONS RELATING TO.—*See* 1940 A.L.J. 301=1940 All. 270; 1938 Pat. 41. An application for certifying payments made out of Court falls under S. 47. 1 P. 644. O. 21, R. 2 does not limit the operation of S. 47. 1 Bur.L.J. 43=70 I.C. 859. Uncertified payment—Suit for recovery of—After satisfaction of decree—S. 47 no bar. 7 R. 310; but not where such application is barred by time. 25 I.C. 884. Application by judgment-debtor to have sale set aside on ground of satisfaction of decree by uncertified payment by another judgment-debtor is governed by O. 21, R. 2 and Art. 174, Limitation Act. If application is barred, he cannot invoke S. 47. 15 P. 422=17 P.L.T. 195=162 I.C. 849=1936 P. 270. S. 47 bars a suit for a declaration that a decree is satisfied. 3 L. 319; 36 I.C. 988=31 M.L.J. 429; 21 C. 437; 15 M. 302; 31 C. 480; 1933 L. 1051; 157 I.C. 814=1935 R. 225. The question of decree-holder's fraud in not certifying the payment and holding a sale after satisfaction did not fall under O. 21, R. 90 but under S. 47. 10 I.C. 625; 30 C.L.J. 248; 41 A. 443. An application purporting to be under S. 151 and O. 47, R. 1, to set aside an order entering full satisfaction of the decree on the ground of fraud is essentially one under S. 47 relating to the discharge of the decree. 148 I.C. 549=1934 P. 202; 167 I.C. 401=1937 Oudh 298=1937 O.W.N. 231. Though order recording full satisfaction might be reviewed by the Judge who passed it, the question whether the petition of adjustment and the order thereon correctly represented the intention of the parties is not one the determination of which falls under S.

47. So, a suit for rectification of a petition for adjustment of a decree and the order thereon, on the ground that the same did not correctly represent the agreement of the parties and that the decree had been recorded by mistake is not barred by S. 47. 39 C.W.N. 966. *See also* 40 P.L.R. 569=1938 Lah. 214. Agreement by decree-holder limiting methods of execution, if can be recognized by executing Court. 154 I.C. 292=1935 A. 364. *See also* (1939) 1 M.L.J. 473=1939 Mad. 499=49 L.W. 360. Where after a decree for possession of a share in an estate, specific lands have been allotted in lieu of the share in partition proceedings, an enquiry as to what are those lands is one relating to execution of the decree. 1 P. 378=43 M. L.J. 124 (P.C.). *See also* 2 P.L.J. 496. Where after attachment of property decree was adjusted but not certified, and property was mortgaged to another in a suit on mortgage, S. 47 would not bar the trial Court from recognizing the adjustment. 19 N.L.J. 175. Revival of application once struck off. 1940 A.L.J. 301=1940 All. 270 and notes under S. 48.

CASES WHERE SEPARATE SUIT WILL LIE.—That which in reality forms the basis of an independent suit cannot be introduced as a question to be tried in execution proceedings. 1 P. 581=43 M.L.J. 589 (P.C.); 49 A. 379; 1929 A. 252=115 I.C. 462. *See also* 1940 N. 336. When a person comes to Court in execution proceedings as the legal representative of a deceased party, he cannot question the decree which has been passed. If the decree concerns property in which he claims an interest, the decree will not be binding upon him unless he was a party to the suit. If he was not a party to the suit or if he had been dismissed from the suit his rights would be entirely unaffected and he would be in a position to enforce them in a suit instituted by him for that purpose. He is not compelled to have his own claims to the property decided in execution proceedings. 54 L.W. 448=(1941) 2 M.L.J. 622 (F.B.). An objection to execution on the ground that the decree is invalid being collusive, can be tried only in a regular suit and not in execution under S. 47. 22 B. 475; 27 M. 118; 28 M. 26; 30 M. 26; 32 C. 265; 21 A. 277 (356); 54 M. 184. So also the question whether a decree was obtained by fraud or collusion. 38 M. 221. *See also* 9 M. 80; 23 C. 639; 38 M. 1076. A pre-decree compromise which is not embodied in decree cannot be pleaded in execution, but separate suit for declaration of rights on basis of the compromise is maintainable. 39 P.L.R. 29=1937 Lah. 89. *See also* 54 L. W. 157; 1939 A.M.L.J. 21; I.L.R. (1941) Kar. 227; 43 C.W.N. 1007=70 C.L.J. 286. Where after the assignee of the decree had received the entire decretal amount, the decree-holder also realised the decretal amount from the judgment-debtor who was thus made to pay the same sum twice over, a suit by the judgment-debtor claiming refund of the extra amount realized from him is not



## NOTES.

barred under S. 47 (1). 18 Lah. 162=39 P. L. R. 904=1937 Lah. 465. Where a decree merely declares the joint liability of the plaintiff and the defendant in respect of a certain debt without any direction for payment of any sum of money by the one to the other, it is incapable of execution. S. 47 is no bar in such a case to a fresh suit between the parties to work out their rights. 64 C.L.J. 55. Cross-suits—Agreement to take decrees for equal amounts and to set-off each against other and to refrain from execution—Decrees passed accordingly—Subsequent execution by one party—Suit by other for damages not barred. (1939) 1 M. L.J. 473=1939 Mad. 499=49 L.W. 360. A separate suit will lie where the existence of the decree itself is denied [1931 A. 490 (F.B.)]; or where the jurisdiction of the Court passing the decree is questioned. (1932 L. 601). Where the final decree was passed after death of the defendant and without substitution of heirs, the real question at issue is the validity and not the satisfaction of the decree and it can properly be raised in an independent suit by the legal representatives of the deceased defendant who seek to set aside the final decree and the sale in execution. The mere fact that their interests were technically represented by an administrator in execution proceedings cannot prejudice them. 39 C.W.N. 1284. S. 47 does not bar a suit by a person against whom a decree has been passed at a time when he was suffering from unsoundness of mind, to set aside the decree. 50 I.C. 109=17 A.L.J. 257. Where property is claimed not under or in execution of a decree, but the claim is for delivery of property on the ground that the decree is not binding on the claimant the question is one that cannot be tried in execution, and therefore S. 47 has no application. 1937 M. 268. Where a decree-holder under a *bona fide* mistake brought to sale in execution some of his own properties, the remedy is only by a suit under O. 21, R. 103 and not by an application under S. 47. 15 L. W. 272=1922 M. 63. *Contra* 116 I.C. 634. A suit will lie against the auction-purchaser for recovery of property sold in execution of a decree, in which the judgment-debtor has no interest. 75 I.C. 238. But *see* 1929 M.W.N. 811=123 I.C. 12=1930 M. 12. Prior proceeding for recovery of debt—Question of pledge not in issue—S. 47 not a bar to subsequent suit for redemption by pledge. 30 L.W. 898=1930 M. 36. Where the creditor seeks his remedy against the trustee personally the trustee's right to indemnity from out of the trust estate should be pleaded in the same suit or in a different suit. The question cannot be investigated in execution. 60 C. 801=1933 C. 668. *See also* 42 C.W.N. 1131=1938 Cal. 818. A suit by the decree-holder for declaration that the assets of the deceased debtor are liable to attachment and sale in execution of the decree, when objections are allowed under

O. 21, R. 58 is not barred by the section. 71 I.C. 1012=1923 A. 292. *See also* 1940 Sind 191. So also where it is claimed that the decree passed against a Hindu widow is not binding on the reversionary inheritance. 30 M. 402; I.L.R. 1940 M. 123=1939 M. 867 (Hindu father and son). Where a decree is of a purely declaratory nature, a separate suit will lie to enforce the rights declared by such a decree. 22 B. 267. *See also* 18 N.L.J. 110; 39 C.W.N. 725; 64 C.L.J. 55. Suit to declare title to decree is not barred by section 47. 1931 R. 24. So also a suit will lie by a mortgagee decree-holder auction-purchaser. I.L.R. (1941) Lah. 91=1940 Lah. 230. *See also* 44 C.W.N. 827; 41 P.L.R. 546=1939 Lah. 211. Where a compromise mortgage decree allowed the relationship of mortgagor and mortgagee to continue and provided execution as the sole remedy, the provision as to execution was only a clog on the equity of redemption and a suit for redemption is not barred under the section. 31 L.W. 44=1930 M. 305. Where in a suit by the prior mortgagee impleading the puisne mortgagee as party, the decree does not provide for the working out of the rights of the puisne mortgagee, he can enforce his mortgage by a suit of his own, unaffected by section 47. 49 I.C. 466=1918 M.W.N. 902. *See also* 42 M. 90. An alleged agreement between the prior mortgagee decree-holder and a third party who purchased the property in execution of a decree on a subsequent mortgage, subject to the prior mortgage decree, by which the former consented to be paid off by the latter and not to execute his decree is not a question falling under section 47 but could only be gone into in independent proceedings. 145 I.C. 528=38 L.W. 728=1933 M. 838 following 57 C. 403 (F.B.). *See also* 1938 Pesh. 12=174 I.C. 295. Where a puisne mortgagee impleaded a prior mortgagee decree-holder and obtained a decree, then the prior mortgagee purchased the property in execution of his own decree and objected to the sale by the puisne mortgagee, the order on the puisne mortgagee's application is not appealable. 99 I.C. 658=1927 M. 431. Question of priority of prior mortgagee cannot be gone into in execution of decree on later mortgage. 1930 A. 826 (2)=1930 A. L.J. 1135. In a mortgage suit where some of the defendants claimed paramount title (occupancy rights), the matter cannot be decided in the suit, and section 47 would not bar the question being raised in subsequent suit. 1936 M. 733; 41 P.L.R. 533=1938 Lah. 178. The bar of section 47 can only apply to cases where there is a duty to raise the question in the earlier proceedings. 1936 M. 733. But *see* 71 M.L.J. 511=1936 M. 675. Where persons who have obtained a decree for possession get possession without execution and are subsequently dispossessed, they are entitled to sue for possession. The fact that they did not execute their decree does not debar them from suing for possession, as under section 47, it is not



## NOTES.

necessary for them to seek possession through execution, when they are already in possession. 1941 A.W.R. (Rev. 771=1941 O.W.N. 1014. A dispute as to possession between rival auction-purchasers of the same property in execution of different decrees does not fall within the scope of section 47. 49 I.C. 629=9 L.W. 81. But see 56 M. 909=65 M.L.J. 407=1933 M. 780. Where two decree-holders are proceeding in execution against the same property and the claim for priority made by one is disallowed by the executing Court, the decision does not bar a regular suit by such decree-holder for establishing his priority. 150 I.C. 964=1934 L. 478. The question of priority as between rival heirs claiming to be entitled to execute the decree by right of succession can be decided in execution proceedings under section 47. 59 B. 417=37 Bom.L.R. 150=1935 B. 298. Section 47 is a bar to a regular suit if the object of that suit is to decide a question between a decree-holder-purchaser and the judgment-debtor. But where the object of the suit is to settle dispute between decree-holder-purchaser and persons other than the judgment-debtor, section 47 cannot be a bar, and it is no objection to say that there was no delivery under O. 21, r. 96. 1936 M. 733. A suit lies for contribution by one judgment-debtor against another, for his share of the decree debt, the whole of which has been levied in execution from him. 18 A. 106. Decree-holder auction-purchaser omitting to take possession through Court—His transferee suing judgment-debtor for possession—Application or suit as remedy—Limitation. 1930 C. 586. Decree-holder purchaser omitting to apply under O. 21, r. 91 within limitation—Subsequent application for realisation of purchase-money in execution of original decree—If competent. 1935 A.L.J. 474=1935 A. 910. Suit by decree-holder auction-purchaser (10 P. 670) or by the purchaser of an undivided interest (1931 M.W.N. 1176) for possession of the properties is not barred. So also a suit for *khas* possession by the plaintiff against his co-sharer landlord on the ground that he had purchased the tenancy in Court auction in a suit for rent against the tenant in which the co-sharer landlord also was a party. 60 C. 1401=149 I.C. 11=1934 C. 277. If the profits are not ascertained, a fresh suit to ascertain their amount is maintainable. 33 I.C. 83. Ascertainment of mesne profits is a matter to be decided in suit and not in execution. 12 Pat.L.T. 127=1931 P. 1. Section 47 is no bar to a suit for actual possession by a purchaser who obtained symbolical delivery after confirmation of the execution sale. 20 C.W.N. 675=23 C.L.J. 587 (26 M. 740, Diss.). See also I.L.R. 1939 L. 295=1939 Lah. 211. Nor to a suit by purchaser who was dispossessed by judgment-debtor after conclusion of execution proceedings. 164 I.C. 260=1936 R. 298. As to when execution proceedings terminate, see 1936 Pesh. 85. A suit by the decree-holder for rectification of a petition

of adjustment, in which a mistake has crept in and upon which an order recording satisfaction of the decree has been passed, is maintainable and not barred by the provisions of section 47. 165 I.C. 756=40 C.W.N. 914=1936 C. 400. A decree-holder-purchaser cannot of course institute a suit for recovery of possession from the judgment-debtor or some one who stands in the shoes of the judgment-debtor, and his remedy is confined to three years. But where the property sold in execution has been held by a tenant under the judgment-debtor from before the date of attachment of the property in execution, and subsequent to the sale the tenant surrenders the property to the judgment-debtor who again leases it to another, the decree-holder purchaser who has not obtained either actual or symbolical possession after the execution sale, or his assignee can maintain a suit for possession against the judgment-debtor and his tenant. Section 47 does not bar such a suit, because the judgment-debtor by the surrender does not obtain possession in the same capacity as he held it at the time of the execution sale. I.L.R. (1939) Mad. 456=1939 Mad. 369=(1939) 1 M.L.J. 468 (F.B.). If a person has two capacities, there is no reason why he should be limited to one. If a representative of a judgment-debtor claims the property which the decree-holder seeks to sell in execution as his personal property, there is no reason why he should be limited to the objection under section 47. He is entitled to adopt the procedure laid in O. 21, r. 58, and if he fails in the claim case, to bring a suit under O. 21, r. 63. 179 I.C. 538=1939 Pat. 354. Partition suit in joint Hindu family—Compromise decree—Land left in common pending another litigation—Property lost to family subsequently and money acquired in its stead—Division of money among sharers—Separate suit is maintainable. 41 Bom.L.R. 836=1939 Bom. 386.

CASES WHERE SEPARATE SUIT WILL NOT LIE.—Section 47 bars both a suit and defence. The section debars a party to the suit or his representative from raising otherwise than in the execution proceedings any question of the class described in the section which arises between himself and the other party to the suit. He cannot raise it either as a plaintiff or as defendant in any separate suit between himself and the other party or his representative. 1939 O.A. 518=1939 O.W.N. 653. A decree obtained by a person for possession of land, which is left unexecuted by leaving the defendants in possession until the execution of the decree is barred by limitation, bars a second suit for possession by reason of section 47. 180 I.C. 76=1939 Pat. 260. Objections by the judgment-debtor to the execution of a decree fall under the section. 46 M.L.J. 240; 22 I.C. 926=12 A.L.J. 12; 151 I.C. 617. If objection to execution is taken by a party to the suit, section 47 applies and not O. 21, r. 63. 16 I.C. 255 (A.). Whether or not execution of a decree is barred. 2 P.L.R. 222



## NOTES.

=1924 P. 683. Whether the decree is valid. 54 C.L.J. 593; or is capable of execution. 140 I.C. 533. That the decree was a nullity having been passed against a dead person. 28 Bom.L.R. 1367=98 I.C. 927=1927 B.53; 38 C.W.N. 1124=60 C.L.J. 102. But *see contra* 148 I.C. 418=1934 O. 167; 27 A. 316. The legality of the execution proceedings and jurisdiction of the executing Court to order sale. 120 I.C. 279=1929 L. 449. As to decree which is wholly without jurisdiction as against a Cantonment Board, *see* 144 I.C. 1016=1933 A.L.J. 162=1933 A. 163. That the Court had no jurisdiction to pass the decree and was against section 42 of the Co-operative Societies Act. 31 C.W.N. 739=103 I.C. 644=1927 C. 578; or is otherwise a nullity. 103 I.C. 673=1927 L. 651; 1929 L. 449; 1930 R. 337 (2); 60 C.L.J. 572=156 I.C. 405 (2)=1935 C. 396. But *see* 1929 M. 383. An action on a judgment is permissible only where the judgment cannot be enforced in some other way. A simple money decree can be enforced by execution, and a suit based upon such a decree will not lie. The fact that such a decree cannot be executed by reason of section 60-A of the Bengal Court of Wards Act—leave of the Court not having been obtained or accorded—is not an inherent defect in the decree itself which renders it incapable of execution. Absence of leave of the Court is no doubt a bar to execution and nothing more; it is not a ground for holding that a suit will lie upon the judgment. Such a suit will lie only when the decree from its very nature is incapable of execution. The decree for money being an executable decree has to be enforced by execution and a separate suit is barred by section 47. 1941 Pat. 70=21 Pat.L.T. 947. The effect of irregularity or illegality of notice issued under O. 21, r. 16. 56 I.C. 461. Objection to want or defect of attachment. 1930 M. 414; 34 L.W. 809. An improper seizure of a judgment-debtor's property by the decree-holder in excess of his rights. 38 A. 339. The right of a transferee of a decree to execute the same. 28 I.C. 906 (M). But *see* 1929 L. 51. The right of alleged true owner to execute decree obtained by benamidar when questioned by judgment-debtor. 1928 C. 835. Where a scheme decree is executable in itself, a suit to declare invalid acts done under such a decree will be barred, and the remedy of the aggrieved party must be sought in execution proceedings. But when there is no executable decree, a suit is not barred. 18 N.L.J. 110. Whether the decree against a shebait is capable of execution against his successor. 14 C.L.J. 337. Whether time is of the essence of a consent decree for specific performance. 125 I.C. 123=1930 P. 234. An objection by the judgment-debtor that a scheme sanctioned by the Court under section 153 of the Companies Act has superseded the decree which has, therefore, become incapable of execution, relates to the execution or discharge of the decree and

comes within section 47. 41 C.W.N. 406. An agreement by which the decree-holder agrees not to take out execution against the person of the judgment-debtor and not to attach certain moneys due to the judgment-debtor from a third person should be given effect to by the executing Court. The question as to the mode of execution must be determined in execution proceedings and not in a separate suit. 1935 A. 364. *See also* 39 C.W.N. 1036. An agreement for stay of execution of decree before the decree is passed is a matter to be enquired into under section 47. 40 M. 233=32 M.L.J. 13 (F.B.); 22 B. 463. But *see contra* 31 C. 179; 29 C. 810; 100 I.C. 156=28 Punj.L.R. 71; but not so the agreement made prior to decree to execute for lesser sum. 4 R. 118. *Pre-decretal arrangements* relating to execution fall under section 47 but not those attaching the decree itself, *e.g.*, credit for pre-decretal payments. 60 M.L.J. 721=54 M. 184. *See also* 18 Pat. L.T. 896=1938 Pat. 41. Judgment-debtor's objection about the existence of other legal representatives to the deceased decree-holder who have not joined in the application. 1929 P. 232=119 I.C. 883. The question whether a decree against a Hindu father is capable of execution against the son, the debt being tainted with immorality. 62 I.C. 905=6 P.L.J. 451. But *see also* 15 L. 772. An objection by the heir of a Hindu judgment-debtor that the debt was not for necessity. 13 I.C. 670. (11 M. 413; 17 M. 122, Dist.; 16 A. 449; 87 P.R. 1887; 147 P.R. 1907; 34 C. 642, Rel. on.) *See also* 1939 M.W.N. 918. But *see* 15 L. 772. A claim by person added as L.R. of deceased judgment-debtor of ownership or charge in his favour over property sought to be sold in execution. 127 I.C. 12=1929 L. 762; 51 A. 878=1929 A. 602. *See also* 42 C.W.N. 87=1938 Cal. 113; 1938 Pesh. 82. A transferee of the defendant *pendente lite* is a representative of the defendant, and a decree in the suit passed against the defendant-transferor must be enforced against the transferee in execution and not by a separate suit. A separate suit is barred by section 47. I.L.R. (1938) Bom. 649=40 Bom.L.R. 512=1938 Bom. 367. An objection by judgment-debtor as to the saleability of his property in execution could be raised under section 47, at any time prior to sale of the property; and even if made later, it would be within time, if made within 30 days from date of sale under Art. 166 of Limitation Act. 1938 N.L.J. 389=1938 Nag. 558. *See also* 1939 Lah. 256. Decree against legal heir of the deceased—Objection to execution by the executor on the ground that he was not a party to it. 149 I.C. 926=58 C.L.J. 487=1934 C. 258. Defendant against whom suit dismissed—Money of, paid in part satisfaction of a decree under erroneous but final orders of Court—Recovery back from plaintiff of—Defendant's suit fresh for—Maintainability. 58 M.L.J. 275. Also an application for the recovery of the land taken possession of by the decree-holder and either not covered by the decree or in excess of it. 23 C. 483; 2 A. 61; 45 A. 96; 1929 M.W.N. 811=



## NOTES.

123 I.C. 24. But *see* 125 I.C. 765; 1938 Nag. 276. A party to a mortgage decree who does not raise the question of paramount title in the execution proceedings leading up to the sale of the property, is precluded from raising that question afterwards in a separate suit. 43 L.W. 740=1936 M. 675=71 M.L.J. 511. Also a suit for declaration that the sale is not valid and binding on the ground that the mortgagee fraudulently and wrongfully caused to be sold properties which were not included in the mortgage and which could not lawfully be sold in execution, is not maintainable and is barred under section 47. 40 C.W.N. 428. A suit does not lie for recovery of property included by mistake in the decree and sold in execution, where the sale was not set aside within time. 46 B. 914. An application for refund of excess amount levied in execution. 44 B. 97; 40 M. 780; 33 Bom.L.R. 1557; 144 I.C. 468=1933 A.L.J. 738=1933 A. 429. *See also* 1938 Nag. 276. An application for restitution of property purchased by the auction-purchaser on the ground that certain properties not covered by the decree were sold, is not maintainable under section 47. 45 A. 96. It is open to a decree-holder to re-open proceedings in execution of his decree, after satisfaction has been entered by an application in Court, on a proper case being made out. 158 I.C. 585=1935 C. 645. Where the sale is set aside, an application for restitution of the property sold may be made under the section and no separate suit lies. 16 M. 287; 22 A. 108; 1939 A.L.J. 211=1939 All. 368 (correction of sale certificate on account of wrong inclusion in it of certain property). Where a decree is amended after full execution, an application for restitution may be made under the section and no separate suit lies. 27 A. 485; 22 A. 79; 5 C.W.N. 627. As to whether suit lies for personal decree after sale of charged properties, *see* 62 C. 28=158 I.C. 1074=1935 C. 596. Whether the property underwent deterioration between date of decree and date of delivery of possession. 38 L.W. 714=1933 M. 825=156 I.C. 440; 41 L.W. 323=1935 M. 280=68 M.L.J. 277; 158 I.C. 88=1935 L. 170. But *see* 145 I.C. 117=1933 L. 168, where it was observed that waste committed by defendant after decree cannot relate to execution, discharge or satisfaction of the decree. The right of a judgment-debtor to stay execution on the ground of fraud or negligence of the decree-holder where the execution proceedings are still pending. 22 I.C. 963. An enquiry into administrator's accounts in case of money decree against him falls under the section. 5 R. 44. An order in execution adjudicating the claims of an assignee decree-holder and a person claiming a charge over the properties is not appealable as it relates to a question between decree-holders *inter se*. 24 L.W. 70=93 I.C. 649=1926 M. 691. The title of a purchaser in execution of a mortgage decree can be determined under this section. 54 C. 419. *See also* 53 C. 837. As to maintainability of an application for a fresh

warrant for possession after dismissal of application for removal of resistance to possession, *see* 1933 N. 369. Orders under section 73, C. P. Code, 1931 P. 357; 150 I.C. 970=1934 P. 350; liability to pay interest from date of decree, 1932 P. 237; granting or refusing payment by instalments, 1932 R. 54. Security bonds can be enforced in execution. 45 A. 649. *See also* 22 Pat.L.T. 734 (Rents for successive periods); 56 M. 989=65 M.L.J. 342=1933 M. 691 (Security bond executed to the Court as a condition for the issue of temporary injunction); but *see contra*, 55 A. 346=1933 A.L.J. 142=1933 A. 269 (F.B.). (Order directing security to be furnished as a condition of stay held to be only declaratory and separate suit held necessary for enforcing the security bond). So also execution can be levied against surety. 143 I.C. 356=56 C.L.J. 576=1933 C. 343. Objection by surety thereto to be decided. 1930 L. 399. Compromise decree in money suit creating charge over property not subject-matter of suit is executable and no suit is necessary to enforce charge. 1930 N. 17. *See also* 60 C. 1467=149 I.C. 224=1934 C. 327. No suit lies after objection was considered and decided in execution application under section 47. 31 Punj.L.R. 191; 1929 O. 256; 1930 O. 268. *See also* 60 C. L.J. 257. So also where objection was wrongly filed under O. 21, r. 58, instead of under section 47. 1935 A.L.J. 74=1935 A. 183. *See also* 194 I.C. 45. A suit to *set aside an execution sale on the ground of fraud* in respect of an application under O. 21, r. 89, is barred by section 47, C. P. Code. The matter is really within the provisions of section 47 and could only be decided under that section and not by a separate suit. 40 P.L.R. 615=1938 Lah. 690. The question whether a sale in execution of a decree was brought about by fraud, being a question relating to execution, discharged or satisfaction of a decree within the meaning of section 47, can be entertained by an executing Court even though the decree had been transferred to the Collector under section 68, and the sale had been confirmed. 1938 O.W.N. 758=1938 Oudh 188. *See also* 1937 188.

**NO SUIT.**—No suit lies to set aside compromise or adjustment of decree effected by next friend of minor without sanction of Court during execution against minor. Minor's remedy is by application under this section or by way of review. 17 P.L.T. 743=165 I.C. 857=1936 P. 506.

**APPEAL: ORDERS APPEALABLE UNDER THIS SECTION.**—The test to be applied in determining whether an order passed in execution is appealable or not is this—does the order conclusively determine the rights and liabilities of parties in a controversy which has arisen between them and which relates to the execution, discharge or satisfaction of a decree. 1940 A.L.J. 377=1940 All. 326. Interlocutory orders dealing with mere matters of procedure can hardly be said to be determination of any question within S. 47 and are not appealable. There must



## NOTES.

be determination of the rights or liabilities of the parties as to the execution, discharge or satisfaction of the decree. 24 C. 725; 34 A. 530; 27 I.C. 444=20 C.L.J. 512; 5 R. 534=104 I.C. 324=1927 R. 317; 1929 L. 815; 1929 M. 718; 1929 A. 85 (1); 151 I.C. 61=1934 Pesh. 43; 1937 Lah. 263; 1939 Lah. 177; 45 C.W.N. 323. But an appeal lies against an interlocutory order passed in execution proceedings, where the order has the effect of reviving an application for execution dismissed for default. 57 I.C. 905; also against an order on the question of notice under O. 21, R. 22. 8 P.L.T. 28. *See also* 20 Pat.L.T. 796; 1940 Pat. 75 (order giving directions to commissioner as to taking accounts in execution); 1937 Cal. 259=41 C.W.N. 531 (order dismissing execution application for failure of decree-holder to comply with order to file affidavit for appointment of guardian of minor judgment-debtor). *See also* 1937 Pat. 380. As to orders from which appeal lies, *see also* the following cases:—1939 Cal. 651 (order on objection opposing transfer of decree); 41 P.L.R. 186 (order transferring decree to another Court for execution); 41 Bom. L.R. 417=1939 Bom. 255 (order holding that decree is time barred in application under O. 21, r. 2); 1939 Lah. 137 (appeal by judgment-debtor against surety); 1939 A.M. L.J. 85 (order adjourning sale to enable sanction of chief commissioner being obtained); 18 Pat. 694=20 Pat.L.T. 492=1939 Pat. 570 (order allowing execution for a sum less than that mentioned in the decree after allowing reduction under local and special laws relating to agriculturists—*See also* 50 L.W. 537=(1939) 2 M.L.J. 609; 1939 M.W.N. 735; 1939 Mad. 942=50 L.W. 411=(1939) 2 M.L.J. 495); 50 L.W. 775=(1939) 2 M.L.J. 924 (order on objection by mortgagor judgment-debtor that sale for defaulted instalments should not be subject to remaining instalments), 1939 Sind 234 (order bringing legal representative of deceased decree-holder on record in execution); 1939 A.L.J. 53=1939 All. 314 (order directing sale of mortgaged property in a particular order—Question left undecided); 50 L.W. 578=(1939) 2 M.L.J. 782 (order settling terms of sale proclamation—*See also* 41 Bom.L.R. 1166=1939 Bom. 526; 41 Bom.L.R. 328=1939 Bom. 182); 41 Bom.L.R. 481=1939 Bom. 258 (order allowing simultaneous execution in two Courts); 1939 Rang. 376 (order under C. P.C., O. 21, r. 16); 1939 Cal. 334=43 C.W.N. 419 (order setting aside sale); 1939 Nag. 183=1939 N.L.J. 270 (auction-purchaser not necessary party in appeal). Appeal—Objection filed only by one of heirs of judgment-debtor—Appeal by decree-holder—Other heirs, are not necessary parties. 45 C.W.N. 342. (order dismissing application for execution by assignee decree-holder). 70 C.L.J. 121.

ASSIGNMENT.—Where a decree is assigned and the assignee assigns it to another but the second assignee's application for permission to execute the decree and to recognize the assignment is opposed by the first assignee and the application is dismissed, an appeal is competent from the order of dismissal as S. 47 applies. 57 M. 457=1934 M. 181 (1)=67 M.L.J. 207. *See also* 1938 N.L.J. 117=1938 Nag. 267; 1937 All. 63. The objection that the transfer of a decree by the decree-holder is not valid, but collusive and sham, and that the transferee is therefore not a representative of the decree-holder as there has been vesting in him of the decree, must be raised and decided by the Court in the application by the transferee under O. 21, r. 16, for permission to execute the decree. When the objections are determined and execution is ordered on recognition of the transfer, that is a decree within the meaning of S. 47. A separate suit for a declaration that the assignment is a sham and collusive transaction is barred under S. 47. 1937 M.W.N. 1043. A dispute between an assignee and the decree-holder is not a dispute between the parties within the meaning of S. 47, and a separate suit relating to the validity of the assignment of the decree is competent. The assignee is, therefore, not barred under the provisions of that section, from urging in a suit in which his assignment is being challenged that his assignment was valid, even though the executing Court had decided against him. 18 Lah. 162=39 P.L.R. 904=1937 Lah. 465. But an appeal by judgment-debtor would not be competent. 37 P.L.R. 305=155 I.C. 974=1935 L. 609. Also against an order allowing execution by an assignee decree-holder. 1934 L. 328.

ARREST.—An order on a claim for exemption for arrest is appealable under S. 47. 47 M.L.J. 678. An order refusing to arrest the judgment-debtor in execution of a decree is appealable. 4 L.L.J. 266=1922 L. 259. Also an order directing decree to be executed only against the property of the judgment-debtor and not against his person. 1924 L. 604. An order deciding the legality of arrest made in execution of a decree falls under the section. 32 I.C. 731=3 L.W. 35. When objection to the legality of arrest is not made at the time of the committal to jail the order is not appealable. 7 R. 110. Order to send judgment-debtor to jail on failure to give security is appealable. 164 I.C. 459=1936 R. 367. Also an order refusing to make any further effort to apprehend the judgment-debtor. 144 I.C. 255=14 P.L.T. 271=1933 P. 248. An order definitely dismissing execution application is an order under S. 47 and is appealable. 1933 A. 732. So also an order refusing attachment of pay under O. 21, R. 48. 144 I.C. 927=35 Bom.L.R. 360=1933 B. 185. Order disallowing judgment-debtor's plea of limitation is appealable, 44 L.W. 486=1936



## NOTES.

M. 801=71 M.L.J. 388.

**AMENDMENT OF DECREE.**—Where the *order amending a decree* for a certain sum is not passed in execution proceedings but on a separate application under Ss. 151 and 152, the application does not fall under S. 47 and no appeal from the order is competent. But the mere fact that the order amending the decree is not itself appealable and the mere fact that an appeal could be presented from the amended decree is no bar to the entertainment of a revision petition of the order in question, if it is passed without jurisdiction. 1938 Lah. 4. Where the description of property directed to be sold by a mortgage decree is incorrect, in the decree itself, the executing Court has no power to amend or rectify it. It is only the Court which passed the decree that can correct the mistake in the exercise of its inherent power under S. 151, C.P. Code. If it corrects the mistake and amends the decree, the amended decree is appealable, but if it refuses to do so, the order of refusal is not a decree and is not appealable. Nor would an appeal lie against the order under O. 43, R. 1, as it is not one of the orders mentioned in that rule. 1940 Bom. 10=41 Bom.L.R. 1170.

**ATTACHMENT PROCEEDINGS.**—Where a judgment-debtor objects to the attachment on the ground that the attached property is *debutter* and that he holds it not in his private or personal capacity, but as *shebait* on behalf of a deity to whom the property has been dedicated in consideration of his performing certain services to that deity, the objection falls under O. 21, r. 58 and not under S. 47. No appeal therefore lies against the order passed on the objection. 17 P.L.T. 810=1936 Pat. 256; *see also* 1938 R.D. 175=1938 A.W.R. (B.R.). 42. Where a decree is passed against the assets of a certain person in the hands of his legal representative, and the legal representative makes an objection that the assets in question belong to her personally, the objection should be treated as one under S. 47 and not as one under O. 21, r. 58. Accordingly, an appeal lies from the order dismissing the objection, but no regular suit is maintainable. 1937 A.L.J. 13=1937 A. 97; *see also* I.L.R. (1941) Kar. 211. Where the executing Court finally negatives the right of the decree-holders to proceed against the land of the judgment-debtor, the order is appealable under S. 47. 2 L.L.J. 398. An order on an objection petition to an attachment put in by defendant against whom the suit had been dismissed, is one under S. 47 though ostensibly put in under O. 21, R. 58. 1924 L. 589=115 I.C. 691; 150 I.C. 703=1934 P. 281. *See also* 44 L.W. 460=1936 M. 812=71 M.L.J. 317. Where an objection under S. 47, questioning legality of issue of second warrant of attachment was rejected and no appeal was filed thereon, the question cannot be raised in

C. C. M.—62

appeal in the execution case which had nothing to do with that objection. 1936 O. W.N. 47=161 I.C. 393=1936 O. 240.

**SALE PROCEEDINGS.**—*See* 1937 Rang. 157. Where the judgment-debtor himself applies to have an execution sale set aside, a second appeal does lie from the appellate order dismissing an appeal from the lower Court's order dismissing the application as in such a case the provisions of S. 47 apply. 156 I.C. 699=42 L.W. 39=1935 M.W.N. 403=1935 M. 438. *See also* 41 C.W.N. 890=1937 C. 461; 1937 Cal. 177. S. 47, though very wide in terms and includes in one sense all questions relating to execution, discharge or satisfaction of the decree, ought not to be applied in such a way as to render redundant other provisions contained in the Code. An application to set aside an execution sale which in terms and in fact and substance falls under O. 21, R. 90, cannot be regarded as an application under S. 47, though the decree-holder himself is the purchaser. It is only when an application to set aside the sale, as between the decree-holder and the judgment-debtor, does not fall under O. 21, Rr. 89, 90 and 91, that it will come within the purview of S. 47. 1937 A.L.J. 288=A.I.R. 1937 All. 407. *See also* 1938 Oudh 188; 1938 Lah. 690. A decision of an executing Court as to the order in which properties were to be sold in execution, even though it is a question between judgment-debtors only, is one relating to execution within S. 47. 45 M.L.J. 478; 53 A. 391 (mortgage suit). But an order passed on an application under O. 21, Rr. 64 and 66 directing that the properties ordered to be sold by a mortgage decree shall be sold in a particular order is not a judicial order and is hence not open to appeal. 156 I.C. 141=42 L.W. 50=1935 M. 714. The order imposing certain conditions on a property being sold last is not appealable. 51 A. 752. An order on objection by the judgment-debtor as to the correctness of the area of the land mentioned in the sale proclamation, is appealable as such decision may be said to determine the rights of the judgment-debtor in certain respects. 145 I.C. 386=34 P.L. R. 851=1933 L. 383. Order passed in a dispute between the decree-holder, who is also the auction-purchaser and the judgment-debtor relating to the grant of a certificate of sale is appealable. 153 I.C. 85=37 P. L.R. 116=1935 L. 144 (2). An application for setting aside an auction-sale on the ground that the judgment-debtor had no notice of the setting of the proclamation under O. 21, R. 66 falls under S. 47 and second appeal is open to the parties. 1930 M. 489. But *see* 153 I.C. 992=1934 C. 761; I.L.R. (1941) Kar. 199. Order setting aside sale on ground that executing Court had no jurisdiction to sell without attachment. 164 I.C. 140=1936 L. 573. *See also* 190 I.C. 174 (order confirming sale). Decree-holder purchaser—Order under O.



## NOTES

21, R. 90—Second appeal lies. 1930 N. 191. An order rejecting an application by the decree-holder auction-purchaser for possession of the property as being barred by time is appealable. 56 C.L.J. 520=1933 C. 311.

**RATEABLE DISTRIBUTION.**—An order under S. 73 rejecting an application for rateable distribution is neither an order under S. 47 determining questions between parties nor a decree under S. 2 (2) and hence is not appealable. 57 I.C. 421=5 P.L.J. 415. See also 42 C. 1; 1924 M. 97; 55 B. 473; 1937 Rang. 134; 1931 B. 252. But see 31 M.L.J. 820. Orders under S. 73 are appealable, if they affect parties to the suit under S. 47, especially when the appeal is by the judgment-debtor who cannot avail himself of the right of suit given by S. 73 (2). 39 M. 570=29 M.L.J. 96; 1931 B. 252. See also 41 Bom.L.R. 997=1939 Bom. 468; 1939 Nag. 101; 41 Bom.L.R. 176; 150 I.C. 970=1934 P. 350. But where order under S. 73 only determines the rights of decree-holders *inter se*, it will not fall under S. 47 and no appeal will lie. 160 I.C. 892=1936 Pesh. 52; 59 M. 399=1936 M. 136=70 M.L.J. 33. See also 1940 Rang.L.R. 718. An order not simply refusing rateable distribution but also dismissing execution application *in toto* is appealable. 98 I.C. 884=1927 L. 100=1931 P. 359. An order of rateable distribution and of sale of the property attached by two creditors to satisfy claims of the other creditors, after the making of deposit under O. 21, R. 55, of a sum sufficient to discharge the two creditors who made the attachment, relates to a question in execution within S. 47. 36 B. 156. Where order of Court is passed only under S. 73 and not under S. 47, no appeal would lie. 162 I.C. 309=1936 L. 181; 160 I.C. 892=1936 Pesh. 52.

**RESTITUTION.**—Order for restitution under S. 144 falls under this section and is appealable. 43 L.W. 773=1936 M. 636. And so also order under S. 151 for something analogous to restitution made as between the parties. (*ibid.*) See also 1938 Cal. 554.

**REFUND.**—An order on an application by an auction-purchaser under O. 21, R. 93, for refund of the sale price is subject to appeal and second appeal. 46 L.W. 280=1937 M.W.N. 749=A.I.R. 1937 Mad. 779.

**MAINTENANCE.**—Where a decree has been passed declaring the right of a Hindu widow to maintenance and also declaring that the maintenance be a charge on the joint family properties, it is not necessary for the widow to bring a separate suit to enforce the charge by sale of the properties. When the decree for maintenance has the effect of a decree for sale, the decree-holder is entitled to proceed to execution without any further action. If the charge is created by the decree in the action then a separate suit would be necessary to enforce the charge by way of sale of the properties charged. But when the charge has arisen not by reason of the

decree made on the maintenance action but under the Hindu Law, bringing the action for the declaration of the right to maintenance and obtaining a decree to that effect would result in the decree having the effect of a decree for sale of the charged property; and it is not at all relevant what language was used by the Court declaring the charge to exist. No separate suit is therefore necessary to enforce the charge. 1937 P. W.N. 830=18 Pat.L.T. 834=A.I.R. 1937 Pat. 654.

**AWARD.**—The proceedings for enforcement of an award under S. 15, Arbitration Act, are governed by S. 47, C.P. Code, and an appeal is competent from an order rejecting such application. 151 I.C. 881=35 P. L.R. 635=1934 L. 49. See also 38 Bom. L.R. 1303. Where there is no judgment according to an award made in arbitration and no decree following thereon, but there is only an order which simply directs that the award should be filed without incorporating the terms of the award in the order, the order is not executable as a decree, though it is styled as a decree. A separate suit for relief in respect of the matters covered by the award is not barred under S. 47, C.P. Code. The fact that the plaintiff treats the order as a decree and files an application to execute it and also obtains some relief by way of execution though not exactly in terms of the decree, does not bring S. 47, into operation. 41 Bom.L.R. 170=A.I.R. 1939 Bom. 114. When a decree passed under Sch. II, para. 21 (2), C.P. Code, is executed; if any question relating to its execution, discharge or satisfaction is raised by any of the parties to the decree, the determination of such a question is a decree within the meaning of the Code, and an appeal is therefore competent from the order deciding the question. 44 C.W.N. 231.

**STAY OF EXECUTION.**—An order staying execution proceeding is appealable. 75 I.C. 419. An order refusing stay of sale falls under S. 47 and is appealable. 75 I.C. 789; 1924 L. 631; 75 I.C. 1001; 44 C.W. N. 587; 44 C.W.N. 364=1940 Cal. 254; 45 C.W.N. 379; 1938 Rang. 317. But see 27 I.C. 444=20 C.L.J. 512; 141 I.C. 841=16 N.L.J. 17=1933 N. 84. See also 39 C. W.N. 313. Whether an order for security to stay execution amounts to a decree or appealable order, see 5 R. 534; 106 I.C. 890 (2). No appeal lies from an order accepting security in execution proceeding. 106 I.C. 866 (2).

**SATISFACTION.**—See 1938 Nag. 49. An order on an objection that a sum paid in part satisfaction of decree has not been given credit to is appealable. 1934 C. 761. So also an order allowing objection by the judgment-debtor that the mortgagee had been in possession of the land and had realized more than the amount due under the decree. 142 I.C. 313=34 P.L.R. 373=1933 L. 361. Also an order determining objection to sale under S. 60. 1929 L. 778 (2); 1931 L. 141.



## NOTES.

Similarly an order dismissing judgment-debtor's application for time to pay the decree amount. 1929 L. 141. See also 1935 R. 500. Also an order deciding whether the whole decree amount has become payable in an instalment decree by reason of default in one instalment. 1929 L. 390.

MISCELLANEOUS.—An order directing execution to issue against a judgment-debtor is one under S. 47, determining the rights and liabilities of parties with reference to the relief granted. 19 C.L.J. 581=26 I.C. 866=19 C.W.N. 1008. See also 1940 Pesh. 24. An order refusing to discharge a receiver appointed in an execution proceeding is within S. 47. 3 P.L.J. 513=46 I.C. 655. Also an order allowing execution of a decree alleged by the defendant to be declaratory in nature. 37 M. 29=21 M.L.J. 1063. An order requiring a Receiver to deposit in Court money part of which was collected by him as a party to the suit (the party being appointed as Receiver) and prior to his appointment as Receiver, is in substance and effect an order directing a party to make a payment and is one in execution. That part of it is appealable under S. 47. It does not fall under O. 40, R. 3 (c). 156 I.C. 886=41 L.W. 763=1935 M. 464=68 M.L.J. 628. Though no appeal lies against an order passed wholly and simply under S. 73, an order which decides a matter covered by S. 47 (1) may although it be passed ostensibly under S. 73 be the subject of appeal. 16 L. 990=156 I.C. 845=1935 L. 302. Decision of executing Court on application under O. 34, R. 5 is appealable. 38 P.L. R. 259=164 I.C. 53=1936 L. 562. An order directing an applicant to file another execution petition while refusing to execute the decree as asked for is appealable. 160 I.C. 812=1936 Pesh. 46. An agent of decree-holder competent to execute decree is also competent to file appeal against order refusing to allow execution. 164 I.C. 463=1936 L. 508; see also 1938 Pesh. 63. Though the dismissal of an appeal from an order in execution, under O. 41, R. 11 (1), is a decree and is open to second appeal, if the suit in execution of whose decree the appeal arises is a *suit of small cause nature*, of the value not exceeding Rs. 500, a second appeal is barred under section 102, C. P. Code. 18 Pat.L.T. 321=A.I.R. 1937 Pat. 349. Where a decree is sought to be executed against a surety for non-appearance of the judgment-debtor and the surety makes an application under O. 21, R. 2, to the executing Court that an adjustment had taken place between the decree-holder and the judgment-debtor and therefore he is discharged from the liability, but the application is dismissed without going into merits on the ground of limitation, the surety can bring a suit for declaration that the decree cannot be executed against him in view of the adjustment; such suit is not barred by section 47, C. P. Code, as a surety, unlike a

judgment-debtor, is a party to the suit or execution proceedings only for the limited purpose of appeal in view of section 145 of the Code. 39 P.L.R. 872=A.I.R. 1937 Lah. 658. Section 145, C. P. Code, puts the surety on the same footing as an original party to the suit; and if section 145 and section 47, C. P. Code, be read together, the inquiry of the Court into a question raised by the surety as to the executability falls under section 47, C. P. Code, and the decision thereon is appealable. Even if section 145 does not in terms apply, as for instance where the surety is not personally liable but the money which he has deposited as security is sought to be made liable, the surety has an equal right of appeal. 1937 M.W.N. 1259=A.I.R. 1938 Mad. 215.

APPEAL: ORDERS NOT APPEALABLE UNDER THIS SECTION.—An order disallowing the objection of a judgment-debtor that a fresh attachment is necessary is not appealable. 34 A. 530. An order in execution of a mortgage decree that there ought to be rateable reduction in the decretal amount is only an interlocutory order, as the Court has still to determine the market value and rateable liability of each item. 1930 A. 638. Order directing restitution following on setting aside of sale is not appealable—If appeal wrongly entertained—Second appeal lies. 1930 P. 280. See also 35 C.W.N. 105=1931 C. 779 (2). Order overruling Collector's objections to inalienability of land and directing him to proceed with the execution sale of the properties is not appealable being merely a direction by the Court to its ministerial officer. 1929 L. 391. An order relating solely to jurisdiction does not determine any question relating to the execution, discharge or satisfaction of a decree. 52 I.C. 461=4 P.L.J. 461. No appeal lies against an order dismissing "as informal" a decree-holder's application to set aside dismissal of a prior execution application. 1928 L. 811 (2). Nor against order allowing amendment of execution petition. 44 L.W. 99=164 I.C. 217=1936 M. 623=71 M.L.J. 256. No appeal lies from an order staying execution. 100 I.C. 23=9 L.L.J. 193; 9 R. 354; 1936 O.W.N. 664=164 I.C. 424=1936 O. 369. See also 1938 Rang. 317; 80 I.C. 39=1924 A. 794 (Order as to costs in granting stay). No appeal lies against an order refusing to stay execution. 100 I.C. 76 (2)=1927 L. 235; nor against an order rejecting security. 102 I.C. 621=1927 L. 527. Also 9 L.L.J. 189; 7 Cut.L.T. 41 (order fixing revaluation of property under section 14, Behar Money-lenders Act). No appeal lies from an order refusing execution of a decree on the ground that it has been attached. The order does not fall under section 47, 154 I.C. 678=1935 O.W.N. 331=1935 O. 272. No appeal lies against an order directing respondent to draw out costs on furnishing security. 5 R. 534. Acceptance of sufficiency of surety by lower Court where order for furnishing security to the satisfaction of lower Court was made by



(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional Court-fees.

#### NOTES.

High Court is not appealable. 59 M.L.J. 892. See also 32 P.L.R. 806. An order setting sale proclamation is not appealable. 46 M.L.J. 192; 27 M. 59=14 M.L.J. 57 (F.B.); 1929 L. 815; 134 I.C. 833; 1934 C. 761; 7 Cut.L.T. 41. So also an order fixing value of properties to be sold. 99 I.C. 455=1927 A. 208; 6 O.W.N. 1085; 56 M.L.J. 224. Also an order under O. 21, R. 99 on application by the decree-holder auction-purchaser. 1930 L. 363. So also order refusing payment to decree-holder out of monies deposited under O. 21, R. 90; 58 M. 972=1935 M. 842=69 M.L.J. 349 (F.B.); 42 Bom.L.R. 367 (Order under O. 21, r. 93). Also order deciding question of delivery of possession between judgment-debtor and decree-holder auction-purchaser. 8 R. 162=126 I.C. 209=1930 R. 61. But see 53 C. 781 (F.B.); 60 C. 832=37 C.W.N. 671=1933 C. 680; 56 C.L.J. 520=1933 C. 311. Order directing party to pay Receiver's remuneration. 1930 L. 352. Also an order directing execution against a surety to a receiver ordered to pay up monies. 59 I.C. 844=10 L.B.R. 236. An application by the Official Receiver of an insolvent's estate praying that certain property of the insolvent attached and brought to sale by a creditor should be released from attachment and that the sale should be stayed or that the sale proceeds should be deposited in Court pending determination of the question as to who is entitled to them, is really a claim or objection under O. 21, R. 58 and no appeal lies against an order dismissing such application. 41 L.W. 28=1935 M. 151=68 M.L.J. 78. A Receiver of the estate of the judgment-debtor is not a representative of the judgment-debtor under section 47. When the Receiver objects to the attachment of moneys in his hands, the objection falls under O. 21, R. 58, C.P. Code, and not under section 47. No appeal therefore lies from an order allowing the objection and raising the attachment. 30 S.L.R. 288. Where objection filed by a stranger was allowed, no appeal is competent as against the objector but the Court can treat the appeal as an application for revision. 145 I.C. 730=1933 L. 421. An order passed in execution by Civil Court remitting award made under Co-operative Societies Act to arbitrator for rectification of some errors therein is not appealable, but a revision lies. 164 I.C. 802=40 C.W.N. 89. An order interpreting a scheme framed in a suit instituted under section 92, or giving directions for carrying out the provisions of the scheme cannot be regarded as an order passed in execution under section 47. But an order of a District Judge finally adjudicating the rights of the Mohant and the committee under the scheme framed in the suit

which is kept pending and to which they may be regarded as parties, amounts to a decree and is appealable as such. 73 C.L.J. 532. Orders made in pursuance of a provision in a scheme are not orders under section 47 and are not appealable. 1930 M. 918=128 I.C. 515, *e.g.*, an order approving the appointment of a trustee in a scheme decree. 1931 A. 765; an order relating to the modification of a scheme, 55 B. 414; an order passed by the Court as *persona designata* under the scheme, 1931 B. 388=33 Bom.L.R. 546. An order under O. 21, R. 99, 58 C. 808; an order directing the mode of taking out execution, 1931 A. 129 (2); 1940 Pat. 75. But see 1933 B. 185; an order refusing to set aside a sale, 1932 A. 530. An order negating the objections by the judgment-debtor to the execution of a decree and directing execution to proceed. 64 M.L.J. 735=37 L.W. 749=1933 M. 500; 1938 Pat. 465. Where there is an appeal as from an order under section 2, C. P. Code, it would be difficult to bring the matter under section 47 so as to render a second appeal maintainable. 33 C.W.N. 1170. As to appeal against order in delivery proceedings between rival purchasers in execution of a mortgage decree and a decree in suit enforcing a charge created by a security bond, see 56 M. 909=65 M.L.J. 407=1933 M. 780.

SEC. 47 (2).—Power of Court to treat application as suit. See 39 M.L.T. 579; 7 O.W.N. 887. The applicant is not entitled for a conversion as of right. 27 I.C. 570. See also 16 I.C. 543; 1939 O.W.N. 936=184 I.C. 850 (It is open to appellate Court to treat an application for execution as a suit). In a partition proceeding the award declared the rights of the parties without giving them possession. A decree was passed in accordance with the award. In a *bona fide* application for execution of the decree, the applicant claimed possession of the property and made an alternative prayer that in case possession might not be given, the application should be treated as a suit under section 47 (2) on payment of additional court-fee. *Held*, that the question of payment of additional Court-fee could arise only when the Court had decided that application for execution did not lie. After this had been done, the applicant could have been called upon to make good the deficiency in the Court-fee. The case was a fit one in which the salutary provisions of section 47 (2) should have been applied. 40 P.L.R. 619=A.I.R. 1938 Lah. 177. Where application purporting to be both under section 47 and O. 21, R. 58 was made but was dismissed on merits and thereupon suit was filed by applicant for declaration that attached property was hers and not liable to attachment: *Held*, that the suit was incompetent



(3) Where a question arises as to whether any person is or is not the representative of a party such question shall, for the purposes of this section, be determined by the Court.

*Explanation.*—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit.

#### LIMIT OF TIME FOR EXECUTION.

48. (1) Where an application to execute a decree not being a decree granting

#### NOTES.

and could not be treated as an application under section 47. 158 I.C. 410=1935 M. 923. See also 159 I.C. 960=1936 P. 268. A suit can be converted into an application only if the application under section 47 would not, at the date of suit, be time-barred. 34 I.C. 774=7 L.W. 400; 45 I.C. 608; 35 B. 452; 53 C. 837; 7 O.W.N. 887; 130 I.C. 117; 60 M.L.J. 219; 60 M.L.J. 471; see also 1935 C. 15; 38 C.W.N. 996; 60 C. 1467=1934 C. 327. Also the Court in which the suit is brought must have jurisdiction to execute the decree. 22 A. 121; 26 A. 101; 29 A. 348; 32 M. 425; 54 C. 419. Thus where a party to a Small Cause suit whose objection to an attachment made in execution of the decree in that suit is dismissed, files a declaratory suit in the Munsif's Court, the suit cannot be treated as a petition under section 47 as such an application can be made only in execution proceedings in a Small Cause Court. 1934 A. 699. Where a suit is brought for restitution in spite of the provision in section 144, it is open to the Court to treat the suit as proceeding in execution in the exercise of its powers under Cl. (2). 67 I.C. 319=1922 N. 198. For a converse case, see 1930 M.W.N. 1245. A prior order in execution which led up to the suit would not operate as *res judicata*. 4 O.W.N. 1045; 35 L.W. 103. A decree passed in a suit barred under this section would still be upheld as an order passed on an application under the section, if it is otherwise good in law. 14 C. 605; 22 C. 483; 28 M. 64; 32 C. 322; 60 M.L.J. 471. Where the proceedings are treated as a suit in the hearing of any objection to the execution, the objector is in the position of a plaintiff and the burden of paying Court-fee falls upon him and not on the decree-holder. 149 I.C. 1003=1934 P. 9. The bar of section 47 can be pleaded for first time in second appeal and the suit converted into an application at that stage. 1928 M.W.N. 601. As to whether sub-section (2) applies to proceeding on Original Side of High Court, see 40 C.W.N. 428.

SEC. 47 (3).—See 82 I.C. 604. The question whether certain persons are legal representatives of judgment-debtor is one which executing Court is bound to decide. The decision on such a question is open to appeal. 39 C.W.N. 313. See also 1939 N.L.J. 82=1939 Nag. 147. Sub-section (3) of section 47 must be read as ancillary to sub-section (1) and only comes into operation where there is a question arising be-

tween the parties to the suit or their representatives relating to the execution, discharge or satisfaction of the decree and it does not apply to a case where the question is between rival representatives of one party the other party having throughout disclaimed any interest. 57 B. 641=146 I.C. 336=35 Bom.L.R. 609=1933 B. 396. The question of the representative character of a party can be determined only for a limited purpose under section 47. 43 I.C. 165=11 S.L.R. 74; 117 I.C. 122. Where a person applies to be brought on record as the representative of the judgment-debtor so that he may raise a question to be decided under section 47, the proper Court to entertain the application is the Court executing the decree. 55 I.C. 812=11 L.W. 173. Section 47 (3), only relates to a dispute between one of the parties to the decree and a person claiming to be a legal representative on the other side. It does not apply where the dispute is between persons who have rival claims to be accepted as legal representatives on one side only. In such cases, no appeal lies and the decision is merely a summary decision for the purpose of enabling the proceedings to be carried on, without affecting any right which any person may have to the proceeds of the decree. 43 P.L.R. 435. Under section 47 (3), a statutory obligation is laid on the Court seized of execution proceedings to determine the question whether a particular person is or is not the representative of a party to the decree. When such a question arises in the appellate stage of the proceedings under section 47, the question must be decided by the Court of appeal. 150 I.C. 425=11 O.W.N. 917=1934 O. 337.

COURT-FEE FOR APPEALS.—*Ad valorem* fee not payable. 113 I.C. 270. An order under S. 144, C. P. Code, is essentially different from an order under S. 47. Such an order could not be obtained by proceedings under S. 47. A clear distinction is drawn between the two cases by S. 2. An order under S. 144 is not for Court-fee purposes the same as an order under S. 47. 1941 N.L.J. 459.

LIMITATION.—Application under S. 47 is governed by Art. 181 and not by Art. 166 of the Limitation Act. 1928 C. 865; 1930 C. 586.

PLEA AS TO BAR OF SUIT.—A plea that a suit is barred by S. 47, not raised either in the pleadings or in either of the lower Courts cannot be entertained in second appeal. 9 Luck. 365=11 O.W.N. 193=1934 O. 55.

SEC. 48: SCOPE AND OPERATION OF THE



Execution barred in certain cases.

from—

an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years

### NOTES.

SECTION.—Saving decrees granted injunctions, S. 48 applies to all decrees. 26 I.C. 244. Section 48 deals with the maximum limit of time prescribed for execution and not period for each application. 46 A. 73. Section 48 does not strictly provide a period of limitation but merely bars the execution after 12 years. 40 A. 198. Section applies only to fresh application not to revival applications. Such application even after 12 years is not barred. 18 Pat.L.T. 90=1937 Pat. 43. Sections 19 and 20 of the Limitation Act cannot be applied to S. 48, C. P. Code, because that would render the provisions of S. 48 nugatory. The question of their applicability to S. 48 must be decided without reference to the provisions of S. 29, Limitation Act, because S. 29 does not include the Code in its scope, as a "special law". So acknowledgments and payment by the judgment-debtor cannot operate to extend the period of 12 years fixed by S. 48. 151 I.C. 541=11 O.W.N. 1103=1934 O. 465. Whether S. 48 controls Ss. 6 and 7, Limitation Act, see 1941 Pat. 45. In proceedings for execution of a decree against a minor, the fact that the minor is not described as a minor in the execution petition, and that the guardian *ad litem* is not appointed till after the expiry of the period of limitation will not make the application barred by limitation. Execution under the C. P. Code, is intended to be less, rather than more, formal than in a suit. 18 Pat.L.T. 341=16 Pat. 316=A.I.R. 1937 Pat. 321. As to the effect of Art. 182 of the Limitation Act, see 1932 O. 220=9 O.W.N. 430; 60 C.L.J. 123. Art. 182 of the Limitation Act leaves the provisions of S. 48, untouched, and there can be no execution of a decree governed by S. 48, when twelve years have passed from the date of the decree, amendment or no amendment. It is true that there is no period of limitation for an amendment of a decree to correct an accidental slip or omission under S. 152, but that does not affect the law of limitation. A correction made in a time-barred decree leaves the decree still time-barred. I.L.R. (1940) Mad. 349=51 L.W. 173=A.I.R. 1940 Mad. 127=(1940) 1 M.L.J. 235 (F. B.). See also 1940 Mad. 19; 1938 Pat. 40. The section does not apply to decrees passed by Chartered High Courts on account of sub-S. (2), cl. (b). See 6 B. 258; 7 M. 541; nor to orders in Council made on appeal to the Privy Council. 20 C. 551. S. 48 has a retrospective effect and governs an application for the execution of mortgage decree passed before the Code came into force. 45 B. 365; 19 I.C. 899; 40 C. 704; 20 C.W.N. 952; 1 Pat.L.J. 214; 27 I.C. 969=11 N.L.R. 25. But see 32 A. 499 (*contra*). The period begins to run only from the date on which the decree is in all parts ripe and capable of

execution. 36 B. 368. See also 43 A. 405; 48 A. 377; 34 C. 874. Section does not apply until the decree becomes executable. 33 Bom.L.R. 1082. S. 48, deals with decrees and the execution thereof and obviously must relate to a decree which is capable of execution. In the case of a decree which is not executable except on the happening of a particular contingency, the time under S. 48, will not begin to run until that contingency occurs. I.L.R. (1939) Bom. 87=40 Bom.L.R. 1278=A.I.R. 1939 Bom. 75. Section does not preclude an order for execution being made after 12 years if application is made within that period. 44 L.W. 805=71 M.L.J. 808. Section is governed by S. 78 (2) of the Provincial Insolvency Act. 8 O.W.N. 1186=1932 O. 69. See also 48 L. W. 881; 54 I.C. 924. S. 48 covers compromise decrees. 39 B. 256. See also 14 P. 816=16 Pat.L.T. 506=1935 P. 380; 191 I.C. 616. The executing Court cannot extend the period prescribed by the section under S. 15, Limitation Act. 45 M. 785=43 M.L.J. 168. See also 54 I.C. 279; 1931 L. 125=131 I.C. 345; 1931 O. 351; 9 O.W.N. 513=1932 O. 246. An agreement to desist from execution does not attract the provisions of S. 15 of the Limitation Act. 52 M.L.J. 137. See also 1939 A.L.J. 522=1939 All. 403; 40 Bom.L.R. 1278=1939 Bom. 75. S. 6 of the Limitation Act does not extend period provided by S. 48 in favour of minors. 27 I.C. 865=13 A.L.J. 166; 1939 N.L.J. 387=1939 Nag. 245; 36 B. 498; 37 M. 186=24 M.L.J. 96; 1929 M. 394=30 L.W. 361. But see 32 Bom.L.R. 1093. The period prescribed in S. 48 begins to run from the date of the appellate decree, even when it is held that no appeal lies. 43 A. 405; 34 C. 874. See *contra* 48 A. 377. See also 32 A. 136 (Second appeal). It is so even when a portion only of the original decree was appealed against. 21 M.L.J. 1020. See also 26 M. 91. But where an appeal is dismissed for default, the period runs from the date of the original decree. 47 I.C. 125=5 O. L.J. 252. Whether time spent in a new trial application and on a subsequent revision petition to High Court can be deducted, see 53 L.W. 284=(1941) 1 M.L.J. 365. The word "decree" in S. 48, is not limited to the decree of the Court of first instance when there has been an appeal from the decree of the first Court, and the appeal is dismissed for want of prosecution, the date of the decree of the appellate Court dismissing the appeal is the starting point of limitation as provided by Art. 182 (2) of the Limitation Act. S. 48 only provides the maximum period during which an application for execution can be taken out, but the time from which limitation would run is that which is provided by the Limitation Act. 19 Pat.L.T. 424=1938 P.W.N. 449=A.I.R. 1938 Pat. 401. Where



## NOTES.

a decree is amended, the date of the amendment is date of the decree. 60 I.C. 318. See also 20 Pat.L.T. 932; 1939 Pat. 607. Pendency of appeal by judgment-debtor does not cause suspension of execution where there is no fraud or force. 32 I.C. 931=20 C.W.N. 686. Decree-holder cannot by binding himself not to execute a decree allow himself more time than the law gives him. 13 I.C. 88=15 C.L.J. 678. The time spent in obtaining the Conciliator's certificate under S. 48 of the Deccan Agriculturists' Relief Act can be deducted. 42 B. 367. A mortgage decree-holder will have 12 years to perfect the preliminary decree into an order absolute under S. 89, T. P. Act and another 12 years for executing the order absolute. 39 M. 544. But see 46 B. 761 (a case of decree under the Deccan Agriculturists' Relief Act). 15 P. 439=1936 P. 615 (Decree under Chota Nagpur Tenancy Act). Where execution of a suit is barred, a fresh suit on the basis of the decree is barred. 43 A. 170. See also 38 A. 509. But see 28 I.C. 85 (11 C. 93, Ref.). Nor can a fresh suit on the same cause of action be instituted. 41 M. 641=34 M.L.J. 167. See also 43 B. 703. As to whether an action can be maintained on a judgment, see 20 C.W.N. 58=20 C.L.J. 272. Mere passing of a preliminary decree in any foreclosure suit does not put an end to relationship of the mortgagor and mortgagee. If the mortgagor fails to redeem within six months and no final decree is passed, he can bring a fresh suit for redemption. 39 B. 41. Plea of twelve years' bar cannot be allowed for first time in appeal. 1929 M. 826=123 I.C. 23. As to whether this section applies to decrees of Presidency Small Cause Courts, see 26 S.L.R. 85 and 91. See also 7 Cut.L.T. 45; 53 L.W. 284=(1941) 1 M.L.J. 365; 48 L.W. 881 (Whether this section is affected by S. 78 (2) of Prov. Insolvency Act). Sentence of fine—Warrant under Cr. P. Code, S. 386—Execution under C. P. Code—Limitation—12 years period prescribed by S. 48, C. P. Code not applicable. 43 Bom.L.R. 122.

WHEN AN APPLICATION MADE OUT OF TIME MAY BE TREATED AS CONTINUATION OF A PREVIOUS APPLICATION MADE WITHIN TIME.—See 21 I.C. 923 (C.); 16 I.C. 541 (C.); 41 M.L.J. 378; 38 I.C. 411; 54 A. 419; 33 Bom.L.R. 1082; 1931 B. 492; 148 I.C. 1017=1934 A. 481 (F.B.); 45 C.W.N. 903. Prior execution application consigned to record-room—Subsequent application is only continuation thereof and is not affected by section 48. 123 I.C. 113=1930 L. 647. See also 1935 L. 918. Decree-holder attaching agricultural land and applying for temporary alienation—Subsequent appointment of Receiver—Not one in continuation of previous application. 1936 Pesh. 209. See also 1937 P. 43; 1937 N. 92. An application for execution was dismissed by the Court not because of decree-holder's default or negligence but on the ground that the case was an old one and the Court intended to remove it from its list. A second ap-

plication was made for similar relief. Held that in these circumstances the second application must be regarded as a continuation of the old one. A.I.R. 1941 Lah. 62. Where a previous application for execution has been dismissed for default on the part of the decree-holder, a subsequent application cannot be said to be for revival of the old application merely because the relief prayed for is the same. 186 I.C. 860=A.I.R. 1940 Lah. 35. See also 1940 Oudh 26. The question of the character of an application for the purposes of ascertaining whether it is a 'fresh application' or not for purposes of section 48, has to be decided upon the circumstances of each case. The substance of the matter must prevail over the form of the application. 66 I.A. 84=14 Luck. 192=A.I.R. 1939 P.C. 80=(1939) 1 M.L.J. 652 (P.C.); 1940 Pat. 432; 1940 All. 270. In order that an application may be treated as one to continue an earlier execution, the first condition necessary is that the earlier execution case must not have been finally disposed of. If it was so disposed of, no question of continuing it can arise. If, on the other hand, there was an interruption in the earlier proceeding by reason of which the Court, being unable to grant the appropriate relief, struck off the case, it cannot be said to have been finally disposed of. It will then be considered to be still pending, and may, if a proper case is otherwise made out, be revived and continued. A second application will not, however, be considered to be a continuation of a former one if it is found to be different in its scope, or if the former execution is found to have been abandoned by the decree-holder or to have been dismissed through his default or laches. 186 I.C. 385=A.I.R. 1940 Pat. 432. The question whether an application is a fresh application or is merely one to revive the previous execution proceedings, has always to be decided upon the circumstances of each case and in each case the substance of the matter must prevail over the form of the application. I.L.R. (1940) All. 377=1940 A.L.J. 301=1940 All. 270 (F.B.). Where an application for execution is dismissed in default on account of non-appearance of decree-holder, a second application cannot be said to be in revival of the prior application and would be barred when it is presented more than three years after the date of the last application. 190 I.C. 379=A.I.R. 1940 Lah. 75. Section 48, bars only a fresh application for execution and not an application by which a prior execution application is revived. Where certain execution proceedings were compromised and on the failure of the judgment-debtor to pay the instalments as agreed, the decree-holder applies for continuation of his prior execution application, the bar under section 48 does not apply to it. It is clearly an application to revive an execution application which remained suspended for some time. 1939 O.W.N. 947=1939 A.W.R. (C. C.). 240. An application by which it is sought to proceed against properties other than those mentioned in the first execution



(a) the date of the decree sought to be executed, or,

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

#### NOTES.

application or against a person not impleaded or mentioned in the first execution application must be regarded as a fresh application within the meaning of section 48, and no such application can therefore be entertained after 12 years from the date of the decree. There is no difference in principle between an attempt to proceed at a late stage in the execution proceedings against properties which it was not sought to proceed against in the original application and an attempt at a late stage to proceed against a person other than the person against whom it was originally sought to execute the decree. 21 Pat.L.T. 407=1940 Pat. 571. In order that an application may be treated as a continuation of another application with-in time, it is necessary that the two applications must be of same nature. 34 A. 396. See also 52 M.L.J. 137=1927 M. 347. It is also a necessary condition that the previous application should not have been dismissed for default on the part of the decree-holder. 72 I.C. 862. The execution of a decree is not barred merely because the application for restoration of an execution petition made within 12 years but struck off on account of insufficient process-fees, is made after 12 years. 33 A. 57. See also 3 Pat.L.J. 103=44 I.C. 560. If on an application for execution by issue of a precept, the Court issues, instead, prohibitory orders, which are illegal, all these orders must be ignored and it must be assumed that the application for execution is still pending in Court and no proper order has been passed thereon. The Court is, therefore, competent to pass a proper order by issue of a precept on the basis of the original application, even after the expiry of 12 years from the date of decree. 152 I.C. 685=1934 L. 610 (2). See also 161 I.C. 960=1936 L. 843 (Release of property from attachment on objection—Application for re-attachment after dismissal of objection is no fresh application for execution). See also 1937 N. 92; 166 I.C. 950=18 Pat.L.T. 90=1937 P. 43. Section applies only to fresh execution application and not to amendment of pending execution petitions. It does not matter that the application or order for amendment was made after the prescribed 12 years. Amendments which in substance create a new execution application should not be allowed. 1928 M. 1154. See also 59 M.L.J. 579; 134 I.C. 730=1931 B. 425 (2); 1937 Pat. 43=18 Pat.L.T. 90. Applications which are only ancillary to the main application are not barred under this section. 1937 N. 92. The period of 12 years prescribed by section 48, ought to be taken to run from the date of the original decree. The period

so fixed is final and cannot be extended by any amendment of the decree; an amendment of the decree does not give a new date for starting a period of limitation. 151 I. C. 541=11 O.W.N. 1103=1934 O. 465. See also 1935 L. 292; 18 Pat. 395=1939 P.W. N. 611=1939 Pat. 607. Ordinarily an execution application which has not been properly made within the 12 years' period prescribed by section 48, should not be allowed to be amended so as to deprive the respondent of right of putting forward the plea of limitation. But the Court is not powerless to order amendment in special circumstances. The Court has a discretion in the matter. 1939 M.W.N. 988. Applications for amendment of an execution application, by which the decree-holder seeks to execute his decree against a person who was not named in the original application as presented to Court within the period of limitation or to execute his decree against property which was not specified in the application as originally presented, must be regarded as "fresh" applications and not as being in continuation of the application already on the file; and if made after the expiry of 12 years from the date of the decree, they must fail as time barred and cannot be allowed. Where the date on which an application to amend an execution petition is presented is a date on which a fresh application to execute the decree would have been barred by section 48, C. P. Code, then the Courts, will apply the same principles as they would in dealing with an application which is in form a fresh application. 21 Pat.L.T. 407=A.I.R. 1940 Pat. 571. An application to transfer a decree to another Court for execution is not an application to execute within this section. 20 A. 78; 16 C. 744; 22 C. 921; 35 B. 103; 34 A. 396; 95 I.C. 96 (2)=1926 A. 660. Application for execution to transferee Court—If a continuation of prior application before transferring Court. See 1935 L. 508; 1937 N. 92. Rent decree against darpatnidar—First application for execution of, on footing that decree created a charge on tenure—Three subsequent applications on footing that decree was a mere money decree—Fifth application on footing that decree created a charge on tenure—If a continuation of first. 57 M.L.J. 184=33 C.W.N. 977 (P.C.); 1937 Nag. 92. As to the proper time when objection under this section can be taken. See 1937 A.W.R. 1222.

SEC. 48 (1) (b).—Under section 48 (1) (b) the subsequent order must be an order in the suit in which decree is made and an order which directs payment by the debtor or the surety of money in respect of the judgment-debt. Where order was made at a time when some of the property which was believed to be the property of the



(2) Nothing in this section shall be deemed—

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application : or

(b) to limit or otherwise affect the operation of article <sup>1</sup>[183 of the first Schedule to the Indian Limitation Act, 1908].

#### LEG. REF.

<sup>1</sup> Amended by Act XXXIV of 1940.

#### NOTES.

debtors was the subject of some suit in the nature of an administration suit in which the receiver was appointed and application for order against the Receiver was made in the absence of judgment-debtor and surety, *held*, that it did not fall within section 48 (1) (b). 60 I.A. 43=12 P. 195=141 I.C. 760=1933 P.C. 52=64 M.L.J. 599 (P.C.). See also 1939 Sind 93. To render the clause applicable there must be an order of Court directing the payment of money on a certain date. Arrangement made between the parties out of Court is of no avail. 72 I.C. 477. Where Court accepted the compromise that decretal amount should be paid by instalments, it would operate to extend the period. 73 I.C. 671=1923 L. 381. See also 34 I.C. 393 (M.). Where the parties to a decree enter into a compromise by which it is agreed that the decretal amount would be payable by instalments and on default to be realised by execution, and a competent Court passes an order in terms of the compromise, the order is in the nature of a subsequent order under section 48 (1) (b), and the limitation for execution runs against the decree-holder from the date of that order, and not from the date of the original decree. I.L.R. (1937) 2 Cal. 373=65 C.L.J. 403. Where the decree amount is payable in yearly instalments by virtue of a compromise entered into between the parties in execution proceedings, the starting point for the period of 12 years fixed by section 48, C.P. Code, is not the date of the decree but the date of default in the payment of the instalments. I. L.R. (1940) All. 536=1940 A.L.J. 439=1940 All. 423. Order under section 48 (1) (b) must be made by the Court which passed the decree. 73 I.C. 794=1923 L. 678; 40 A. 198; 2 P.L.T. 80=58 I.C. 393. But see 95 I.C. 243=1926 L. 463. Order of executing Court granting time to the judgment-debtor is not a subsequent order directing payment of money within the clause, and does not operate to extend the period. 40 A. 198. See 57 C. 789=1929 C. 687. Order of executing Court regarding realization of the decretal amount by instalments does not amount to a "subsequent order" within the meaning of section 48, cl. (1) (b). 162 I.C. 715=1936 O.W.N. 517=1936 O. 266; 54 A. 573 (F.B.); nor a subsequent compromise order made in execution proceedings. 14 P. 816=156 I.C. 297=1935 P. 380. The words "subsequent order" in sec-

tion 48 (1) (b) show that the order must be subsequent to the decree. Hence the order which the section contemplates must be passed not in the suit but in execution. A mere variation as to the time or mode of paying the decretal debt cannot be considered a substitution of one decree for another or any material alteration in the decree which the Civil Procedure Code forbids. But where the parties, keeping the decretal liability unaltered, enter into a compromise by which the method of satisfying the decree is changed and the executing Court by its order records the compromise and directs the parties to act upon it, the order must be deemed to be a "subsequent order to pay" within the meaning of section 48 (1) (b) and a fresh period of 12 years runs from the date of such order. I.L.R. (1939) Kar. 502=1939 Sind 93. If an instalment decree provides for payment of whole sum on default of any instalment, time runs from the date of the first default, in respect of the whole claim. 49 I.C. 497; 24 C. 281. See also 162 I.C. 673=1936 L. 159; 1928 A. 629; 33 Bom.L.R. 459=1931 B. 263; 1932 L. 564=132 I.C. 255. Where some defendants only appealed and the others were not made parties to appeal, limitation for the non-appealing defendants starts from date of first Court's decree. 30 C.W.N. 306=95 I.C. 257=1926 C. 664. Decree directing money to be recovered from one party—On default money to be recovered from another—If barred 12 years from date of decree. See 48 M. 846=49 M.L.J. 498=1926 M. 20. Where mortgage decree directed sale of mortgage property and the balance to be realised from other properties and the persons of the defendants, limitation for execution of the latter part of the decree runs from date of the decree. 45 I.C. 436=22 C.W.N. 145 (P.C.), in effect overruling 40 M. 989=31 M.L.J. 513 (F.B.). See also 43 I.C. 122; 29 I.C. 556 (M.). Mortgage suit—Compromise decree—Other properties offered as security—Default in abiding by terms of compromise decree—Suit on the basis of compromise decree—Application for personal decree—Limitation. 114 I.C. 792. Whether time runs from date of decree or date of sale for execution against person in a case where a combined decree against the person and property of mortgagor, see 50 M. 5=52 M.L.J. 256. Where mesne profits are ascertained in execution, application for its recovery should be made within 12 years from date of decree and not from date of its ascertainment. 53 M.L.J. 440. If a decree compromises different items, decree-holder is entitled to a period of



## NOTES.

12 years to execute his decree regarding each item commencing from the time each becomes recoverable by him. 152 I.C. 685=35 P.L.R. 548=1934 L. 610 (2). As to execution by Collector, see 151 I.C. 541=11 O.W. N. 1103=1934 O. 465.

**FRAUD.**—Fraud or force need not have occurred within 3 years of the application. 53 I.C. 862=10 L.W. 566. Nor is it necessary to show that it extended continuously for 12 years. It is sufficient if it is shown that the judgment-debtor on various occasions prevented the execution by fraud. 12 I.C. 793=14 O.C. 238. See also 22 M. 320; 35 M. 670=22 M.L.J. 35. Section 48 (2) (b) extends the period to 12 years from the time when the decree-holder was prevented by fraud of the judgment-debtor, from executing the decree. 34 A. 20=11 I.C. 672=8 A.L.J. 1020. (7 C. 566, Dist.) To claim exemption under section 48 (2) (a), it is enough if the decree-holder merely proves a fraud having been committed by the judgment-debtor. It is not necessary for him to prove further by evidence that because of that fraud he was actually prevented from executing the decree within 12 years. 40 L. W. 694=67 M.L.J. 751. 'Fraud' should be understood in a large and liberal sense. 44 A. 319; 24 M.L.J. 270. See also 35 M. 670=22 M.L.J. 35; 54 A. 513. The term should be interpreted in a wider sense than that in which it is generally used in English law. 13 I.C. 88=15 C.L.J. 678; 6 M. 365; 80 I.C. 905. It includes, except with reference to contract, circumvention. 25 A.L.J. 842=103 I.C. 277=1927 A. 668. A fraudulent transfer of property by the judgment-debtor amounts to fraud within the meaning of section 48 (2). 42 P. L. R. 10=1940 Lab. 178. Delaying execution by frivolous, futile and dishonest objections on the part of the judgment-debtors amounts to fraud. 44 A. 319; 1930 M.W. N. 729=128 I.C. 455. But see 53 A. 419. But objection which ultimately proves unsuccessful will not amount to fraud. The fraud should be such as to prevent decree-holder from executing the decree. 13 I.C. 88=15 C.L.J. 678; 53 A. 419. The mere raising of objections so as to prolong execution proceedings beyond the period of limitation cannot, in all cases, be regarded as fraud for the purposes of S. 48. If the objections are patently frivolous, they can ordinarily and ought to be disposed of speedily by the Court if the decree-holders are diligent. An objection by a person to the attachment on the ground that the executing Court had no jurisdiction to adjudicate on the question whether he was or was not a partner of the judgment-debtor firm cannot be regarded as dishonest. But where his objection that he was not a partner of the judgment-debtor firm is false and was adopted as a trick by which the decree-holders were forced by no fault of their own to delay execution proceedings until the period of 12 years had expired, his

conduct in raising the plea is fraudulent and has the effect of enlarging the period of limitation. 161 I.C. 960=1936 L. 843. "Fraud" is used in S. 48 (2) (a) in the ordinary juridical sense of the word; and what is contemplated is some action on the part of the judgment-debtor preventing the decree-holder from taking out execution proceedings and thus allowing time to run against him, or some action of the judgment-debtor which entices the decree-holder to hold his hand. Where the judgment-debtor only takes advantage of the procedure allowed by the law, he cannot be held to have prevented the decree-holder from executing his decree by "fraud", however obstructive he may be. To so hold would be stretching the language of the section beyond what is legitimate. 14 P. 816=16 Pat.L.T. 506=1935 P. 380. An intentional avoiding by the judgment-debtor of arrest under a warrant by the decree-holder to avoid payment of decretal amount amounts to fraud. 12 L.W. 710=60 I.C. 630; 47 M.L.J. 428; 6 M. 365. Also locking up the house to prevent attachment of movable property. 9 B. 318; 22 M. 320. But keeping doors closed is *per se* no evidence at all of fraudulent conduct on the part of a pardanashin lady. 40 I.C. 399=4 O.L.J. 345. A fictitious transfer of property made in order to defeat or delay execution amounts to fraud. 4 M. 292; 80 I.C. 905. Also a deliberate evasion of the process of Court to defeat execution. 35 M. 670=22 M.L.J. 35. See also 13 I.C. 929=9 A. L.J. 17. Where execution of decree is prevented by the fraud of one of several judgment-debtors, extension of time will be allowed only against such judgment-debtor. 38 M. 419 [on appeal from 35 M. 670]; 1930 M.W.N. 729; 1930 S. 218. Court's refusal to allow execution to proceed against properties in receiver's hands will not make S. 48 (2) applicable, when decree-holder failed to proceed within the 12 years against judgment-debtor's other available properties or against surety. 1929 P. 597. Where the entire property of a judgment-debtor was under the control of the Collector for some period, commencing from a certain date, in execution of a decree and another decree was obtained against the same judgment-debtor subsequent to that date, and various applications for execution were put in, the period referred to above should be excluded from the period of twelve years prescribed by S. 48. 1937 O.W.N. 1116. Court sale—Auction-purchaser's right subsequently found against—Suit against decree-holder for recovering purchase-money—Payment by decree-holder and fresh application after 12 years of decree—Fraud alleged—Limitation ran from payment by decree-holder—Because of fraud S. 48 does not apply. 107 I.C. 653=1928 M. 152. The fraud proved against judgment-debtor can be availed of by decree-holder against legal representative of judgment-debtor, where decree is sought to be attached against assets of the deceased defendant in hands of legal representative.



## TRANSFEREES AND LEGAL REPRESENTATIVES.

49. Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

Transferee.

50. (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

Legal representative.

## NOTES.

40 L.W. 694=67 M.L.J. 751. As to application to continue execution against legal representatives of judgment-debtor, see 31 Bom.L.R. 858=1931 B. 425 (2).

RES JUDICATA.—The Court has jurisdiction to decide rightly or wrongly. Executing Court can determine whether application for execution is barred under S. 48. It may arrive at a wrong conclusion. The wrong decision is binding on parties unless it is corrected at their instance in appeal or revision. But so long as it stands it cannot be attacked collaterally in another proceeding, on the ground of want of jurisdiction in the executing Court. 61 C. 234=38 C. W.N. 348=1934 C. 282.

SEC. 49.—S. 49 relates only to the stage of execution and has no application to a suit for damages. 42 M. 338=36 M.L.J. 376. Judgment-debtor can attach the money deposited by him in Court towards a decree against him, which is assigned to one against whom he has a decree. 19 N.L.R. 164=1924 N. 46. For purpose of S. 49 the equities have to be enforced even though the assignee might in fact have been one without notice. Otherwise the very object of S. 49 would be in effect frustrated and its provisions rendered nugatory. So a right of set-off available to a judgment-debtor against the assignor decree-holder is also available against the assignee of the decree, though the latter had no notice. 145 I.C. 767=1933 M. 215. See also 1937 R. 316. The principle embodied in S. 49 is the same as that enacted in S. 132, T. P. Act, the right of set-off being an equitable right. If judgment-debtor has right to set up a cross-decree under O. 21, R. 18, he has that right also against the transferee of the decree-holder. The right is not however available where there is no cross-decree on the date when the decree is assigned. 37 C. W. N. 758=1933 C. 865. Code does not contemplate any specific application to bring on record the legal representative of the judgment-debtor though in ordinary practice such a prayer is usually added in an execution petition. Hence an application for execution against the legal representative is valid and saves limitation even though it does not contain an express prayer for adding him. 143 I.C. 844=38 L.W. 224=1933 M. 568.

SEC. 49 AND O. 21, R. 18.—Applicability and scope—Execution by assignee—Claim to set-off—Principles. I.L.R. (1937) A. 553=1937 A.L.J. 258=1937 A. 351. There is no inconsistency between S. 49 and O. 21,

R. 18. If there be any, S. 49 will prevail. I.L.R. (1937) A. 563. An equitable set-off can be and has been recognised in India; in fact the right of a judgment-debtor to ask for a stay under O. 21, R. 29, is an equity which binds the assignee of the decree; and when both decrees arose out of one transaction no Court of equity can reject the request of the judgment-debtor. The assignee can only take subject to the judgment-debtor's equitable right to have execution stayed until his suit shall have been decided and therefore to set-off his decree which may be passed in his suit. I.L.R. (1938) Bom. 263=40 Bom.L.R. 188=1938 Bom. 253.

SEC. 50.—“Dies”—Civil death is not contemplated. 53 A. 529=1931 A. 306; 159 I.C. 390=1935 C. 713. Execution may be had not only against the legal representatives of the judgment-debtor but also against the transferee who purchased the property pending execution proceedings. 51 B. 37=29 Bom.L.R. 60. See also 14 P. 732. As to whether a mere alienee from a legal representative is so for purposes of execution, see 47 L.W. 782=1938 M. 684=(1938) 1 M.L.J. 867. Legal representative merely means the person who in law represents the estate of the deceased, and it is immaterial whether such a person has actually obtained possession of the estate or even whether the deceased left any estate. The extent of liability has to be decided in execution. 1939 A.M. L.J. 69. The provisions of the Code are to be strictly observed and there is no provision under S. 50, for attachment in execution against a legal representative of either a debt due to him or of movable property that has not yet come into his possession. The security deposit therefore of a deceased judgment-debtor in deposit with his employer cannot be attached by a prohibitory order under O. 21, R. 48 of the Code in execution against the legal representative of the judgment-debtor. 170 I. C. 766=1937 Rang. 274. Where the judgment-debtor dies in the course of the execution proceedings, there is no necessity for having the names of his legal representatives substituted. If the decree-holder executes his decree, it would only be necessary for him to proceed against the legal representatives after due notice had been given to them. 158 I.C. 419=1935 O.W.N. 1087. If a judgment-debtor dies during execution, it is irregular for the Court which has not passed the decree to proceed with the execution against the representatives of the deceased judgment-debtor without fresh orders from the Court which



(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of ; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

#### NOTES.

passed the decree; under S. 50, the application for such execution is to be made to the Court which passed the decree. 168 I. C. 346=1937 P. 239. But see 1931 A. 320 (2); 1938 R. 385; 11 Pat. 445. Where a decree is transferred to another Court for execution subsequent to the death of judgment-debtor an application to bring his legal representatives on record must be made to Court which passed decree and not to Court to which decree is transferred for execution. (18 Bom. 224, Foll.; 55 I.A. 227, Dist.) 36 Bom.L.R. 443=1934 B. 215. Under S. 50, it is the Court which passed the decree which has power to substitute heirs of a deceased judgment-debtor and not the Court to which the decree is transferred for execution. But when a Court to which a decree has been transferred for execution makes an order for substitution under S. 50, it is a matter of procedure and not of jurisdiction. An appellate Court should not consequently interfere with an order for substitution made by a Court to which the decree has been transferred execution when the merits of the case are not affected by the irregularity in view of S. 99. 1941 Pat. 139=19 Pat. 838. A purely personal decree such as an injunction can be so executed. 1931 B. 280=133 I.C. 244; 1931 B. 482=55 B. 709. Duty of Court which passed decree to decide who are the legal representatives before transfer of decree. 1926 M. 411. Where wrong legal representatives were brought on record and real heirs having knowledge of the same did not object, decree is binding on them also or on any subsequent purchaser from them. 51 B. 125. Plaintiff must be diligent and implead all ordinary legal representatives under the law applicable if he wishes to bind them, but where he impleaded a person who was apparently the legal representative and there was no fraud or collusion, the estate would still be bound, if other persons turn out to be the actual legal representatives, provided that the plaintiff was ignorant of, or had no means of knowing the facts or circumstances by reason of which the proper legal representatives were other than those impleaded by him. 141 I.C. 580=34 P.L.R. 511=1933 L. 380. See also 144 I.C. 30=1933 M. 508=40 P.L.R. 25. Where a judgment-debtor died after proclamation of sale, and his legal representatives were not brought on record before sale actually took place, *held*, the sale was not a nullity and was not liable to be set aside. 32 C.W.N. 418. Where, after the attachment of the immovable properties of the judgment-debtor in execution of a decree against him, and after the Court has passed an order for sale, the judgment-debtor dies

and the sale is held without impleading the judgment-debtor's legal representatives, the sale is null and void and not merely irregular. 59 M. 461=1936 M. 205=70 M.L.J. 162 (F.B.). Death of party pending appeal to Privy Council does not nullify decree and it is executable. 11 P. 445=1932 P. 261. Insolvency of judgment-debtor pending execution—Official Receiver necessary to be brought on record—Sale without notice to him invalid. 120 I.C. 889=1929 M.W.N. 168. Reversioner, to whom the life-estate holder has surrendered her estate, if legal representative of judgment-debtor. See 159 I.C. 370=1935 C. 713. Legal representative of a Hindu is liable to the extent of property coming to him without any distinction as to ancestral or self-acquired property of deceased. 118 I.C. 396=38 Bom.L.R. 977. "Property of judgment-debtor"—Person governed by Dekkan Agriculturists' Relief Act—Liability for debt of deceased judgment-debtor. 32 Bom.L.R. 320=1930 B. 238. Suit against legal representative of deceased debtor should not be dismissed on the finding that defendant is not in possession of any estate of the deceased. It is a matter for determination in execution. 120 I.C. 333. The transferee Court can also substitute legal representatives. 1931 A.L.J. 166=1931 A. 320 (2). But the proper Court for the purpose is that which passed the decree. The getting of an order of substitution is only a matter of procedure and if the application is erroneously made to the transferee Court, the defect may be waived. 11 P. 445; 1938 R. 385.

SEC. 50 (2).—Once it is admitted or proved that the man sought to be made liable under a decree obtained against a deceased person has come into possession of assets belonging to the estate of the deceased judgment-debtor, it is for him to satisfy the Court as to the extent of the assets received by him and to account for them. 1933 R. 309. See also 71 M.L.J. 385; 1941 R.D. 120=1941 A.W.R. (Rev.) 229. Where the decree-holder has any complaint against the legal representative for not properly administering the estate of deceased although he (decree-holder) might have a remedy against him by filing a separate suit, he can deal with this point in execution of the decree itself. 1933 R. 309. Where step-sons are in enjoyment of income on account of property, though non-transferable (*e.g.*, occupancy fields which belonged to their father), it is equitable that they should be legally bound to devote a due proportion of that income to the maintenance of the step-mother or the dependants of their father. In such circumstances a personal decree should be passed against the step-sons.



## PROCEDURE IN EXECUTION.

51. Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree—

Powers of Court to enforce execution.

- (a) by delivery of any property specifically decreed ;
- (b) by attachment and sale or by sale without attachment of any property ;

## NOTES.

142 I.C. 274 (1)=29 N.L.R. 103=1933 N. 57. See also 30 Bom.L.R. 977. When once a decree has been fully satisfied, there is no need to bring the legal representative on record under S. 50. Where proceedings under R. 95 of O. 21 are taken they are between the auction-purchaser and the claimants, in which the legal representative of a judgment-debtor do not require to be added. 1941 N.L.J. 494.

SECS. 50-53.—A creditor is not entitled to bring a suit for the administration of the estate of a deceased Hindu who was joint with his son and died leaving no property apart from his interest in the family estate. There is nothing in Ss. 50, 52 and 53, C. P. Code, which would sustain an administration suit where the Hindu father dies leaving no property of his own. I.L.R. (1939) Mad. 820=1939 Mad. 552=(1939) 2 M.L.J. 653.

SEC. 51: EXECUTION SALE.—S. 51 lays down the mode in which a Court may execute a decree. It does not give the Court any discretion to choose one particular mode of execution as against another. The Court has therefore no jurisdiction to direct a decree-holder to proceed against the property of the judgment-debtor, when he desires to proceed against the person. (1926 L. 110; 1934 N. 140, Foll.; 48 M. 494 and 11 I.C. 848, Dist.; 29 I.C. 152, Diss.) 160 I.C. 812=1936 Pesh. 46. Sale of property not belonging to judgment-debtor—Void or valid—Distinction in cases where property is *bona fide* believed to belong to judgment-debtor. 52 M.L.J. 148. Executing Court has power to order mortgage of judgment-debtor's land, when the decree is against agriculturist. 119 I.C. 231 (Lah.). But see also 1938 A.L.J. 444=1938 All. 290 (F.B.) (No power to lease lands). *Quære*.—Whether the Civil Court has a general right to grant a remedy in execution by itself giving a lease of the property of the judgment-debtor for the purpose of satisfying the decree. But the Code does not make any provision for such a procedure. 1937 A. L. J. 801=1937 All. 699. The power to grant a temporary alienation under S. 51 is derived from the power of sale and if the power of sale is taken away by the legislature all powers derived therefrom are similarly taken away. 161 I.C. 628=1936 Pesh. 90. Decree-holder asking for arrest is not bound to accept instalments. 1930 L. 220. Execution applications filed by decree-holder enure for benefit of receiver subsequently appointed for execution of decree. 1929 B. 279=31 Bom.L.R. 320. A sale in execution is not a nullity even if it is not preceded by an

attachment. Neither R. 30 nor R. 64 of O. 21, C.P. Code, negatives the power expressly given to the Court by S. 51 of the Code to sell without attachment. I.L.R. (1939) Bom. 420=41 Bom. L. R. 463=1939 Bom. 277. Where a defendant against whom a decree for price of plaintiff's car has been passed makes a hypothecation of the plaintiff's car along with other cars, that have been left with him for sale or for custody, to a third party, and he then brings a suit against the third party and abandons it, and the transaction of hypothecation appears to be fictitious, his conduct amounts to making a fraudulent concealment or transfer of his properties and comes within proviso (a) (ii) to S. 51 as amended by S. 2, C. P. Code (Amendment) Act XXI of 1936. 177 I. C. 1008=1938 Cal. 448 (2).

SEC. 51 (b).—Though a decree as being saleable property under S. 60, is liable to be sold in execution, yet, High Court has power to make rule prohibiting the sale of a decree in execution of another decree. That having been done under R. 178, Civil Rules of Practice, the rule being within the powers of the High Court under Ss. 51 and 122, C. P. Code, a preliminary decree for partition cannot be sold in execution of a money decree. 152 I.C. 789=1934 M. 692=67 M.L.J. 669. Under the newly introduced proviso to S. 51, C. P. Code, in determining the question of the capacity of a judgment-debtor who is an agriculturist to pay the amount of a decree, his agricultural lands and his residential houses cannot be taken into account. 41 P. L. R. 101=1939 Lah. 299. See also 1940 Pesh. 33. In the calculation of the means of the judgment-debtor for the purpose of S. 51, proviso, cl. (b), the necessary expenses of maintaining the life of the debtor and of his dependants must be taken into account and deducted from his income. 43 C.W.N. 427. In the calculation of the means of the judgment-debtor for the purpose of cl. (b) of the proviso to S. 51, C. P. Code, the value of the property under attachment in execution of another decree, cannot be taken into account. 43 C.W.N. 427. Where a judgment-debtor after the date of the decree sells his property, receives the consideration but neglects to pay the decretal amount or a substantial part thereof, Cl. (b) of the Proviso to S. 51 comes into play and he is liable to be detained in civil prison. 174 I. C. 629=1938 Pesh. 17. The onus of proof is on the decree-holder to establish that the judgment-debtor had sufficient means to pay the debt within the



- (c) by arrest and detention in prison ;
- (d) by appointing a receiver ; or
- (e) in such other manner as the nature of the relief granted may require.

<sup>1</sup>[Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied—

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,—

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property ; or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

*Explanation.*—In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.]

#### LEG. REF.

<sup>1</sup> Proviso added by S. 2 of Act XXI of 1936.

#### NOTES.

meaning of sub-cl. (b) of the Proviso to S. 51. 177 I. C. 797=1939 Pat. 22. See also 1940 All. 494.

SEC. 51 (c).—Where execution by arrest is asked, the question whether the necessary circumstances exist is one of fact. The burden lies on the judgment-creditor to show that the necessary circumstances exist. If it is found either way by the lower Court, it is not open to the High Court to go behind it in second appeal. 1940 All. 494. Under S. 51 (c), it is not open to the Court, in absence of special circumstances, to say that decree-holder must proceed against the properties of the defendant before applying for his arrest. But there may be circumstances which would not only justify refusal of a warrant of arrest, but would even demand such refusal. Where properties of judgment-debtor are under attachment at instance of the decree-holder or such properties are the subject-matter of a decree on a mortgage at the decree-holder's instance, and the judgment-debtor is precluded from raising money on the properties by reason of the decree-holder's action, a refusal of arrest would be justified. 38 C.W.N. 1085. Receiver appointed in execution of one decree, other decree-holders need not apply for appointment of receiver for the same property—Status and duties of receiver. 1930 M. 4. The High Court can on equitable grounds appoint receiver in execution for property in the mofussil. 57 C. 964=34 C.W.N. 238=1930 C. 502. The Court has no doubt

jurisdiction to appoint a receiver of immovable properties in execution of a decree although such properties be situate outside the jurisdiction of the Court. But if the judgment-debtor objects to the appointment of a receiver in execution and if there is a reasonable chance of the decree-holder being able to satisfy his decree by attachment and sale, he should be relegated to that remedy. In a case, however, where the properties of the judgment-debtor prove to be saleable, the Court is entitled to appoint a receiver in execution of properties outside the jurisdiction notwithstanding the judgment-debtor's objection thereto. 40 C.W.N. 1065. Decree—Execution by receiver mortgagee as against decree-holder—Capacity of receiver need not be mentioned in final mortgage decree—Receiver not affected by attachment before judgment or by parties entering into consent decree. 31 Bom.L.R. 320=1929 B. 279. As regards the grounds for appointing receiver, see 8 O.W.N. 677; 35 C.W.N. 1066=1932 C. 189=59 C. 225; 1936 N. 288; 71 M.L.J. 87; 1938 A. 3=I.L.R. 1938 A. 35 (wakf property). A person applying for appointment of receiver in execution of a decree must make out reasonable ground for the appointment. The mere fact that the judgment-debtor presses the applicant to accept a smaller amount than the sum decreed or applies to Manager, Sind Encumbered Estates, for his aid does not constitute a valid ground for appointing a receiver, more especially when there is no danger of waste or destruction of the property. 1933 S. 231=150 I. C. 473. An appointment of receiver by way of execution cannot be obtained where the



52. (1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

## NOTES.

decree-holders can execute the decree in the ordinary manner. (*Ibid.*) A Court has no power to appoint a receiver in respect of property which is not the subject of any suit or of any execution application. (*Ibid.*) Execution by appointment of a receiver under S. 51 is a distinct and different mode of execution from that of attachment and sale. In the case of lands exempt from attachment under S. 24 of Ajmer Courts Regulation, if they were leased to lessees, a receiver could be appointed to recover the rents. But if the lands were being cultivated by the judgment-debtor personally an appointment of a receiver would probably be inappropriate. 1937 A. M.L.J. 89. See also 1938 A.L.J. 444=1.L.R. (1938) All. 528=1938 All. 290. In execution of a decree against a person possessing a share in a firm it is doubtful if a receiver under S. 51 can be appointed because a receiver cannot be appointed for the custody of the property which the judgment-debtor himself cannot take possession of. In order to ascertain the approximate value of the shares of the judgment-debtor, it may be open to the Judge to appoint a Commissioner to make an inventory of the assets of the firm and its liabilities. 1937 Lah. 313. A decree for the payment of arrears of alimony passed under S. 37 of the Divorce Act is a decree of a special character; but it is a decree for the payment of money within the meaning of the proviso to S. 51. Before ordering arrest and detention in prison of the debtor in execution of such a decree, the Court must be satisfied as to the matters covered by the proviso. 1941 Bom. 17=42 Bom.L.R. 945. The explanation applies only to Cl. (b) of the proviso. By virtue of the explanation, property which could not be attached or sold was not to be considered only when deciding as to whether the judgment-debtor had any means to pay the money decreed. Obviously, the explanation has nothing to do with Cl. (a) and therefore it cannot be said that a gift by the judgment-debtor after the institution of the suit, of his land not liable to attachment and sale does not make him forfeit the protection afforded to him by the amendment of S. 51 by Act XXI of 1936 even if the gift was made with a dishonest intention. 189 I.C. 371=1940 Pesh. 33.

SEC. 51 AND O. 40, R. 1: APPOINTMENT OF RECEIVER—DISCRETION OF COURT.—No doubt section 51, C. P. Code, prescribes the appointment of a receiver as one of the modes in which a decree can be executed but the appointment of a receiver in all cases is subject to the provisions of O. 40, r. 1 of the Code

and no receiver can be appointed in any case unless it appears to the Court that it is just and convenient that a receiver should be appointed. 167 I.C. 302=1937 O.W.N. 243=1937 O. 232. See also 1937 Mad. 864; 14 Luck. 538=1939 O.W.N. 206=1939 Oudh 116. Execution by appointment of a receiver is one of the methods of execution provided by section 51, and so long as in the circumstances of the case it is the best means of securing the rights of the judgment-creditor without causing undue hardship to the judgment-debtor, there is no valid reason for avoiding this method of execution. 45 C.W.N. 1104. There is no reason why the decree-holder should not take out any or all the forms of execution which the Code of Civil Procedure entitles him to pursue against various items of the judgment-debtor's property. Consequently, where by a consent order a receiver is appointed of certain properties, treating the appointment of receiver as a form of equitable execution, there is no reason why the decree-holder should not proceed or be entitled to proceed against properties which are not the subject-matter of the order appointing receiver. 17 Pat. 248=19 Pat.L. T. 359=1938 Pat. 130. Where decree-holder can only exercise the ordinary legal remedies at considerable risk and with doubtful results, there is ample justification for the appointment of a receiver in execution in such circumstances. 1941 Cal. 240. The Court can appoint receiver over property out of its jurisdiction. This power is based upon the doctrine that the Court acts *in personam*. The Court does not and cannot attempt by its order to put its own officer in possession of property in foreign territory, but it treats as guilty of contempt any party to the action in which the order is made who prevents the necessary steps being taken to enable its officer to take possession according to the laws of the foreign territory. 39 P.L.R. 415.

SEC. 52: SCOPE OF SECTION.—As a general rule a decree must be against a person and not merely against something which is not a person, for example, the estate of a deceased person, though it may operate upon such estate by force of a direction to a person, who has the estate in his hands, to discharge the judgment-debtor out of it. This is what section 52 provides for. A decree which merely states that the money could be recovered from the assets of a deceased person, without adding in whose hands these assets were to be found, is defective and inexecutable; the proper course is to apply to the Court which passed it to amend it. 151 I.C. 617=1934 M. 562 (2). Where the debtor dies before the suit and a defendant is sued as representing the deceased person's estate, the defendant, in order to bind the estate and the rightful



## NOTES.

owner, must substantially represent the estate, and where he does not substantially represent the estate, the Court has no jurisdiction to sell the estate and the decree would not bind the real heir. But where a debtor himself is a party to a suit and dies either in the course of the suit or in the course of execution proceedings and the Court by a judicial decision brings a person on the record as the legal representative of the deceased debtor, the decision however wrong will bind the estate of the deceased person, and the rightful heir cannot subsequently come and dispute the correctness of the decision or the jurisdiction of the Court to sell the deceased debtor's estate. 150 I.C. 323=1934 A. 474. Section does not provide for reservation of property to satisfy debts. 30 I.C. 256=18 M.L.T. 147. Liability of legal representative under this section and under section 50 are the same. 7 M. 257. See also 89 I.C. 534=1925 O. 515. Where property in the hands of a son is sought to be proceeded for debts of the father, if it is proved that the son has received certain assets from father, onus is on son to give detailed information regarding the property received. 1933 L. 447. See also 148 I.C. 930=1934 L. 101. Section does not contemplate the insolvency of the deceased party. 22 C. 259. Written statement in the suit that no assets are available—Suit if to be dismissed. 49 A. 645=1927 A. 459; 25 A.L.J. 359. Suit on promissory note—Defendant's father and sons of deceased executant admit jointness of family—Proper course is to pass decree against assets and leave the liability of the properties under Hindu Law to be determined in execution. 116 I.C. 86 (1). A person holding a decree against assets of a deceased person can obtain satisfaction by attachment and sale of only such property as is shown to have formed part of the assets of the deceased. The onus is on the decree-holder. When there is a partition in the family and the properties in dispute are not dealt with at the partition, it is for the decree-holder to establish that the property attached formed part of the joint family property. There is no presumption that any particular property is joint family property. 148 I.C. 1113=1934 A. 249. The principle or method of which section 52 is an expression has always been so operated as not to prejudice the rights *inter se* of beneficiaries or legatees over whom the creditor has priority. 65 I.A. 219=13 Luck. 494=42 C.W.N. 901=1938 P.C. 169=(1938) 2 M.L.J. 210 (P.C.). Section 52 (1) gives a creditor a right to proceed against the property of the deceased in the hands of a legal representative and sub-section (2) of that section gives the creditor the right to proceed personally against the legal representative if the latter cannot satisfy the Court that he has properly accounted for the property in his hands. It does not give the creditor a right to proceed against property which is no longer in the hands of the judgment-debtor. To proceed against

such a transferee, the creditor must establish his equitable right to do so in a separate suit. It would not be competent to an executing Court to attach the property of a stranger on purely equitable considerations. But any interest which the legal representative has in such property, such as an equity of redemption can be attached by the creditor. 47 L.W. 782=1938 Mad. 684=(1938) 1 M.L.J. 867.

ASSETS—MEANING OF.—“Assets” include also property acquired after decree. On this point, see also 89 I.C. 477=1925 N. 449. “Assets” include rents and profits. 9 O.W.N. 315; 1932 L. 383. “Property” includes rents from immovable property. 2 Luck. 408. It includes share of temple offerings. 58 A. 457. Investigation as to assets may be made either in suit or in execution. 85 I.C. 768=1925 N. 380. Rents and profits of the property of a deceased person accruing after the property has devolved on his heirs form part of the estate of the deceased. 1937 O.W.N. 1243=1938 Oudh 45. Where property of the deceased is in the hands of his widow as executrix and it is not proved that it belongs to her in her personal capacity, the property may be attached in execution of decree against her as executrix. The decree-holder may not file an administration suit because a decree-holder has rights which he may work out in execution proceedings, and the cumbrous method of filing an administration suit when he desires to attach property *prima facie* in the hands of the judgment-debtor as such may not appeal to him. 187 I.C. 370=1940 Rang. 78. Whether executing Court has power to inquire into administrator's accounts where a money decree is passed against him. See 5 R. 44. Arrears of maintenance due to a Hindu widow at her death are assets. 11 B. 528; but not maintenance paid under an arrangement in lieu of surrender. 129 I.C. 374=1931 A. 368. As regards partners, see 1931 S. 84=25 S.L.R. 374. Where the estate in the hands of the heirs of the original debtor against whose estate the decree was passed is liable for the satisfaction of the decree, then even the produce and income of that estate which has accrued after the death of the original debtor is liable to attachment and sale in satisfaction of such decree. 165 I.C. 802=1936 L. 236. Where on the death of a legal representative against whom a decree has been passed to the extent of the assets of the deceased in his hands, his legal representative is added, he cannot escape the liability for the decree so long as the assets are in his hands. 1938 N.L.J. 176.

LEGAL REPRESENTATIVE—MEANING OF.—See 50 I.C. 951 (Executor *de son tort* is legal representative). See also 38 Bom.L.R. 977.

DECREE AGAINST PARTY AS LEGAL REPRESENTATIVE.—A legal representative can be sued without proving that assets have come into his hands, if there are assets of which he may become possessed. 8 B. 309. See also 13 B. 653; 33 A. 414=8 A.L.J. 199; 56 I.C. 962; 89 I.C. 235; 134 I.C. 862=1931 N. 173.



(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

## NOTES.

If in a suit on a bond instituted after the death of the executant against his personal representatives, the Court is satisfied that at the time when the suit was brought the defendants had received no part of the assets of the deceased, the only course open to it is to dismiss the suit. 1936 A.W.R. 32. A creditor of a deceased coparcener is entitled to a decree against a surviving brother of the deceased without giving any proof that he has got possession over any property belonging to the deceased and held by the deceased separately apart from the joint family estate. When he applies for the execution of his decree then the question will come up for consideration whether the deceased has left any such separate assets. If the decree-holder can prove that the surviving coparcener has got any such assets, then he would be entitled to execute his decree against the surviving coparceners. 157 I.C. 51=1935 A.L.J. 293=1935 A. 390. Section 52 shows that there may be a decree passed against legal representative of a deceased person without showing that the deceased left any property and legal representative got that property. 49 A. 645=1927 A. 459. Per *Ashworth*.—Section 52 provides for the due application of the assets, i.e., of '*plene administravi*' being taken in execution proceedings. Therefore it must be inferred that it cannot be taken at an earlier stage. In English law the plea of '*plene administravi*' can certainly be raised by a legal representative sued on a debt due from the deceased. 49 A. 459. The fact that the estate is not in the hands of the legal representative, but in the hands of third parties, is no bar to a decree against him. 22 C. 259. Plaintiff must prove assets had or ought to have come to the hands of the defendant. 3 M.H.C.R. 161. See also 4 C.W.N. 151; 89 I.C. 477=1925 N. 449. A personal decree may be passed against the legal representative if it is proved that he has received sufficient assets. 20 M. 446. As to effect of obtaining decree against a wrong person as legal representative, see 15 Bom.L.R. 41; 34 A. 79; 1928 M. 243. When a wrong person is sued as representative and property is sold, the proper representative can sue. 9 B. 86. See also 11 M. 408; 11 C. 45. A decree against one representative does not bind the other representatives. 4 C. 142. See also 7 A. 822 (F.B.); 8 C. 370; 24 I.C. 280. A decree obtained against a widow as legal representative of the estate of her deceased husband without making the minor sons, who are the proper legal representatives, as parties to the suit, is binding upon such sons, when there is nothing to show that the widow was negligent of the interests of her sons or that she did not defend the case properly.

C. C. M.—64

183 I.C. 487=41 P.L.R. 147=A.I.R. 1939 Lah. 277. Legal representative should account for mesne profits in the shape of rent or interest. 15 W.R. 285; 30 M.L.J. 391. Also liable for the assets realized by sale of the properties of the deceased. 12 W.R. 177. In case he fails to account for the assets come into his hands, he can be arrested in execution. 12 W.R. 117. Delay in bringing him on record does not absolve him from liability to account, though it may affect the quantum of proof. 129 I.C. 885=1930 L. 332. Absence of assets—Effect of. 1926 N. 170. Right of creditor to follow the assets in the hands of the legatee should be exercised by suit. It cannot be exercised by levying execution against the assets in the hands of the legatee under a judgment against the legal representative. 34 C.W.N. 761=58 C. 170.

SEC. 52 (2).—Section 52 (2) does not apply so long as there are sufficient assets to meet the decree—Meaning of the words "such property." 1930 L. 354. See also 41 L.W. 350=1935 M. 298. Section 52 (2) simply enacts a rule of procedure in accordance with natural justice. If a debtor dies and his properties are taken by his legal representatives, they are bound to pay his debts to the extent of the assets they have taken. Consequently if a creditor has obtained a decree for the payment of money out of the property of the deceased, and proves in the execution proceedings that the debtor died leaving properties which came into the hands of his representatives, then it is for these representatives to account for those properties, and if they fail to do so, they become personally liable to the extent of the assets not accounted for. 20 Pat.L.T. 685=1939 Pat. 580. Section 52 (2) does not come into operation and there can be no execution against the legal representative personally until it is proved that the property inherited by the legal representative from the deceased judgment-debtor is no longer in his possession. 169 I.C. 445=A.I.R. 1937 Pesh. 80. Section 52 merely provides that if the legal representative of a judgment-debtor has improperly disposed of any property of the deceased he would himself become personally liable. That does not mean that if an alienation is made by the legal representative which is void in law, the property in the hands of the alienee could not be pursued by the decree-holder. 41 P.L.R. 362=A.I.R. 1939 Lah. 373. Jurisdiction of Registrar of Presidency Small Cause Court to pass order under section 52 (2). The creditors of the ancestor have a general lien upon the assets of the ancestor's estate for the payment of their debts and can follow such assets in hands of the heirs but not in the hands of other persons. If the heir has dis-



53. For the purposes of section 50 and section 52, property in the hands of a son or other descendant which is liable under Hindu Law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be

Liability of ancestral property.

#### NOTES.

posed of ancestor's property to other persons, who took the property without notice of the creditors' claims, then the creditors' right to follow the property is lost. That right cannot be revived to them by the fact that the heir has been adjudicated insolvent, and that his transfer of the property inherited by him has been set aside under the provisions of the bankruptcy law so that it now becomes available for distribution among his creditors. (22 B. 1, Rel. on.) 12 R. 603=152 I.C. 558=1934 R. 162. See also 1940 Mad. 22=50 I.W. 655. Once it is admitted or proved that the legal representative of a deceased person had come into possession of assets belonging to the estate of the deceased, it is for him to satisfy the Court as to the extent of the assets received by him and to account for them. In such cases the *onus* is, in the first instance, on the decree-holder to prove that some assets had come into the hands of legal representative and when this is done the *onus* is shifted on to the latter to show the extent of the assets received by him and also to satisfy the Court as to how they had been applied. 148 I.C. 980=1934 L. 106. It is for the decree-holder to satisfactorily establish that any property belonging to the deceased had actually been disposed of by the legal representative before the latter can be held personally responsible for the payment of the decree under section 52 (2). 39 P. L.R. (J. & K.) 48. An heir of the deceased is for the purpose of section 52 a legal representative of the deceased, and the property which he obtains as a result of an administration suit comes into his possession as legal representative. Therefore it is his duty under section 52 (2) to satisfy the Court that he has duly applied this property. But where such heir disposes of the property so obtained before the passing of a decree against the deceased, his personal property is not liable to attachment in execution of the decree under section 52 (2). 148 I.C. 1092=1934 R. 93. Rents and profits of property of a deceased person must be deemed as his assets. 137 I.C. 632.

SECS. 52 AND 53.—If an award is made by the Registrar under the Co-operative Societies Act against a son as representing the estate of his father, the ancestral property in the hands of the son and his sons is liable to be attached and sold in execution of the award. A.I.R. 1939 Pat. 500. The principle of the section applies to a decree passed against a company which has taken over the entire assets and liabilities of another company when the latter went into liquidation, and its liability is expressed in the form adopted in decrees against legal representatives of deceased persons. As regards the mode of execution of such a decree, it does not in principle differ from a decree passed

against the legal representatives of a person who has died a natural death. 20 P.L. T. 685=A.I.R. 1939 Pat. 580. Mortgage executed by two members of joint Hindu family—Death of one of them—Suit by mortgagee decreed against estate of deceased executant in hands of his sons and against other executant personally—Suit dismissed as against grandsons of deceased executant—Decree, cannot be executed against interest of grandsons—Mortgagee's proper remedy is by way of appeal from the decree. 13 Luck. 61=(1937) 1 M.L.J. 41=1938 P.C. (P.C.).

SEC. 53.—This section is new, and gives effect to the rulings under the old Code in 34 C. 642 and 20 B. 385. The law laid down in 31 C. 224; 27 M. 243 and 28 M. 26 are now good law.

SCOPE OF SECTION.—See 20 Bom.L.R. 660=46 I.C. 745. See also 24 A.L.J. 273=40 A. 245=1926 A. 220. Section 53 is only meant to cover the case of a son or other descendant who under the section is to be deemed the legal representative of his ancestor with respect to property which was liable under Hindu Law for the payment of the debt of the deceased ancestor, in respect of which a decree had been passed. It does not apply where a share of a brother of the father has come to the son and no decree has been passed against the father's brother. Hence such share cannot be attached in execution of decree obtained against father. 159 I.C. 233=1935 L. 650. See also 1937 Oudh 327: (1937) 1 M.L.J. 224. Per *Cornish, J.*—Apart from section 53 a Hindu son cannot be made liable in execution as his father's legal representative in respect of property which was not property in which the father had any right or title at the time of his death. The language of section 53 is sufficiently wide enough to include a liability incurred by the father which is enforceable against the property in the hands of his son, whether the liability was incurred by the father in his capacity of manager or personally. In both cases it is the Hindu Law which attaches to the property this liability. Section 53 covers a case where there is a decree against the father in respect of a pre-partition debt binding on the share of property allotted to the son in the partition. The word 'debt' as used in the text is wide enough to include a pre-partition debt which will include a liability for mesne profits incurred by the father before partition, although the actual liability is not determined in a suit until after the partition. I.L.R. (1937) Mad. 880=A.I.R. 1937 Mad. 610=(1937) 2 M.L.J. 251 (F.B.). Section 53 imposes the liability to pay the decree on the son or other descendant of the judgment-debtor and not on any collateral of the judgment-debtor. Accordingly on the death of a member of a joint Hindu family against



deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

# NOTES.

whom a personal decree is passed, the decree-holder can proceed only against the assets of the deceased in the hands of his sons and not against the property belonging to the surviving brother. 1937 O.W.N. 516=A. I.R. 1937 Oudh 327. See also 18 Pat.L.T. 341=1937 Pat. 321. Section 53 is creating a fiction for the purpose of section 50 and the purpose of section 52. The fiction created by section 53 is that in certain circumstances property, not the property of the deceased and not therefore in A as the deceased's personal representative, shall be deemed to be property held by A as a legal representative. Section 53 seems to be limited to cases where the decree that is being executed is a decree passed in a suit on a debt. Hence it will not apply to a case where a decree for compensation in lieu of specific performance has been passed, for, the decree may only be regarded as creating a debt of record without its being a decree on a debt. 1940 N.L.J. 275=I.L.R. (1941) Nag. 632=1940 Nag. 278. Section 53 deals with the liability of ancestral property in the hands of a son or other descendant for the payment of the debts of a deceased ancestor in respect of which a decree has been passed. Where the ancestor against whom a decree is passed is still alive, there is no question of enforcement of the decree against his legal representatives or against ancestral property in the hands of such legal representatives, and the entire family property is, therefore, not liable to attachment and sale under the section. 158 I.C. 490=1935 O.W.N. 1113. Section 53 was not intended in any way to alter the liability of the property under the Hindu Law; the object of the section was to make it clear that the same remedy which might have been available by a separate suit is equally applicable in the execution department and that although strictly speaking it cannot be said that the joint family property in the hands of a son of a deceased Hindu owner is property which has come into his hands as the legal representative of the deceased, it must be deemed to have so come into his hands within the meaning of sections 51 and 52 of the Code. The word "property" used in section 53 does not mean any tangible property which is necessarily capable of being seized or possessed physically but must include proprietary interest in such property. Nor does the expression "in the hands of a son" necessarily mean property which is exclusively in the hands of a son without any partner or coparcener. 150 I.C. 411=1934 A.L.J. 483=1066; 157 I.C. 945=1935 O.W.N. 1005=1935 1066=157 I.C. 945=1935 O.W.N. 1005=1935 O. 510; 41 L.W. 61=68 M.L.J. 104. The definition of the term "legal representative" does include a son becoming owner of his father's property by virtue of survivorship, for he does represent in law the estate of the deceased and at any rate it is he who inter-

meddles with the estate of the deceased. 184 I.C. 456=1939 Pesh. 45. Section 53 is as comprehensive as it can be, and it does not limit the liability of ancestral property to property devolving by survivorship. The section would equally apply to ancestral or joint family property which comes into the possession of the son or other descendant on a partition between him and his father or ancestor. It is deemed to be the property of the father or ancestor (judgment-debtor) for the purpose and within the meaning of section 53, C. P. Code. There is nothing in section 53 which limits the scope of the enquiry or the remedy to property devolving by survivorship. I.L.R. (1939) Kar. 300=1939 Sind 258. Section 53 provides that a question as to what property would be liable in execution, is to be determined in execution proceedings and not by a separate suit. 16 I.C. 970=16 C.L.J. 85. On this section, see also 23 A.L.J. 467; 28 Bom.L.R. 1322; 41 L.W. 61=68 M.L.J. 104; 14 P. 732=16 Pat. L.T. 393=1935 P. 275 (F.B.). Section 53 was enacted to settle a question, on which there was a conflict of judicial decisions, namely, whether coparcenary property surviving to Hindu sons after the father's death can be proceeded against in execution of a decree against the father. Section makes it clear that such property can be followed by the decree-holder in execution of his decree without obtaining a decree that the property is liable for the debts of the deceased. The section is not intended to allow the representative of a judgment-debtor in a mortgage decree to resist proceedings in the executing Court on the plea that the decree itself ought not to have been passed. 1934 L. 438=15 L. 772. To make this section operative there should be a decree against the son as the legal representative of the deceased. 103 I.C. 338=1927 A. 683. But see 1930 N. 134. Decree against Hindu father—Attachment of joint family property—Insolvency and death of father—Application for execution against sons—If affected by insolvency of father. See 38 Bom.L.R. 977. Watan property cannot be regarded as property inherited by a son from his father so as to expose it to liability in execution under section 53. A son does not inherit watan property from his father at any rate to the extent of making that property liable for the father's debts. To hold that watan property is liable for the father's debts, like other property of a Hindu father would be to go behind the prohibition in section 5 of the Watan Act. 43 Bom.L.R. 232. Decree against member of joint Hindu family—Execution against shares of other members except sons—Rights of creditor—Other members—If legal representatives. See (1937) 1 M.L.J. 224=1937 M. 472.

ILLUSTRATIVE CASES.—Grandson's liability as "other descendant". 1932 B. 522=34 Bom.L.R. 1005. See also 144 I.C. 397=1933 O. 309. It is only the son or lineal descendant of a deceased Hindu that comes



54. Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Crown, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.

## NOTES.

within the scope of section 53. 45 A. 455. (42 B. 504, R.); 24 I.C. 280=1914 M.W.N. 354. A son is liable for the decree debts of his father to the extent of the ancestral properties unless the debt was for an illegal or immoral purpose. This is so even if the son was a party to the decree against the father. 20 A.L.J. 969=1923 A. 124; 15 L. 772=19 I.C. 252; 9 I.C. 631. The whole of the ancestral property and not merely that part of it in the hands of a Mitakshara son is liable for satisfaction of the judgment-debt. 16 I.C. 970=16 C.L.J. 85; 32 Bom.L.R. 919. Where a Hindu father made himself responsible to produce certain crops entrusted to him or on failure to make good a particular sum and died and the crops disappeared it was held that the father was in the position of a judgment-debtor and he having died the decree or order could be executed against his legal representative who would be liable to the extent of the assets of the deceased in his hands and that under section 53 even ancestral property could be proceeded against, if it is liable under Hindu Law and the debt not being repugnant to good morals, the property in the hands of the sons were liable. 1941 A.W.R. (Rev.) 229. See also 1939 Pesh. 45. A Hindu son can, under section 47, have the question whether the debt had been contracted for immoral purposes, tried. 33 C. 676. See also 20 M. 385; 3 Pat.L.T. 43=1923 P. 142; 1939 M.W.N. 918 (Plea by Hindu son that no debt existed as against his father). Section 53 does not in any way negative the claim of the son to be a legal representative within section 2 (11). 42 Bom.L.R. 1066=1941 Bom. 23 (F.B.). Ancestral property of a deceased judgment-debtor is not an asset in the hands of his heirs. 11 I.C. 376=80 P.W.R. 1911. *Watan* property owned by a *watandar* is not after his death liable for his debts in the hands of his heirs under section 53. A money decree obtained against a *watandar* during his lifetime cannot be executed against the *watan* property in the hands of his son. 58 B. 218=151 I.C. 151=36 Bom.L.R. 169=1934 B. 116. A gratuity granted to the heirs of a deceased employee by a railway administration is not assets in the hands of his heirs. 26 O.C. 53=1923 O. 21. Where a suit is instituted against the heirs of a deceased member of a joint Hindu family, for loan advanced to the latter, the actual existence of assets of the deceased need not be proved for passing of decree against the heirs. Decree can be passed against them to the extent of the assets of the deceased that may be found in their possession. If no assets can be found, it is

clear that nothing can be realised from them, but that is no ground for dismissing the suit. 147 I.C. 138=1933 P. 605. See also 1934 R. 196.

SEC. 54: SCOPE OF SECTION.—In case the Collector contravenes the direction in the decree or acts *ultra vires*, his action is subject to the control and correction of the Court. 19 B. 434; 28 B. 238. The primary object of the section is to prevent the annulment of joint responsibility for the payment of land revenue. See 16 C. at p. 205 and 24 C. at p. 734 (F.B.). Section only applies to case of estates assessed to revenue in lump and not to those assessed at acre rates. 95 I. C. 39 (1)=1926 R. 80. Nor to partition of a particular *mouza* in undivided estate. 1931 C. 104=34 C.W.N. 895. Section does not apply to a suit for partition of a revenue-paying estate when no separate allotment of revenue is asked for. [24 C. 725 (F.B.), Foll.] 13 P. 637=150 I.C. 608=1934 P. 365. See also 146 I.C. 201=1933 Pesh. 101. Where a Civil Court has passed a decree for partition of a revenue-paying estate, a subsequent partition obtained from the Collector does not supersede the Civil Court decrees. 13 P. 637=150 I.C. 608=1934 P. 365. Section applies only to a case where decree comprehends the partition of the whole of the estate paying revenue to Government. It does not apply where decree is for separate possession of a share of a portion of an undivided estate. 64 M.L.J. 63=56 M. 443. Per *Venkatashubba Rao, J.*—What section 54 refers to is the partition of the estate assessed to the payment of revenue and not the partition of the estate as well as the revenue. 56 M. 443=141 I.C. 181=1933 M. 259=64 M.L.J. 63. For meaning of the words "for the separate possession of such an estate," see 34 C.W.N. 892=1931 C. 93=58 C. 122; 64 M.L.J. 63=56 M. 443.

POWERS OF THE COLLECTOR.—A Collector cannot refuse to carry out a partition. 14 B. 450. A Civil Court cannot appoint a Commissioner to make a partition under this section. 23 C. 679. Collector's duty is not confined to mere division of the lands but includes the delivery of the shares to the respective allottees. 11 B. 662. Also 103 I. C. 231=1927 N. 300 (along with the crops attached to the land). He no doubt acts ministerially, but when a certain discretion is allowed to him, and so long as he keeps within bounds the Civil Court has no right to interfere. 12 B. 376. See also 15 B. 527; 19 B. 435; 28 B. 238. The Collector can do nothing which contravenes the command of the Court. 14 B. 450; 28 B. 238. See also 1935 S. 192.

POWERS OF CIVIL COURT.—A Civil Court has no power to interfere with the Collec-



## ARREST AND DETENTION.

55. (1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the Provincial Government may appoint for the detention of persons ordered by the Courts of such district to be detained :

Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise :

Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such dwelling house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorised to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found :

Provided, thirdly, that if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorised to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest :

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The Provincial Government may, by notification in the Official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the Provincial Government in this behalf.

## NOTES.

tor's proceedings under section 54. 42 B. 689=20 Bom.L.R. 411. A Civil Court is not competent to make a division of revenue-paying land even with the consent of the parties. 30 I.C. 209.

FINAL ORDER—MEANING OF.—35 M. 26=12 I.C. 775. The decree of a Court is final and a final decree in a partition suit cannot be re-opened unless by way of review. 4 P. L.J. 29=45 I.C. 895. See also 38 I.C. 593. Partition of a revenue-paying estate—If allowable. 2 P.L.J. 221=39 I.C. 173.

ESTATE.—A ryotwari holding is not an estate. 7 M. 382 (F.B.). But see 16 B. 528. The word 'estate' is used in its ordinary sense. 10 C. 400. Section only applies to cases where revenue is assessed in lump and not at acre rates. 5 R. 206.

SEC. 55: ARRESTED IN EXECUTION OF A DECREE.—Provision of the section is mandatory. 154 I.C. 782=1928 C. 62. As to what is meant by the word 'arrest', see 11 C. 451 (458). In the execution of a decree payable by instalments the judgment-debtor cannot be arrested for default in the payment of each instalment. 7 B. 106. An undischarged insolvent can be arrested for a debt not included in the schedule, and for which a decree has been subsequently obtained. 16 C. 85. A warrant of arrest may be issued even when a writ of attachment has already issued.

7 B. 301. Where the salary of a judgment-debtor is such that no portion of it would be attachable under section 60 to allow a decree-holder to proceed by way of arrest of such a judgment-debtor, would be to make the law ridiculous. 1939 A.M.L.J. 75. An arrest on a Sunday is legal. 4 M.H.C.R. 12.

"AS SOON AS PRACTICABLE".—See 30 M. 179. When a warrant orders a debtor to be imprisoned in a particular civil jail, his confinement in another jail would be unlawful. 11 C. 527. An arrest is illegal if officer has not warrant with him at time of arrest. 5 A. 318. See also 27 A. 258. An irregular endorsement on the warrant does not invalidate the arrest. 6 A. 385. See also 7 A. 507.

ENTRY INTO PLAINTIFF'S HOUSE TO ARREST HIS BROTHER—TRESPASS—DAMAGES.—Defendant had a decree against plaintiff's brother and the latter though residing outside usually came and lived with his brother. In execution of the decree, defendant entered the *baithak* of plaintiff's house with the bailiff and *naib* sheriff believing that the judgment-debtor was there as usual, with the object of effecting his arrest. The judgment-debtor was not there and on the plaintiff's remonstrating, the defendant apologised. Subsequently the plaintiff sued for damages. *Held*, that the bailiff and *naib* sheriff acted lawfully in entering the house



(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he <sup>1</sup>[may be discharged] if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court <sup>2</sup>[may release] him from arrest, and, if he fails so to

## LEG. REF.

<sup>1</sup> Substituted for the words "will be discharged" by S. 2 of Act III of 1921.

<sup>2</sup> Substituted for the words "shall release" by S. 2 of Act III of 1921.

## NOTES.

*bona fide* for arresting the judgment-debtor, that the defendant accompanied them to point out the person to be arrested, that no trespass was committed and that plaintiff was not entitled to any damages. 146 I.C. 543=1933 L. 723.

PROVISO 3.—It is not necessary that a special order of the Court should be made, empowering an officer authorized to arrest a *purda* lady, to enter the zenana house in which she resides. 7 C. 19.

PROVISO 4.—This proviso applies only when the arrest is made in execution of a "decree for the payment of money". 24 C. 766. A decree for the enforcement of a mortgage or charge will not be such a decree. See 24 C. 766; 21 M. 364; 19 A. 174; 29 M. 65.

SEC. 55 (3) AND (4).—The failure of the Court to inform the judgment-debtor under S. 55 (3) that he can apply for insolvency, does not invalidate the warrant of arrest which is otherwise legally issued. 42 P. L.R. 374. The provisions apply only to judgment-debtors who are under arrest and not already committed to jail. 8 M. 503. S. 55 (3) does not entitle the debtor to be adjudged insolvent on an application except in conformity with the provisions of the Insolvency Law. 21 I.C. 293=25 M.L.J. 545. The provisions apply to small cause debtors. 2 M. 9. But see also 22 B. 731. When application of judgment-debtor to be declared an insolvent has been dismissed and he is re-arrested in execution, he cannot claim the benefit of S. 55 (3) and (4) so long as the previous dismissal is not set aside. 9 I.C. 121. Where insolvency petition is filed one day too late, delay cannot be excused, and surety becomes liable. 1926 M. 286=86 I.C. 304. When judgment-debtor furnishes security under S. 55 (4) the security should be directed to continue until final order is made. 46 B. 702=1922 B. 340. Mere filing of insolvency petition by debtor or dismissal of an execution petition does not absolve the surety. 34 I.C. 407=(1916) 2 M.W.N. 273. (14 C. 757, Dist.) See also 22 I.C. 953; 5 P.L.J. 417

=57 I.C. 303. The liability of surety is now clearly laid down in S. 145. Surety is liable to a transferee decree-holder. 26 M. 258. Surety is not liable when judgment-debtor dies. 29 A. 466; 41 C. 50. See also 1924 B. 428 (Judgment-debtor not applying within time, dying subsequently—Liability of surety). Application to set aside order of arrest abates on death of the person against whom the order is made. 22 I.C. 953. Covenants in surety bond as to what is to happen in case the application to be declared an insolvent is refused, do not come within the purview of the section. 16 A. 37. See also 23 A.L.J. 59.

SEC. 55 (4).—A bond executed by a surety under S. 55 (4) cannot be made to contain conditions not covered by the section. 30 S.L.R. 177=1936 S. 244. Under S. 55 all that is necessary is that security 'to the satisfaction of the Court' should be furnished. It is not provided that the surety will become effective only if a bond is formally executed. In such cases the liability of the surety is determined by the undertaking that is given to the Court by means of the agreement or statement made by him and accepted by the Court, and non-compliance with the undertaking renders the surety liable under S. 145, C.P. Code. A.I.R. 1937 Lah. 772. A surety is liable under S. 55 (4), if there is a breach of either of the two conditions, that is to say, if the judgment-debtor fails to apply in insolvency or fails to appear before the Insolvency Court or the executing Court. It is not necessary that both the conditions should be broken. 1937 A.M.L.J. 49. An order made under S. 55 (4) rejecting an application for forfeiture of security bond is appealable and therefore no revision lies. 34 I.C. 247. (15 A. 183, Dist.) Liability of a surety when arises—Interpretation of section. 101 I.C. 525=52 M.L.J. 523. Delay by one day—If excusable. 86 I.C. 304=1926 M. 286. See also 1926 M. 689=50 M.L.J. 477=95 I.C. 444. Surety undertaking to produce judgment-debtor until discharge from insolvency—Debtor obtaining protection order does not absolve surety of his duty to do so. 97 I.C. 413=1926 M. 958 (2). See also 145 I.C. 531=1933 M. 360. The fact that a judgment-debtor for whose appearance a person has stood surety absconds does not necessarily involve a breach of the



apply and to appear, the Court may either direct the security to be realised or commit him to the civil prison in execution of the decree.

#### NOTES.

condition in the surety bond executed by the surety, if that bond provides that he should appear only when ordered by the Court; if the Court has permitted the judgment-debtor to absent himself, and if he then absconds, the bond cannot be enforced against the judgment-debtor. But if there is a disobedience by the judgment-debtor of an order of Court, whether expressed or implied, to appear, *prima facie*, the surety is liable under the bond. 1 I.L.R. (1939) Kar. 401=A.I.R. 1939 Sind 270. Surety for producing judgment-debtor on a particular date, which turns out to be a holiday—Subsequent production though after some delay is substantial compliance with the bond. 1928 M.W.N. 871. Where a surety for the appearance of the judgment-debtor who was arrested in execution of a decree, produces the judgment-debtor in Court and requests to be absolved from further liability under the surety bond, the Court should not refuse to grant the prayer. It is open to the decree-holder to apply to the Court for the arrest of the judgment-debtor until he furnishes a fresh security. 151 I.C. 154=1934 L. 962 (1). When a surety gives security in the course of execution proceedings for the appearance of a judgment-debtor and for satisfaction of the decree against him in the event of his failure to produce him when required, the security bond in the absence of any indication to the contrary does not enure after the dismissal of the application for execution in default. The surety would naturally consider himself absolved from his liability on the dismissal of the application in the proceedings relating to, which his bond was taken. The Court has no justification for summoning the surety at the stage of restoration application and the mere fact that the surety failed to raise the point as regards the validity of the bond at the time cannot estop him from raising it later. 148 I.C. 570=1934 L. 92. See also 55 A. 548=144 I.C. 731=1933 A. 382; 14 R. 190=162 I.C. 251=1936 R. 168. (Surety bond—Breach—Condition that judgment-debtor would appear on all days fixed for hearing of his insolvency petition—Petition adjourned for mention as to arrangement between him and his creditors—Failure of judgment-debtor to appear on adjourned date—Liability of surety enforceable). Where judgment-debtor fails to apply for insolvency within a month of his release, the option to commit him to prison or to realize the security lies with Court and not with decree-holder. 1927 A. 377=100 I.C. 626. Court cannot proceed both against judgment-debtor and his surety. 117 I.C. 910=1929 L. 479. If the Court at the request of the decree-holder commits the judgment-debtor to the civil prison the surety is discharged automatically. The judgment-debtor once hav-

ing been committed to prison, the Court cannot concurrently proceed against the surety. 144 I.C. 239=29 N.L.R. 83=1933 N. 38. In enforcing a bond executed by a surety under S. 55 (4), the Court has no power to reduce the amount for which the bond is executed. The security in such a case is not forfeited by way of penalty. It is part of the fruits of the decree obtained by the decree-holder, and the Court is not entitled to deprive the decree-holder of the fruits of his decree. 30 S.L.R. 177=1936 S. 244. Where a surety executes a bond to the Court stipulating that the judgment-debtor will be present in Court on a particular date, and that if he failed to be present the surety will produce him, the liability of the surety is not confined to producing him merely on that date. He is liable to produce the judgment-debtor on some date after that date, and if he fails to produce him on a subsequent date when called upon by Court, he is *prima facie* liable under the bond. The fact that the Court grants time to the judgment-debtor several times cannot have the effect of exonerating the surety, as the grant of time by the Court cannot impair the decree-holder's security, unless it can be shown that the *decree-holder* granted time to the judgment-debtor. 1937 M.W.N. 1165. Surety—Bond—Undertaking to produce judgment-debtor on date fixed—Surety failed to appear and failed to produce judgment-debtor on date fixed—Plea of illness of judgment-debtor—Absence of evidence to show physical impossibility to appear. *Held*, that the surety bond not having provided for such a contingency or for absolving the sureties from liability in such a contingency, they were not absolved from liability and hence were liable to be proceeded against under the bond in execution of the decree. 47 L.W. 408=1938 M.W.N. 321=A.I.R. 1938 Mad. 530. A surety bond has to be interpreted according to the conditions expressly mentioned in it, and not independently of them. The fact that it is executed under S. 55, makes no difference. In case the conditions laid down in the section are not fulfilled, the option lies not with the decree-holder but with the executing Court to proceed against the surety under the section or against the judgment-debtor. When once the Court exercises its option and discharges the surety, it cannot afterwards re-open the matter and proceed against him. If it does so, it acts without jurisdiction and the High Court will interfere under S. 115, C.P. Code. 18 Pat.L.T. 357=A.I.R. 1937 Pat. 476. Liability of surety—Previous execution proceedings against judgment-debtor consigned to record—Effect of. See 1935 L. 918. See also 123 I.C. 113=1930 L. 647. The application referred to in this clause need not necessarily be an application containing all the particulars



Prohibition of arrest or detention of women in execution of decree for money.

56. Notwithstanding anything in this Part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money.

57. The Provincial Government may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

#### NOTES.

required by the Provincial Insolvency Act. 134 I.C. 718=1931 B. 444=33 Bom.L.R. 820. The judgment-creditor's remedies are alternative and concurrent. 1931 B. 444. See also 1933 N. 38. Where a surety bond has been executed under S. 55 (4) unless there has been failure in both respects, namely, in applying for adjudication and in appearance, the decree-holder is not entitled to proceed against the surety. Where the judgment-debtor applies for adjudication, one of the conditions is complied with and the decree-holder is not thereafter entitled to ask the Court to realise the security. I.L.R. (1940) All. 338=1940 A.L.J. 344=A.I.R. 1940 All. 304. A person who becomes a surety under S. 55 (4) cannot claim to be released from his obligation at his pleasure. There is no analogy between a security bond executed under S. 55 (4), C.P. Code and a continuing guarantee under S. 129, Contract Act and S. 130 of the Contract Act (and its principle) cannot apply to a surety under S. 55 (4), C.P. Code. The surety under S. 55 (4) cannot be discharged from his obligation at any stage before he has fully carried out his undertaking to the Court. 1941 M.W.N. 793. A judgment-debtor who was arrested in execution of decree was released on his furnishing security that he would apply within one month to be declared as insolvent. He failed to apply within one month but the decree-holder made no attempt to execute for over three and half years. Held, that the obvious inference was that the decree-holder realized that the judgment-debtor had substantially, if not technically, complied with the order of the Court, and that the purposes for which the security was given was substantially fulfilled. It would therefore be wholly inequitable at such late stage to order that the security should be forfeited. A.I.R. 1941 Cal. 122. Dismissal of execution application for default does not discharge the surety. 138 I.C. 198=1932 L. 492. An order under this clause against the surety after notice to him is appealable. 135 I.C. 812=1932 B. 77=33 Bom.L.R. 1593. A surety bond under this clause need only be stamped with a Court-fee of eight annas under Art. 6, Sch. II, Court-Fees Act. 141 I.C. 301=1933 L. 89 (S.B.). See also 143 I.C. 12=34 P.L.R. 480=1934 L. 228. Undertaking by the surety that the judgment-debtor "would continue the insolvency proceedings" extends up to adjudication only. 1933 N. 40=144 I.C. 615=29 N.L.R. 28. See also 144 I.C. 731=1936 A. 382; 41 L.

W. 647=1936 M. 963=71 M.L.J. 646; 156 I.C. 113=1935 M. 543 (Failure of judgment-debtor to apply in insolvency—Liability of surety). See also 1935 L. 918.

DEATH OF SURETY PENDING SALE—PROCEDURE.—An execution proceeding cannot be continued against the estate of a dead man without bringing on record his legal representatives. Where in execution proceedings against a surety for a judgment-debtor under S. 55 (4), C.P. Code, the surety dies after the issue of the sale proclamation and before sale, the decree-holder should, in order that he may continue the proceedings, substitute, in the place of the deceased surety, his legal representatives. The Court should issue notice to them under O. 21, R. 22, C.P. Code, whilst substituting them, and their objections should be heard before the execution proceeding can be further continued against them. The circumstance that the legal representatives have already entered appearance in the execution proceeding does not dispense with the issue of notice under O. 21, R. 22 or of hearing their objections, if any. 18 Pat. 761=1940 Pat. 142. Rowland, J.—There can be no short cuts in matters of procedure. The correct procedure for taking proceedings against a surety for the judgment-debtor is first to call on him to produce the judgment-debtor, then, on his failure to do so, to call on him to show cause against forfeiture and execution, and next on his failure to show cause to the satisfaction of the Court, to obtain an order of the Court directing execution to proceed against the person and property of the surety. The correct procedure after the death of the surety is to substitute his heirs in the execution proceeding and to obtain the leave of the Court to continue the execution against them; thereafter to serve them with notices under O. 21, R. 22, C.P. Code, and on their appearance, the Court, after hearing and determining any objections that they may make, would permit or disallow the continuance of the execution. A sale cannot proceed without the legal representatives being brought on the record. 18 Pat. 761=21 Pat.L.T. 369=A.I.R. 1940 Pat. 142.

APPEAL—REVISION.—An order passed on an application by the surety for cancellation of the surety bond is not a decree within the meaning of the Code, and is not appealable by the decree-holder. His remedy is only by way of revision. (1928 A. 527 and 43 M. 325 R.) 144 I.C. 731=1933 A. 382.

SEC. 56.—A money decree does not necessarily carry with it a right to execute it by



Detention and release.

58. (1) Every person detained in the Civil Prison in execution of a decree shall be so detained,—

(a) where the decree is for the payment of a sum of money exceeding fifty rupees, for a period of six months, and

(b) in any other case for a period of six weeks :

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be,—

(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or

(ii) on the decree against him being otherwise fully satisfied, or

(iii) on the request of the person on whose application he has been so detained,

or

(iv) on the omission by the person, on whose application he has been so detained, to pay subsistence allowance :

Provided, also, that he shall not be released from such detention under clause (ii) or clause (iii), without the order of the Court.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison.

#### NOTES.

arrest of the judgment-debtor, *e.g.*, minor or a female, or a legal representative. 18 N. L.R. 145=1922 N. 98.

SEC. 58.—Section does not apply to the case of a person imprisoned for contempt. 4 C. 655. The Court has no power to fix shorter terms of detention than those prescribed. 13 M. 141. Imprisonment on arrest before judgment becomes, after decree, imprisonment in execution of a decree, and the imprisonment suffered must be taken into consideration in calculating the period provided by this section. 7 B. 431. In execution of a decree payable by instalments the debtor cannot be detained separately for default in the payment of each instalment. 7 B. 106. The language of sub-S. (2) indicates that immunity from re-arrest arises only when there has been release after "detention in the civil prison". See 8 M. 21. See also 23 C. 128. When a warrant of committal to jail has been made out, the discharge of the debtor whilst in confinement in the Court-house for non-payment of subsistence allowance must be regarded as discharge from jail. 9 B. 151. But see 8 M. 21; 1929 L. 361=118 I.C. 531. Code contemplates as immaterial the circumstances under which the debtor obtains his release. 20 C. 878. See also 12 C. 652. Code does not forbid retaking of a person who has been released under S. 13 of the Indian Insolvency Act. 26 B. 652 at 659. A debtor who has been discharged for non-payment of subsistence money cannot be re-arrested. 4 M.H.C.R. 76. Cost of clothing, etc., required under S. 33, Prisons Act, is not subsistence allowance under S. 58. 17 I.C. 911. When a debtor who has been committed to a particular jail is detained in another jail, he is entitled to his release. 11 C. 527. While calculating the period of

imprisonment under a new warrant, the time of imprisonment suffered by him under the former warrant should be deducted. 17 I.C. 911. A payment is not made to the officer until the officer actually receives the money. 22 I.C. 25.

JOINT DECREE.—The only effect of a release under S. 58, is to protect from re-arrest the judgment-debtor who has been released from prison. The incarceration of one judgment-debtor out of eight judgment-debtors in execution of a joint decree for arrears of rent and his release before the expiry of 6 months cannot discharge his debt; nor can it clear the liabilities of the other seven. Crops raised by all the judgment-debtors are consequently attachable in execution of the decree notwithstanding the imprisonment and release of one of the judgment-debtors. 1937 R.D. 13.

'DETENTION'—MEANING OF—IF INCLUDES DETENTION IN COURT-HOUSE.—Words 'such detention' in proviso (1) and 'detention under this section' in proviso (2), S. 58, refer to and mean 'detention in civil prison'. Civil prison means civil jail and not Court-house. Detention therefore in the Court-house cannot be said to be detention in a civil prison. A judgment-debtor was committed to the civil prison in execution of a decree but was released during the pendency of the appeal by him against the decree. Decree-holder withdrew the balance of the subsistence allowance deposited by him on release of the judgment-debtor. On dismissal of his appeal he was detained by the appellate Court for the whole day but was released as no subsistence allowance was deposited by the decree-holder. He was ordered to appear before the lower Court on a fixed date and on appearance it was contended by the judgment-debtor that he could not be re-arrested in view of proviso



59. (1) At any time after a warrant for the arrest of a judgment-debtor has been issued the Court may cancel it on the ground of his serious illness.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

(3) Where a judgment debtor has been committed to the civil prison, he may be released therefrom—

(a) by the Provincial Government on the ground of the existence of any infectious or contagious disease, or

(b) by the committing Court, or any Court to which that Court is subordinate on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by section 58.

#### ATTACHMENT.

60. (1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds, or other securities for money, debts, shares in a corpora-

Property liable to attachment and sale in execution of decree.

#### NOTES.

(2), S. 58. *Held*, that as at the time of the decree-holder's omission to pay the subsistence allowance the judgment-debtor was not detained in the civil prison but in the Court-house, S. 58 did not apply. The judgment-debtor was not therefore exempt from being committed to the civil prison to undergo the remaining term of imprisonment. 1937 L. 253=39 P.L.R. 471.

SEC. 59.—The provisions of S. 59 are self-contained and are not controlled by the provisions of S. 55 (3) and (4) and are based on purely humanitarian grounds. If a judgment-debtor is suffering from serious illness the Courts of justice would be well advised in ordering his release so as to escape the moral responsibility if anything happens to him in the event of his being sent to jail. 152 I.C. 427=36 P.L.R. 72=1934 L. 807 (2). The adoption of either or both courses specified in Cls. (1) and (2) of S. 59 lies entirely within the discretion of the Court. Asthma and indigestion do not constitute serious illness. And where a Court refused to cancel the warrant of arrest, the appellate Court will not interfere unless the discretion is wrongly exercised. 145 I.C. 709=34 P.L.R. 856=1933 L. 307.

SEC. 60: CONSTRUCTION OF SECTION.—The provisions of S. 60, which restrict the right of the decree-holder to realise the decretal amount from the property of the debtor should be strictly construed. 39 I.C. 375. All the sub-heads running from (a) to (p) under S. 60 (1), proviso, are on the same footing, and the exemptions provided thereunder are cumulative, and any man is entitled to all the benefits and not confined to one only, if he is qualified to do so. 1939 Rang.L.R. 504=A.I.R. 1939 Rang. 432.

Distress is not permitted under C. P. Code and provisions of S. 60 cannot be applied by analogy to distraint. I.L.R. (1939) Kar. 566=184 I.C. 698=A.I.R. 1939 Sind 276.

SCOPE OF SECTION.—Exemption under S. 60 can only be claimed by the judgment-debtor. If, for some reason or the other, the judgment-debtor chooses to waive that privilege, his son cannot complain of his action. 145 I.C. 169=1933 L. 251; 102 I.C. 616=1927 P. 233; 52 A. 1027; 1940 Lah. 126. S. 60 is a prohibition against forcible attachment or sale. There is nothing in this enactment to prevent an agriculturist voluntarily selling or otherwise alienating his house. Where an agriculturist voluntarily agrees to mortgage his house, S. 60 does not apply. 1935 L. 164; 42 P.L.R. 261. *See also* 1935 L. 942. Where an agriculturist himself mortgages his house, S. 60 does not apply. (A.I.R. 1935 Lah. 164, Rel. on.). 189 I.C. 782=A.I.R. 1940 Lah. 126. But *see* 1941 Pesh. 53. Section does not apply to sales where there is no attachment, as in mortgage decrees. 23 A.L.J. 841=89 I.C. 364. *See also* 47 A. 900; 1929 R. 275 (1). A preliminary decree for dissolution of partnership and for accounts is property which is capable of attachment within the meaning of S. 60, though it may not be capable of immediate execution, it nevertheless creates rights which must be regarded as property. Such a decree falls under O. 21, R. 53 (4) and can be attached in the manner provided therein. 18 Pat. 688=1940 Pat. 107=1939 P.W.N. 839. *See also* 1937 All. 652. A decree-holder can attach all the properties of the judgment-debtor as S. 60 does not limit the extent of properties to be attached. He can also attach property for mesne pro-



tion and, save as hereinafter mentioned, all other saleable property, movable or

## NOTES.

fits even before they are assessed. 16 I.C. 708. The articles given in section as liable to attachment are given only by way of illustration. Per *Mukerji, J.*, in 26 A.L.J. 253 = 108 I.C. 229 = 1928 A. 193. Damages resulting from wrong attachment may be recovered from the decree-holder though he acts in good faith. 8 N.L.J. 170 = 1925 N. 390. Provisions whether applicable to attachment under Co-operative Societies Act. 23 N.L.R. 66. Objection under this section not taken by party—Court must give effect if it otherwise becomes cognizant of the exemption. 1930 A. 727. But see 1930 L. 106. It is a matter of doubt whether a Court has power to grant any form of equitable execution over property which is not liable to attachment under S. 60. 1935 S. 21 = 154 I.C. 580. Property of judgment-debtor—Meaning of—Hindu father—Suit on mortgage—Exoneration of sons—Partition—Subsequent personal decree against father not executable against son's shares—Properties allotted to sons are not property of father. I.L.R. (1938) N. 136 = 1938 Nag. 24. Cls. (h) and (i) of S. 60 (1), as amended by Act IX of 1937 have no application to proceedings arising out of a suit instituted before the first day of June, 1937. 178 I.C. 141 = 19 P.L.T. 761 = 1939 P. 77. See also 1938 S. 144. The word 'suit' in section 3 of the Amending Act IX of 1937 is not necessarily confined to execution proceedings arising out of suits which are initiated by the presentation of a plaint, but is also applicable to execution proceedings resulting on an award in arbitration. The Legislature never intended that the word 'suit' in S. 3 should be used in a restricted sense. 177 I.C. 504 = A.I.R. 1938 Sind 176.

**EXEMPTION FROM ATTACHMENT—MODE OF RAISING PLEA.**—Where a judgment-debtor is aware of the proclamation of sale and his property has been attached but does not make any objection prior to the sale, he cannot, after the sale, be allowed to raise an objection under section 60 that the property proclaimed to be sold is not liable to attachment and sale under that section. An objection or application by a judgment-debtor that his property is not liable to attachment and sale under section 60 is an objection under section 47 and is governed by Art. 166, Limitation Act. 30 N.L.R. 135 = 148 I.C. 200 = 1934 N. 82. See also 58 B. 564 = 36 Bom.L.R. 681 = 1934 B. 348. A mere right to give a lease is not property which can be transferred. So it is not attachable under section 60. 161 I.C. 628 = 1936 Pesh. 90.

**'DEBT.'**—It is not necessary that the exact amount due should be ascertained prior to attachment. 16 A. 286. See also 16 I.C. 708. So also the interest of an heir in the hands of the administrator holding

as trustee though such interest is not determined and allowed to him. 117 I.C. 76 = 1929 L. 600; 33 C.W.N. 282 = 1929 C. 352. (Accrued debt can be attached—Not one where the debt and its payment rest in the future. 1925 C. 561 = 78 I.C. 881) The word 'debts' in section 60, includes share of debts. A debt due to the judgment-debtor and other persons jointly can, therefore, be attached and sold in execution. 41 C.W.N. 410 = 1937 C. 199. The word 'debt' in section 60, means an actually existing debt, that is, a perfected and absolute debt. A sum of money which might, or might not, become due, or the payment of which depends upon contingencies which may or may not happen, is not a debt. 176 I.C. 634 = 40 P.L.R. 73 = 1938 Lah. 336. See also 178 I.C. 141 = 19 Pat. L.T. 768; 1941 Rang. 256 (Provident fund amount); 1941 Rang. 239. Purchase-money due to a judgment-debtor on certain contingencies is no 'debt'. 133 I.C. 248 = 33 Bom.L.R. 396 = 1931 B. 288. On this point, see 86 I.C. 626 = 5 Pat.L.T. 504. Prospective rent cannot be attached. 3 R. 235 = 89 I.C. 794. Nor rent in respect of a period still in existence. 26 A.L.J. 253 = 108 I.C. 229 = 1928 A. 193. A decree for money, if debt. 6 M. 418. Money not immediately payable, if debt. 56 I.C. 948. *Contingent interest*, if attachable. See 1936 C. 802; 163 I.C. 206 = 30 S.L.R. 50 = 1926 S. 65. A decree of a Revenue Court is a debt. 21 A. 406; 21 M. 293. Money deposited with a Railway Company by one of its servants as guarantee for due performance of his duties can be attached. 9 M. 203. See also 11 R. 116 = 142 I.C. 360 = 1933 R. 23 (F.B.). A monthly allowance given in payment of an antecedent debt and acknowledged by the debtor as such, is attachable in execution as debt. 9 C.W.N. 703. Insolvent furnishing security for costs of Privy Council appeal—Same can be attached subject to result of appeal. 8 P. 478; 1930 A. 225 (F.B.). Money payable under a life insurance can be attached for the debts of the heirs of the deceased. 1928 C. 518. The amount due under a policy of life assurance is a debt within the meaning of section 3, T.P. Act, and it is attachable under section 60, C.P. Code, though it becomes payable only on the death of the assured. 39 Bom.L.R. 493 = A.I.R. 1937 Bom. 382. Unpaid balance of mortgage-money payable to third person is "debt" due to mortgagor. 17 L. 270; 1935 L. 141. Money left by a judgment-debtor with a vendee to whom he had sold some immovable property for payment to his creditors but which was not so paid within a reasonable time, can be looked upon as a debt due to the judgment-debtor and attached and sold in execution of a decree against him, even though no time limit had



immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf :

#### NOTES.

been fixed for its payment to the creditors. 39 P.L.R. 201=1937 Lah. 608. *Arrears of maintenance* payable under an order of a Criminal Court under section 488 of the Cr.P.Code, are neither a "debt" nor "saleable property" within the meaning of section 60, and are not therefore liable to attachment. 62 C. 404=39 C.W.N. 281=1935 C. 578. *See also* (1937) 1 M.L.J. 249. 1937 M. 424=I.L.R. 1937 M. 1004.

**COMPENSATION MONEY IN HANDS OF COLLECTOR AWARDED UNDER LAND ACQUISITION ACT.**—Compensation money awarded under the Land Acquisition Act is not liable to attachment at the instance of the creditors of the persons whose lands have been acquired until the amount is tendered to them under section 31 of Land Acquisition Act. The money in the hands of the Collector is money belonging to the Government until the tender is made and no relationship of creditor and debtor can be said to have been established between the Collector on the one side and the owners of the lands on the other. Section 60, does not therefore apply to such a case and the amount in the hands of the Collector cannot be attached by creditors holding money decrees against the persons to whom the compensation has been awarded. I.L.R. (1938) Lah. 548=40 P.L.R. 817=A.I.R. 1938 Lah. 533.

**SALEABLE PROPERTY.**—What is: 28 M.84; 15 M.L.J. 7; 6 C.W.N. 796; 7 B.L.R. 186 (P.C.) and 30 M. 378. Decision of trial Court as to whether property is saleable or not, cannot be questioned in execution. 23 A.L.J. 841. "Saleable" means saleable by auction at a compulsory sale under the order of the Court and not transferable by act of parties. 19 C.W.N. 1182. A judgment-debtor retains his interest in properties after Court-sale but before confirmation and such interest can be attached. 34 L.W. 531=131 I.C.14=1931 M. 511. A claim which may accrue under a pending award cannot be sold. 7 B.L.R. 186 (P.C.). All decrees, except money decrees, are both attachable and saleable. 16 B. 522. An occupier of state lands possesses the right of cultivating them and of reaping and selling the crops, which gives him a disposing power over the profits. As the right of occupancy of state lands has value and as the Government expressly permits the right to be transferred, the occupier has a saleable interest in the property which can be attached and brought to sale in execution of a decree against him. The fact that the Government may step in and deprive the transferee of the benefit of the purchase does not alter the

position. 167 I.C. 920=1937 R. 74=14 R. 619. (*See also* 149 I.C. 815=1934 R. 263.) The share of a partner in a partnership business is saleable property. 20 C. 693. Also his unascertained interest in partnership business. 13 M. 447. Preliminary decree in suit for unpaid purchase-money is saleable property; *see* 1937 A.L.J. 776=1937 All. 652; *see also* 18 Pat. 688=1939 P.W.N. 839. An interest in the income of immovable property assigned by way of maintenance to a Hindu widow, cannot be attached. 15 A. 371. The equity of redemption of the mortgagor is saleable property. 21 B. 226. Also the interest of a person in ancestral property governed by the Mitakshara Law. 5 A.430. Also property revertible to the donor after donee's death. 17 B. 503. Whether interest of a Burmese Buddhist husband in property of marriage saleable. 5 R. 478. Also an actionable claim. 14 C. 241. The doors and window-shutters of a pucca building cannot be separately attached and sold. 11 C. 164. Future *melwaram* rents of an inalienable *shrotriem inam* cannot be attached. 4 M.L.J. 13. Nor can a non-transferable lease. 7 L.R. 33 (Rev.). After a cheque for the payment of money is delivered to the payee, it cannot be attached by giving notice to the payer. 3 B. 49. A debt due to a judgment-debtor under a promissory note standing in the name of a third person who holds it in trust for or on behalf of the judgment-debtor is attachable under section 60 (1). 41 L.W. 15=1935 M. 181=68 M.L.J. 81 (F.B.). Where by custom the pala of an endowment was transferable among a limited class of heirs. *Held*, that the palas were attachable in execution. 58 C.L.J. 289=37 C.W.N. 978=1933 C. 757. Where the *Khadims'* share in the offerings of the shrine was by custom allowed to be sold among the *khadims* themselves. *Held*, that a right to such share was liable to attachment and sale in execution of a decree but that such a right should be sold only to a *khadim*. 15 L. 136=148 I.C.(2)=56 P.L.R. 446=1934 L. 57. *See also* 58 A. 459. Earnings derived from offerings made by pilgrims are not saleable. 19 C. 730. "He has a disposing power"—Meaning of. *See* 26 M. 222. Where a statute prohibits the voluntary alienation by a person of his property it cannot be attached and made the subject of a court-sale. 10 P. 582=132 I.C. 868=1931 P. 364. *See also* 1938 M.W.N. 440 (Crown grant to grantee and his heirs with a covenant prohibiting alienation). Power of voluntary transfer is the measure of liability to involuntary alienation. (*Ibid.*) *See also* 58



Provided that the following particulars shall not be liable to such attachment or sale, namely :—

(a) the necessary wearing-apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments, as, in accordance with religious usage, cannot be parted with by any woman ;

(b) tools of artizans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle, and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section ;

#### NOTES.

I.A. 215=61 M.L.J. 208=132 I.C. 727=1931 P.C. 160 (P.C.). See also 1937 Nag. 248 (Grant of absolute hereditary estate); 14 Rang. 619=1937 Rang. 74 (Occupancy rights in state lands); (1937) 1 M.L.J. 249 (Properties allotted to wife and daughter on partition). The whole or any portion of property dedicated to a trust cannot be attached, even although after the due performance of the trust, a balance remains, which goes into the pockets of the trustee. 15 C. 329 (P.C.). See also 1936 P. 88 (Decree against real owner—Attachment of property in the hands of benamidar—Validity). Monies vested under the Rules of a Benefit Fund in Trustees and payable to the children of a deceased employee over which the employee had no disposing power cannot be attached for the employee's debt. 134 I.C. 558=33 Bom. L.R. 720=1931 B. 300. See also 1933 R. 23 (F.B.). So also *bona fide* assignment by debtor for benefit of creditors. 1 B.H. C.R. 233. Letters in a Post Office addressed to judgment-debtors, are held in trust for them by the Postmaster. 13 M. 242. When a decree expressly directs that property of the kind specified in this section is to be sold, the Court executing it cannot go behind its terms. 8 B. 185.

SEC. 60 (a) PROVISOR.—The words “and such personal ornaments, etc,” give effect to the decision in 9 B. 106. The expression “cooking vessels” ought to receive a liberal interpretation. It does not mean only vessels in which food is actually cooked but includes vessels necessary for cooking operations. 54 A. 399=136 I.C. 280=1932 A. 344.

SEC. 60 (b): TOOLS OF ARTIZANS—Musicians and washermen are not artisans. 5 L.W. 596=38 I.C. 415. A musician is not an artisan and his musical instruments are not “the tools of an artisan” exempt from attachment under section 60 (1) (b). 1941 M.W.N. 783. Sewing machine owned by a tailor is a tool of an artisan and therefore exempt. 65 I.C. 416. A soap-maker is an “artizan”. 54 A. 399. Where a tailor who was using a number of sewing machines sells a couple of them after their attachment and works thereafter in another's shop, that cannot affect the question

of exemption of all the machines from attachment. The criterion in such matters is the position of affairs at the time of execution. If on that date he was working in his own shop with all the machines, then all are exempt from attachment; and his subsequent conduct and position does not affect the question of exemption. 1941 O.W.N. 52. A tailor who uses a sewing machine is an artisan, and the sewing machine is an artisan's tool. Section 60 (1) (b) does not say that only such tools shall not be liable to attachment as are necessary for the maintenance of the artisan. Hence if a tailor has a number of sewing machines all of them are exempt from attachment though as a matter of fact a single machine might be sufficient for his livelihood. 1940 O.W.N. 52. A motor tractor is not indispensable for agriculture and therefore it cannot be regarded as being essential to it and hence is not exempt from attachment. 1938 N.L.J. 416. The term ‘implements of husbandry’ in Cl. (b) should be interpreted in a fair and reasonable and even a generous spirit and not in a narrow and mean manner. The clause is not intended to force agriculturists back to primitive ways but to protect them in their livelihood as agriculturists by preventing the attachment even of those mechanical means whereby they plough and irrigate and cultivate the soil and obtain their livelihood as agriculturists. An engine or a water-pump is necessary for the agriculturist to irrigate and cultivate his fields and earn his livelihood as an agriculturist and therefore it comes within the term “implements of husbandry”. I.L.R. (1939) Kar. 499=1939 Sind. 96. The word ‘artizan’ implies a handicraftsman, i.e., one who makes certain things as part of his trade or calling. The term does not include the instruments of a professional man, like a surgeon or a doctor. 144 I.C. 848=34 P.L.R. 809=1933 L. 936 (1). An artisan is not merely a person who is engaged in mechanical employment but a person who works in the production of some commodity and whatever he uses for the production of the commodity may be considered as his tools. Hence the utensils used by a sweet-meat vendor for preparation of sweet-meats are tools even though he is employed by another to make



(c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him :

#### NOTES.

them. 158 I.C. 623=1935 A.L.J. 1011=1935 A. 848.

SEC. 60 (c): SCOPE OF SUB-CL. (c).—The term "agriculturist" does not include persons who are agriculturists by virtue of a Government Notification. 106 I.C. 45. For the purpose of exemption from attachment under proviso (c), section 60 (1), the occupation by an agriculturist of a house belonging to him must be in good faith for the purpose of agriculture. 11 R. 372=145 I.C. 326=1933 R. 227 (F.B.). See also 147 I.C. 676=35 P.L.R. 185. In determining whether a person is an agriculturist the following factors should be noted: (1) Whether a person is an agriculturist or not is not a question turning one source of income but on nature of occupation. (2) A person may have many occupations. If one of them is agriculture and for that purpose a house or building is occupied, protection can be claimed. (3) A person who owns and lets it reserving either money or produce is not an agriculturist but a landlord. (4) A person who cultivates the land as a labourer, though neither a landowner nor a tenant, is an agriculturist. (5) If a man cultivates the land with his own hands or by means of labourers whose activities he directs, he is an agriculturist whether he operates on a large or a small scale. If he has no connexion with the land except that he owns it and people work for him, he may or may not be an agriculturist according to circumstances. (Case-law discussed). Hence an owner of land is not an agriculturist, if he lets out on *batai* (reserving share of produce instead of money rent). I.L.R. (1938) Nag. 461=A.I.R. 1938 Nag. 366; see also 1938 R.D. 840; 41 P.L.R. 524=1939 Lah. 556. The term "agriculturist" as used in section 60 must be strictly construed. It denotes a husbandman and a person who carries on and makes his living by tillage and not a mere owner of land. (47 P.R. 1897, Foll.). I.L.R. (1938) Lah. 374=A.I.R. 1938 Lah. 72. A judgment-debtor is not an agriculturist under section 60 (1) (c), if agriculture is only a subsidiary occupation of his. A.I.R. 1940 Cal. 5. A person who is proved to have cultivated land in one year and who admits not to have cultivated any land in the subsequent year cannot be said to be an "agriculturist" within the meaning of section 60. 42 P.L.R. 261. The protection under section 60 (1) (c), is intended to be given to those who are real tillers of the land; and an "agriculturist" within the meaning of section 60 (1) (c) is a person who is really dependent for his living on tilling the soil and unable to maintain himself otherwise. The test is not whether agriculture is the sole, main, chief or princi-

pal source of his income. I.L.R. (1937) Mad. 777=45 L.W. 704=A.I.R. 1937 Mad. 551=(1937) 2 M.L.J. 11 (F.B.). The occupant of a house in an *Istimrari* Estate, is entitled on eviction, to remove the materials of the house and hence to that extent, he has an attachable and saleable interest in the house. 1939 A.M.L.J. 102. An "agriculturist" includes a person who gains a substantial portion of his livelihood, not necessarily the whole of it, by agriculture. In order to enable the judgment-debtor to claim the benefit of the exemption in section 60 (1) (c), he must prove the circumstances qualifying for exemption and his *bona fides*. It is not necessary for him to demonstrate that each square foot of the premises is required for his agriculture. He has to show that the property is occupied by him for purposes of agriculture, i.e., to enable the owner or occupier to cultivate the land. 17 N.L.J. 271. See also 1937 L. 200; 41 P.L.R. 560=1939 Lah. 388 (F.B.). A person relied for his livelihood upon trade and contractor's work. He had no agricultural land except a *pleasure garden* appurtenant to his house nor was this garden used as a source of livelihood. Held, that neither the house nor the garden was exempt from attachment under section 60. 163 I.C. 621=1936 F. 151. The term "agriculturist" in section 60 (1) (c) refers to an occupation and a man is an agriculturist who engages in the cultivation of land, that is, who ploughs land, sows the crop and attends to it. The cultivation of land by hired labourers by a person who has a different occupation cannot constitute that person an agriculturist. 153 I.C. 511=1935 A.L.J. 306=1935 A. 292. There is no statutory bar to an agriculturist voluntarily alienating his houses. The bar under section 60 is against the compulsory sale of such a house in execution of a money decree. Where therefore an agriculturist waives objection to attachment and agrees to the sale of the houses in execution of the decree, section 60 does not protect the houses from attachment and sale. (A.I.R. 1935 Lah. 164, Foll.) A.I.R. 1939 L. 316=42 P.L.R. 398; see also 1937 L. 939; 1940 Pesh. 53. S. 60 (c) is intended to protect agriculturist who are the owners of the houses and in occupation thereof as such owners. If an agriculturist mortgages his house with possession and is occupying a portion of it on rent from the usufructuary mortgagee, his occupation is merely as a tenant and not as owner and such occupation is not protected by this clause. 156 I.C. 759=1935 O.W.N. 793. The test applicable in deciding whether a person is an "agriculturist" within section 60 (c), is whether his main source of income is derived from cultivation or not. The



## NOTES.

term "agriculturist" is used in the sense of a person who is an agriculturist by profession, that is, a person whose main source of livelihood is cultivation. 157 I.C. 986=1935 A.L.J. 507=1935 A. 448. Protection given by section 60 is intended to be given to those who are real tillers of the land. An agriculturist, within the meaning of section 60, is a person who is really dependent for his living on tilling of soil and unable to maintain himself otherwise; main, chief or principal sources of income are not the proper tests. Where the person claiming protection under section 60, is a large landlord whose main source of income is rents from tenants and a jagir of Rs. 3,500, he is not an agriculturist within the meaning of section 60. (A.I.R. 1937 Mad. 551 (F.B.) Rel. on. A.I.R. 1936 Lah. 737, Not foll). 41 P.L.R. 225=A.I.R. 1939 Lah. 40. A man who has been cultivating for many years and who has his cattle tethered beneath his house and a granary at the back of it has all the insignia of a cultivator. Where he occupies the house sought to be attached, and uses it directly for agricultural purposes in housing his cattle, his implements and his seed, paddy and his labourers, he must be regarded as occupying the house as an agriculturist, and is entitled to exemption from attachment. The mere fact that the judgment-debtor owns 150 acres of land makes no difference when there is evidence to the effect that he cultivates only 25 acres, while the rest of the land is cultivated by his son who devotes all the profits to paying off his father's debts; that does not render the judgment-debtor a zamindar or a rent receiving landlord. 162 I.C. 694=1936 R. 215. The judgment-debtor can waive the privilege provided by the section. The judgment-debtor will be estopped from pleading protection under the section, if he mortgages the house. 6 P. 254=102 I.C. 616=1927 P. 233. See also 52 A. 1027=133 I.C. 478=1931 A. 112; 1938 Nag. 544. The house of an agriculturist cannot be sold in execution even of a mortgage decree passed against that property. A.I.R. 1941 Pesh. 53. S. 60, C. P. Code, does not prohibit a voluntary transfer of a house of an agriculturist for satisfaction of a decree against him. 170 I.C. 896=A.I.R. 1937 Lah. 939. See also 1940 Lah. 126; 1933 L. 251. S. 60 is only intended for the benefit of the indigent agriculturists and not when the judgment-debtor suffers no material inconvenience. 25 I.C. 117=1 L.W. 519. The word 'occupation' does not mean residence only. 99 I.C. 376=1927 A. 214. See also 102 I.C. 712 (2). Where agriculturist judgment-debtor agreed under a compromise to have immovable property attached in execution, he cannot at the time of execution be protected by saying that the property is non-transferable. 57 I.C. 249=24 C.W.N. 575. S. 60 (c) exempts all the houses and other buildings which form the

premises occupied by an agriculturist even if a portion would enable the judgment-debtor to earn his livelihood as an agriculturist. (51 I. C. 129; 130 I. C. 81, Ref.), 141 I.C. 824=29 N.L.R. 106=1933 N. 80. Where two houses of an agriculturist are attached and it is found that one is quite sufficient for occupation by him *bona fide* for purposes of agriculture, e.g., tying cattle and stacking fodder the release of that house alone is justified. 1934 L. 168. In the case of an agriculturist insolvent, according to the provisions of S. 60, the house of an agriculturist does not vest in the Official Receiver and therefore he cannot sell it. This is so even with respect to a house wherein the agriculturist insolvent is residing not as an owner but as a lessee; for the word used in S. 60 is "occupied" which seems to be a physical fact and not "possessed". 1933 L. 1010. The words "occupied by" in S. 60 (1) (c), C. P. Code, mean "lived in by" or "used for agricultural purposes by". Therefore, if the agriculturist proves either of those conditions, his case can come within Cl. (c) of sub-S. (1) of S. 60. (65 P.R. 1909, Approved.) 149 I.C. 428=35 P.L.R. 509=1934 L. 680. Where a house has not been occupied by a person as an agriculturist and it is not denied that he has other residential premises, it is not exempt from attachment. 35 P.L.R. 520=1934 L. 614 (2). By the deliberate use of the two words "houses and buildings" in S. 60 (1) (c) the Legislature meant that not only the residential house lived in by the agriculturist but also the other buildings occupied by him should be exempt. On a plain reading of the clause, there are only two conditions governing the exercise of this privilege. Firstly the person claiming it should be an agriculturist and secondly he should occupy the house and the buildings. There is nothing in S. 60 (1) (c) to show that when occupying his residential quarter the agriculturist should also put it to some other agricultural use for enabling him to keep it safe from his creditors. A.I.R. 1941 Pesh. 68. An objection under S. 60 (c), on the ground that the house of the judgment-debtor could not be attached and sold in execution, as he was an agriculturist, is one which ought to be taken before the sale, and could not be raised after the sale as a ground for setting it aside. S. 60 (c) further relates to a house in the actual occupation of an agriculturist. 58 B. 564=36 Bom.L.R. 681=1934 B. 348. The question whether the judgment-debtor is an "agriculturist" within the meaning of S. 60, has to be decided with reference to his status at the date of the attachment. If he becomes an agriculturist at the date of the attachment, his property cannot be attached although at the time of the decree he was not an agriculturist. Similarly if he ceases to be an agriculturist at the time of the attachment, his property can be attached although he was an agriculturist at the date of the decree. Where, therefore, property



## NOTES.

is attached while in possession of the legal representative of the debtor, it is the status of the legal representative and not that of the original debtor that determines the attachability or otherwise of the property. 41 P.L.R. 524=A.I.R. 1939 Lah. 556. See also 1939 All. 85.

WHO IS AGRICULTURIST.—A judgment-debtor is not an agriculturist under S. 60 (1) (c) of the Code, where his only source of living is not by cultivation. 63 I.C. 681; 35 I.C. 343=20 C.W.N. 834. See also 87 I.C. 564; 7 L.L.J. 95=88 I.C. 543; 20 C.W.N. 874. A person does not cease to be an agriculturist merely because he transfers his land by lease or mortgage. 55 I.C. 481; 4 B. 25. The protection afforded by this clause was intended for agriculturist in the strictest sense, and for an agriculturist in that sole character. 12 B. 363; 7 B. 530. Chief means, and not one means, determines profession. 92 I.C. 416=1927 M. 342. See also 105 I.C. 129; 132 I.C. 809=1931 A. 20. A zamindar is not. 8 L.R. 229 (Rev.)=1927 A. 601. But see also 162 I.C. 694=1936 R. 215. Exemption under Cl. (2)—Scope of—Person ceasing to be a Zamindar and becoming an "Agriculturist" between dates of attachment and sale can claim exemption under this section. 1939 A.L.J. 1314=1939 A.W.R. 1220=1939 All. 85. See also 1939 Lah. 556.

WHAT IS EXEMPT FROM ATTACHMENT.—A house of an agriculturist is exempt from attachment and sale in execution of a decree. 39 A. 120; 38 I.C. 171; 40 I.C. 544; 35 A. 307=11 A.L.J. 437=19 I.C. 125. House to be attached occupied by sons of deceased debtor as agriculturists—They need not prove that it was so occupied by their deceased father. 116 I.C. 20. See also 138 I.C. 685 (1)=1932 A. 508. The phrase "houses and other buildings" does not include a vacant site used for storing manure and fodder and with no structure over it. 39 I.C. 375. The house must be a building; if in ruins without doors or roof it is not a building. 99 I.C. 376=1927 A. 214. But see also 105 I.C. 129. The clause refers only to a house occupied by an agriculturist, and does not refer to his town residence. 7 Bom.L.R. 685; 45 I.C. 546. But see 1926 L. 230. See also 49 M. 227=92 I.C. 328=50 M.L.J. 90; 1929 L. 181. Where a house has been used by the judgment-debtor for tethering his agricultural cattle, the mere fact that he has another residential house and two open sites where he might build a shed and tether his cattle is no justification for not exempting the house, when it has been used *bona fide* for purposes of agriculture. 1930 L. 1034; 5 P.R. 1897 and 11 R. 372 (F.B.), Rel.; 1935 L. 894. A house in town occupied by a *bania* who has ceased to do any shop keeping business, but who owns and cultivates two parcels of land, one about eight miles away and the other about two miles away from his house, the

bullocks used for cultivation being tied up in the house of labourers in the neighbourhood of the lands and not in the house occupied by him, cannot be held to be the house of an agriculturist, so as to be exempt from attachment under S. 60 (1) (c). 158 I.C. 59 (1)=1935 P. 496. The words 'occupied by' in S. 60 (1) (c), mean that it is something more than a dwelling-house. It is a building occupied by him when he is following his avocation of an agriculturist. The use of the word 'houses' make it clear that all houses occupied by him, as such, are exempt. 1938 R.D. 840. See also 1941 Pesh. 68. A decree for money was executed against the deceased debtor during his lifetime and his non-ancestral house was attached. The judgment-debtor was not an agriculturist. Subsequently his legal representative inherited it and occupied it as an agriculturist and claimed exemption from attachment. Held, that in deciding the question whether the house is or is not exempt from sale under S. 60, it was not the profession of the legal representative but that of the deceased debtor against whom the decree was and against whom it was being executed, that should be taken into consideration. 1936 L. 895. Where for the debts of a person a decree is passed against his legal representative who is a non-agriculturist his property derived from the original debtor is liable to attachment even if the original debtor was an agriculturist. (A.I.R. 1939 Lah. 556, Affirm.) 190 I.C. 321=A.I.R. 1940 Lah. 320. See also 41 P.L.R. 524=1939 Lah. 556. As S. 60 forbids the sale of materials of a dwelling-house occupied by an agriculturist, a decree for the sale of such a house is bad even though it be a mortgage decree. 33 A. 136; 34 A. 25; 41 B. 475; 39 I.C. 639=19 Bom.L.R. 281. In the case of attachment of the cattle of an agriculturist, the Court has to see whether the cattle are necessary to enable an agriculturist to earn his livelihood. 56 I.C. 69; 61 I.C. 777. The right (for improvements) of a mulgeni tenant in South Kanara to compensation cannot be attached nor sold in execution. 48 I.C. 705=36 M.L.J. 92. Property owned jointly by two tarwads—Separate mortgage by each of undivided share to same mortgagee—Suit for redemption by one tarwad alone without claiming partition is maintainable. 47 L.W. 686=1938 Mad. 562.

BURDEN OF PROOF.—The party alleging that he is an agriculturist must prove it. 1923 B. 12; 100 I.C. 104; 98 I.C. 857=1927 L. 66 (2); 1938 R.D. 840; 161 I.C. 16=1936 L. 532. Occupation *bona fide* for purposes of agriculture must also be proved. 12 L. 367=130 I.C. 419=1931 L. 1034. See also 136 I.C. 335=1932 O. 76 (following 49 M. 227). Where crops are grown on a tenancy by the heir of deceased tenant after his death, such crops cannot be said to be his crops and cannot be as such liable to attachment and sale in the hands of the



- (d) books of account ;
- (e) a mere right to sue for damages ;
- (f) any right of personal service ;

## NOTES.

heir under S. 60, C. P. Code. 69 I. C. 520.

RESJUDICATA.—Where in execution of a decree against a father of a joint family, the father objects to the sale of his house on the ground of its being exempted under S. 60 (1) (c), from such a sale, but it is dismissed for default and the house is sold, it is not open to the sons later on to file a regular suit to restrain the purchasers from interfering with their possession, on the ground that the house could not be sold in execution; the reason being that inasmuch as the father had represented the sons in the execution proceedings, the decisions in those proceedings are as much binding on them as on their father. I.L.R. (1939) All. 602=1939 A.L.J. 450=A.I.R. 1939 All. 399 (F.B.).

OBJECTION UNDER SECTION BELATED.—IF CAN BE ENTERTAINED.—Objections under section 60 even if belated could be entertained, and where, therefore objections under section 60 (1) (c) were raised two days prior to the sale, the Court ought not to dismiss them on that ground. 38 P.L.R. 669. Where an owner of property has failed to raise a plea under section 60 (1) (c), at the time of the execution sale, it is not open to a stranger in possession to raise the plea in a suit by the auction-purchaser for possession of the property purchased by him in auction, 1940 O.W.N. 618. Under cl. (c) of the proviso to sub-section (1) of section 60, exemption attaches to the property itself and not to the person holding the property for the time being. Consequently if a property is exempt from attachment under said clause in the hands of the judgment-debtor, it is also immune from attachment in the hands of his legal representatives, although they are not agriculturists. 40 P.L.R. 409=A.I.R. 1938 Lah. 608.

SEC. 60 (1) (c), (AS AMENDED BY SEC. 35 OF PUNJAB RELIEF OF INDEBTEDNESS ACT).—The words “for a period of a year or more” in section 60 (1) (c), C. P. Code, as amended by section 35 of the Punjab Relief of Indebtedness Act, qualify “left vacant” only and not “let out on rent or lent to others.” I.L.R. (1941) Lah. 441. The amendment to section 60 (1) (c), C. P. Code, introduced by section 35, Punjab Relief of Indebtedness Act (VII of 1934) which came into force in 1935 does not divest the Official Receiver of property which is validly and legally vested in him in 1933. Nor can the legal representatives of the insolvent claim exemption under section 60 (1) (c) when succession to them opened out long after the vesting of the property in the Official Receiver. 40 P. L.R. 793=A.I.R. 1938 Lah. 459. Where a house belonging to an agriculturist is exempted from attachment and sale in execution of a decree under section 60 (1) (c),

as amended by section 35, Relief of Indebtedness Act, the mere fact that the judgment-debtor has mortgaged the house with possession and taken it on rent from the mortgagees, does not disentitle him to the protection afforded by section 60 (1) (c), as the judgment-debtor never gave up possession of the house and has been using it throughout for purposes subservient to agriculture. (A.I.R. 1933 Lah. 893, Rel.) A.I.R. 1938 Lah. 736. The onus of proving facts necessary for the exemption under section 60, as amended by section 35 of the Punjab Relief of Indebtedness Act, lies on the judgment-debtor for two reasons: (1) the burden of proving an exception is generally on the person seeking to proving the exception (2) the judgment-debtor has special knowledge of the circumstances. I.L.R. (1941) Lah. 441. If the insolvent was not engaged in the occupation of tilling the land on the date of order of his adjudication and there is nothing to indicate that he maintained himself solely or mainly on agriculture at that time, his house is not exempt from attachment and sale under section 60 (1) (c), C. P. Code, as amended by the Punjab Relief of Indebtedness Act. 41 P.L.R. 663=A.I.R. 1939 Lah. 537. Where the house of the judgment-debtor was not occupied by him but was lent to and occupied by his sons who were independent proprietors and were living at a different place. Held, that the house was not exempt from attachment as the sons came under the word ‘others’ in section 35 of the Punjab Relief of Indebtedness Act. 41 P.L.R. 377 (1)=A.I.R. 1939 Lah. 50.

SEC. 60 (e).—A right to sue for mesne profits cannot be attached. 9 C. 605. Also the right to appeal. 3 W.R. Mis. 16. The right to claim compensation being a mere right to sue cannot be attached in execution. 31 N.L.R. 235=1935 N. 135. The right of a co-sharer to village profits does not accrue till the end of the agricultural year. The rights are not ascertainable until the year has ended and consequently any attachment of the share of a co-sharer in village profits before the first day of the agricultural year next following that to which the village profits refer, is an attachment of a mere right to sue and of no effect. 1936 N. 218.

SEC. 60 (f).—A “virthi” is a right of personal service. 23 B. 131. See also 12 B. 366 and 10 B. 395. But see contra 29 Bom.L.R. 102=100 I.C. 1008=1927 B. 143 (virthi could be sold). The right to officiate at funeral ceremonies cannot be attached. 16 W. R. 171. Also the right of a shebait of Hindu idol. 5 B.L.R. 617; also the right of managing a temple. Right of a Gangaputra to receive offerings cannot be attached but his right to occupy specific portions of the river can. 1929 O. 444; 4 A. 81. An inam of land granted to do swasthiwachakam service is always burdened with service and is not liable



(g) stipends and gratuities allowed to <sup>1</sup>[pensioners of the Crown] or payable out of any service family pension fund notified in the official Gazette by <sup>1</sup>[the Central Government or the Provincial Government] in this behalf, and political pensions;

## LEG. REF.

<sup>1</sup> Substituted for "pensioners of Government" by para 3 and Sch. I, A.O., 1937.

<sup>2</sup> Substituted for "the Governor-General in Council" by Sch. I, A.O., 1937.

## NOTES.

to attachment and sale in execution. 42 M. L.J. 477=45 M. 620. The *rights of personal service* within the meaning of proviso (f) to section 60, cannot be either heritable or partible or transferable. 160 I.C. 355=17 Pat.L.T. 77=1936 P. 10. The birth of a Mahabrahman is a right to personal service and cannot be sold in execution of a money decree. 41 A. 656. Offerings made at the temple by the worshippers being the personal property of the priest are not liable to be attached. 42 I.C. 390. A future perquisite on account of offering or bhog to the deity will be an uncertain and indefinite income which cannot be attached. 55 I.C. 175=1 Pat.L.T. 75; 29 C. 70; 1 C.W.N. 493; 1 M. 235; 23 M. 274; 44 A. 81. If it is once shown that there is a custom to transfer by private treaty *palas* for worship of certain deities, there will be no objection to transfer by execution limiting the class of persons entitled to bid and eventually to purchase the property to the class of persons who would be entitled to perform the services. 154 I.C. 944=1935 P. 131. Money due to the firm of managing agents of a company from the company does not constitute a "right of personal service" within the meaning of section 60 (1), Cl. (f). A.I.R. 1941 Cal. 240. As to whether and when a religious office can be sold, see 6 M. 76 and 6 B. 296.

SEC. 60 (g).—The bar to the attachment of gratuities is not limited to such gratuities as are allowed to "pensioners", but applies to a gratuity granted in consideration of past services. 6 A. 173. A political pension is not transferable. 50 M. 711=52 M.L.J. 622. The Code makes all political pensions exempt in whatever form they are granted by the Government, that is to say, an allowance granted by the Government in the form of remission of land revenue or assignment of land revenue would be a pension, and if the grounds for grant of pension are political it would be exempt from attachment. 38 P.L.R. 531. No distinction can be drawn between the right of a jagirdar, who has been granted the income as jagir of certain water mills, to recover a certain sum per year as revenue, jagir or royalty and his right to recover rent from the lessee to whom he has granted lease of the water mills. The only right he has in the water mills is the right to recover rent from the occupants of the water mills and the rent is really the royalty for the use of water. The occupation of the water mills is merely a subsidiary right to the principal right and the principal right is conferred upon him as a jagir by the Government. Consequently his income from the lease

cannot be attached. 1937 L. 211. 39 P.L.R. 434. A gratuity granted to the heirs of a deceased employee by a Railway administration is not assets of the employee in the hands of his heirs and cannot be attached in execution of a decree against him. 69 I.C. 893. The word 'pension' means the same thing as in section 11, Pensions Act. 4 B. 432; 31 A. 382, Foll.; 24 I.C. 805; and implies periodical payments of money by Government to the pensioner. 58 I.A. 215=1931 P.C. 160=61 M.L.J. 208 (P.C.). See also 1938 N.L.J. 112=1938 Nag. 269. The word 'pension' as used in section 60 (1) (g), is wide enough to recover all sorts of periodical payments in whatever shape they are made by the Government. A *jagir* that is realised in the shape of an assignment of land revenue is a pension within that clause, and is, therefore, exempt from attachment in execution of a decree. 39 P.L.R. 80=1937 L. 178=18 Lah. 415. The word 'pension' as used in the C. P. Code "implies periodical payments of money by Government to the pensioner", and it does not apply to a person who draws rents not as a pensioner, but as a limited owner of the properties which yield them. 1937 Nag. 202. A *Malikhana* allowance is in the nature of a pension and so cannot be attached in execution of a money decree. 13 I.C. 194=8 A.L.J. 126. Grant in consideration of right as *Deshmukh*, *Deshpandia* and *Sir Mukaddam*—not affected by Cl. (g) or (m), see 1938 Nag. 269=1938 N.L.J. 112; 1937 Nag. 202. Grant of land revenue in a *jagir* is not exempt from attachment. 137 I.C. 799=35 L.W. 395=1932 M. 417. In deciding whether a particular *jagir* is a political pension within section 60 (1) (g), the test to be applied is whether it is in the nature of a fixed periodical allowance or stipend granted, not in respect of any right, privilege, perquisite, or office, but on account of past services or particular merits, or as compensation to dethroned princes, their families and dependants. A *jagir* assigned by the British Government to an independent Ruler who was exercising sovereign rights is a clear example of compensation to a dethroned prince for the loss of his sovereign rights. 36 P.L.R. 105=1934 L. 881. See also 1937 Nag. 202; 19 Pat.L.T. 280; 18 Pat 370. A bonus sanctioned by a Railway Company to one of its servants, and which has not been paid over to the payee, cannot be attached. 6 A. 634; 11 P. 584=140 I.C. 561=1932 P. 311. Arrears of pension due to the estate of a deceased cannot be attached. 5 M.H.C.R. 371. Also 47 A. 900. The stipend of a Carnatic stipendiary cannot be attached. 4 M.H.C.R. 277. Also one allowed to a member of the Mysore family. 7 W.R. 169. A *zemindari* granted revenue free, as a reward for services rendered is not a pension. 1902 A.W.N. 161. An executing Court cannot question the decision of the trial Court regarding saleability of a pension. 47 A. 900=23 A.L.J. 841=



<sup>1</sup>[ (h) the wages of labourers and domestic servants, whether payable in money or in kind ; and salary, to the extent of the first hundred rupees and one-half the remainder of such salary ;

(i) the salary of any public officer or of any servant of a railway company or local authority to the extent of the first hundred rupees and one-half the remainder of such salary :

Provided that, where the whole or any part of the portion of such salary liable to attachment has been under attachment, whether continuously or intermittently for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months and, where such attachment has been made in execution of one and the same decree, shall be finally exempt from attachment in execution of that decree.] ;

#### LEG. REF.

<sup>1</sup> Clauses (h) and (i) were substituted for the original clauses by S. 2 of Act IX of 1937 with effect from 1st June 1937.

#### NOTES.

89 I.C. 364. The pay of a soldier of His Majesty's regular forces subject to the Army Act of 1881, is not liable to attachment under a decree of the Civil Court. A. I.R. 1938 Sind 237. The rights of a grantee under a grant of Letters Patent can be attached and sold in execution of a decree. 42 C.W.N. 1086. Where the judgment-debtor is a licensee whose licence under the Electricity Act has been revoked, the Court when it has to consider whether under section 60, his property is or is not liable to attachment and sale in execution of the decree, has to bear in mind section 4, C. P. Code. As the Electricity Act is a special law, the provisions under the C. P. Code are subject to any conditions regulating that procedure by the provisions of the Electricity Act, 1940 All. 24=1939 A.L.J. 983=1939 A.W.R. (H.C.) 848.

SEC. 60 (h).—See 6 M. 179. The word "salary" in Cls. (h) and (i) of section 60 (1), before the Amendment Act IX of 1937, cannot be construed as being restricted to an emolument which is payable monthly or to a man who holds a permanent or semi-permanent employment. The remuneration of a temporary employee engaged on daily fee is "salary" within the meaning of Cls. (h) and (i) of section 60 (1). 178 I.C. 141=5 B.R. 61=19 Pat.L.T. 768. On a consideration of the entire section 60, there is no doubt that the latter part of Cl. (h) of sub-section (1) protects from attachment in execution of a decree salary of all persons in receipt thereof other than public officers and servants of a railway company or local authority. 182 I.C. 185=A.I.R. 1939 Sind 134. Cl. (h) of sub-section (1) of section 60 should be interpreted with reference to the entire section, and any interpretation founded upon that clause alone would be unsafe and unwarranted by all canons of interpretation. 182 I.C. 185=A.I.R. 1939 Sind 134.

SEC. 60 (i).—There is no reason to restrict the scope of Cl. (i) of section 60 (1), and to hold that the salary mentioned in Cl. (i) refers to the salary of one who is entitled to

get allowances mentioned in Cl. (h). Though Cl. (i) refers to Cl. (h), that is only to avoid the repetition of the description of officers whose salaries have been exempted. It does not follow that their salary for the period for which they are on duty is not covered by Cl. (i), sub-section (1). 178 I.C. 141=19 Pat.L.T. 768. A khot is not a public officer, and percentage received by him for collecting the assessment on dhara lands is not "salary". 13 B. 673. The profits accruing to a ghatwal from his estate are not his salary within the meaning of section 60, and is not on that account exempt from attachment. The surplus profits of the estate after all the necessary outgoings are to be regarded as the personal property of the ghatwal and are therefore liable to attachment in execution of a decree against him. 1939 P.W.N. 86=A.I.R. 1939 Pat. 242. An officer of the Indian Staff Corps is a "Public Officer". An officer in the regular forces is not such an officer. 24 C. 102. Conduct of a suit on behalf of the Government by an advocate for the recovery of public money is performing a public duty which the advocate undertakes. An advocate who is appointed by the Government as a lawyer to conduct a suit on its behalf is an officer and a public officer within the meaning of section 60 (1) (i), C. P. Code. 178 I.C. 141=19 Pat.L.T. 768. Civil Courts can attach one moiety of the salary of an officer in the Indian Staff Corps. 25 M. 402. Part of the pay of an officer of the Indian army while serving in this country can be attached. 39 A. 308; 39 I.C. 92; 15 A.L.J. 264. See also 50 I.C. 683; 21 Bom.L.R. 143. An attachment by a Civil Court, of a moiety of the monthly salary of a debtor, subject to Military Law not exceeding Rs. 20, is legal. 9 M. 170. Under section 15 (2), Provincial Insolvency Act, read with section 60, C. P. Code, the insolvent's salary vests in the receiver. 38 I.C. 410. A direction as to payment of a portion of salary into Court in a conditional order of adjudication in insolvency is void as opposed to section 60 (1), C. P. Code. 9 P. 304. It is open to a judgment-debtor to enter into a compromise contracting himself out of any benefit that section 60 confers on him in the matter of the attachment of his salary. 41 P.L.R. 631=A.I.R. 1939 Lah. 539.



(j) the pay and allowances of persons to whom the <sup>1</sup>[Indian Army Act, 1911, or the Burma Army Act applies] <sup>2</sup>[or of persons other than commissioned officers to whom the Naval Discipline Act as modified by the Indian Navy (Discipline) Act, 1934, applies];

(k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, <sup>3</sup>[1925] for the time being applies in so far as they are declared by the said Act not to be liable to attachment;

#### LEG. REF.

<sup>1</sup> Substituted for "Indian Articles of War apply" by para. 3 and Sch. I, A.O., 1937.

<sup>2</sup> Inserted by S. 2 and Sch., Act XXXV of 1937.

<sup>3</sup> Figures substituted for the figures "1897" by S. 2 of Act IX of 1937, with effect from 1st June, 1937.

#### NOTES.

SEC. 60 (j).—[See also Notes under Cl. (i).] Salary of an officer in Indian army could not be attached. 38 B. 667; 23 I.C. 575; 16 Bom. L.R. 233; 146 I.C. 494=1933 A. 153. The pay of a Staff Sergeant in the Army is not attachable under a decree of the Civil Court. 35 Bom.L.R. 1112. The pay of the First Class Warrant Officer to whom the Army Act applies is not attachable under a decree of a Civil Court even to the extent contained in section 60 (1). 144 I.C. 897=35 Bom.L.R. 360=1933 B. 185. If a soldier, to whom the Army Act applies, is a public officer as defined in section 2 (17), his salary is exempt from attachment to the extent mentioned in Cl. (i) of the proviso to section 60 (1) and if he is not such a public officer, it is not exempt from attachment to any extent. (Case-law referred.) 55 A. 648=1933 A.L.J. 1468=1933 A. 597. The pay of an Assistant Surgeon of the Indian Medical Department is not liable to attachment in execution of an order for maintenance and alimony passed by a Civil Court. 1936 A.L.J. 1291=167 I.C. 179=1937 A. 129 (F.B.).

SEC. 60 (k).—This clause is new. The deposit which a Railway servant makes towards a provident fund is a compulsory deposit, and does not cease to be so when he leaves the service. 6 Bom.L.R. 921. But see 5 Bom.L.R. 454. Compulsory deposits made in a State Railway Provident Fund by an officer of the Railway during his employment are not liable to attachment in execution of money decree even if he has ceased to serve. 50 C. 347=27 C.W.N. 472. Deposit under Provident Funds Act—Not attachable. 21 A.L.J. 454=74 I.C. 746=45 A. 554. See also 92 I.C. 673; 150 I.C. 213=36 P.L.R. 145=1934 L. 153. See also 179 I.C. 296=1939 Sind 15. Although section 60, C. P. Code, prohibits the attachment of provident fund money, it is open to a decree-holder against the estate of the deceased to apply for the appointment of a receiver in execution. 44 C.W.N. 637. The allowances of a Railway guard over and above his salary are not exempt from attachment. Where an advance taken by a guard from his Provident Fund is being recovered from him in monthly instalments, such instalment payments by him are not deposits, though they may be compulsory deductions

or recoveries, and there can be no deduction of this amount from the salary available for attachment under section 60 (1) (k), C. P. Code. 52 L.W. 69=A.I.R. 1940 Mad. 766=(1940) 1 M.L.J. 936. A Provident Fund maintained by the authorities of an aided college, provided it is constituted by the authority of Government is a Government Provident Fund as defined by the Provident Funds Act, and as long as the money remains in the fund it is immune from attachment under section 60 (1) (k). The fact that a Provident Fund has been in existence before the Government issued a Notification introducing a Provident Fund makes no difference; when the Fund is constituted under the authority of the Government, the entire amount of the Fund,—both the amounts subscribed before and the amounts subscribed after the notification—becomes consolidated into one Fund, and the whole deposit is exempt from attachment. *Quære*.—Whether the immunity from attachment lasts only as long as the money is in the Fund and whether it comes to an end when it reaches the depositor. 15 P. 779=166 I.C. 499=17 Pat.L.T. 731=1937 P. 22. Under section 60 (k), the amount standing to the credit of an employee of the Imperial Bank of India in the Provident Fund established by that Bank for the benefit of its employees is exempt from attachment. 165 I.C. 767=38 P.L.R. 1155=1936 L. 694. Provident Fund—Deposit in—Attachability after payment to subscriber. 37 Bom.L.R. 494=1935 B. 396. Two parties cannot by a mutual agreement do away with the existing rights of independent third parties. Hence the member and the trustees of a Provident Fund cannot agree between themselves that when a third party obtains an order of the Court to attach the interest of the member in the fund held by the trustees that interest should cease to exist. When the attachment is received it is in existence and no understanding between the member and the trustees can ensure that it shall be deemed to have disappeared. On an attachment being made the only effect of such an agreement or rule is that that portion of the interest of the member which is not covered by the attachment, or which exceeds the amount mentioned in the prohibitory order, is forfeited to the trustees. But an attachment order cannot be rendered ineffective so far as regards the amount referred to therein, and when the money becomes payable to the subscriber it must not be paid otherwise than under the orders of the Court. A.I.R. 1941 Rang. 239. See also 1941 Rang. 256. A debt for the purpose of attachment must be a debt that is payable to the judgment-debtor or to his estate, but a sum, which a person may or



<sup>1</sup>[(l) any allowance forming part of the emoluments of any public officer or of any servant of a railway company or local authority which the <sup>2</sup>[appropriate Government] may by notification in the official Gazette declare to be exempt from attachment, and any subsistence grant or allowance made to any such officer or servant while under suspension ;]

(m) an expectancy of succession by survivorship or other merely contingent or possible right or interest ;

## LEG. REF.

<sup>1</sup> Clause substituted by S. 2, Act IX of 1937, with effect from 1st June 1937.

<sup>2</sup> Substituted for the words "Governor-General in Council" by A.O., 1937.

## NOTES.

may not pay in his uncontrolled discretion is not a debt. A sum standing to the credit of the deceased judgment-debtor in the benefit fund of the Irawaddy Flotilla Mills, Limited, is not a debt within section 60, and cannot be attached. 11 R. 116=142 L.C. 360=1933 R. 23 (F.B.).

SEC. 60 (l).—Section 60, C. P. Code, is a prohibition only against forcible attachment or sale, and there is nothing in law to prevent a judgment-debtor from consenting to the attachment of half of his salary although the attachment contravenes the section as amended by Act XI of 1937. 1940 Lah. 65=41 P.L.R. 834. The definition of "Compulsory deposit" in section 2 of the Provident Funds Act applies to "Compulsory deposits" referred to in section 60 (1) (k), C. P. Code, and they mean "subscriptions to or deposits in" a Provident Fund. A judgment-debtor is, therefore, entitled to claim exemption from attachment the amount of subscription payable out of his salary to the Provident Fund. Before the time of payment the money is not his. At the time of payment it becomes a subscription to the Fund and a subscription to the Fund is a compulsory deposit and therefore exempted. There is no intervening moment when it is susceptible of attachment. 1939 Rang.L.R. 504=A.I.R. 1939 Rang. 432. The wages of a private servant cannot be attached in whole or in part, before they become due, and a debt exists. 21 M. 293. Persons who agree to spin cotton and to receive a certain amount of money or a certain quantity of cotton spun by them are labourers, and their remuneration is wages. 5 B. 132. An attachment of salary under section 60 before 1st June, 1937, made by a judgment-debtor saved by section 3 of the amending Act, is available by way of rateable distribution to another judgment-creditor who is not covered by aforesaid section 3. A.I.R. 1941 Sind 96. Where there were two decrees against the same judgment-debtor, one obtained in a suit instituted before the 1st June of 1937 to which the amendment of section 60, C. P. Code by Act IX of 1937 would not apply, and another subsequent to that date, to which the amendment would apply, the half salary of the judgment-debtor, has to be attached and distributed rateably between the two decree-holders. 1939 A.M.L.J. 157.

Section (as amended in 1937)—section 60 (1) (i) and (k)—Scope and effect of—The C. P. Code Amending Act (IX of 1937), enlarges the exemption from attachment of a judgment-debtor's salary provided the proceedings relate to suits instituted on or after 1st June, 1937. The new Cl. (i) of section 60 (1) exempts from attachment in execution of a decree the salary of a public officer to the extent of the first hundred rupees and one half the remainder of such salary. Further, Cl. (k) of section 60 (1) exempts all compulsory deposits to a Provident Fund when the judgment-debtor belongs to a recognised Provident Fund. The exemption of deposits in Provident Fund is separate from the exemption in respect of salaries given by Cl. (i) and the result therefore is that that the recurring contributions of the judgment-debtor to the Provident Fund must, in working out the amount attachable, fall on that moiety of the excess of the salary over the first hundred rupees which is not already reserved for the judgment-debtor by Cl. (i). In other words, a decree-holder who is hit by the amendment of 1937, is only entitled to look to the balance after deducting the Provident Fund contribution from the amount that left over after giving effect to the exemption granted by Cl. (i). *Quære*:—Whether income-tax deductions made from the monthly salary of a public officer have to be deducted for the purpose of Cl. (i) and whether salary means net salary only after such deduction? 1941 Pat. 157=21 Pat.L.T. 776.

SEC. 60 (m).—What in English Law would be termed a vested remainder, is capable of attachment and sale during the lifetime of the person in possession. 17 B. 503; e.g., residuary legatee's interest under a will. 130 I.C. 163=1931 P. 70 [32 C. 198 (P.C.) and 1923 C. 21, Rel. on]. The interest of an heir under the Hindu Law, expectant on the death of a widow in possession, cannot be attached. 7 Bom.L.R. 341. *See also* 5 A. 430. Hindu widow—Life interest in lands—Maintenance. 47 B. 597. The right of a son to succeed by right of survivorship to his father's specific share cannot be attached. 8 W.R. 253. The reversionary right of a grantor under a deed of maintenance can be attached. 10 A. 462. An expectancy of succession by survivorship is not attachable. 22 B. 984. The right of a judgment-debtor to get by division a quantity of land which had been reserved by him for his own use in a deed of gift, can be attached. 14 C. 241. *See also* 17 B. 503. Future rents and profits that may become due to a *ghatwal* cannot, as such, be attached. 28 C. 483. Also a claim which may accrue under a pending



## (n) a right to future maintenance ;

## NOTES.

award. 14 M.I.A. 40. See 3 A. 12 and 21 M. 293. Possible right or interest to be determined by a Court in future can't be attached and sold. 134 I.C. 602=1931 O. 398=8 O.W.N. 927. See also 1937 Nag. 391 (The contingent right of judgment-debtor to surplus sale proceeds pending confirmation of sale). "Contingent or possible right or interest"—Bequest of income of property to husband and wife for life—Gift over of income and corpus to children—Interest of children not attachable during lifetime of parents. 48 L.W. 912=(1938) 2 M.L.J. 906 (P.C.). Where in execution of a decree against a Hindu coparcener, the share of that coparcener in a part of the joint family property is put up for sale, the want of specification of the extent of the coparcener's interest in the joint family property cannot invalidate the proclamation or the sale; section 60 (m) has no application to the case. The interest of a coparcener in the joint family property is not a matter of contingency or dependent upon any future happening. So far as it is an interest, it must *ex hypothesi* be a vested interest. 54 L.W. 365=(1941) 2 M.L.J. 550.

SEC. 60 (n).—A mere right to maintenance cannot be attached and sold in execution of a decree. 5 I.C. 879=7 I.C. 80, Foll 40 M. 302; 34 I.C. 381; 30 M.L.J. 361. But see also 85 I.C. 477=23 A.L.J. 149. Maintenance decree is attachable in so far as it relates to the arrears of maintenance. 148 I.C. 196=1934 N. 83. The annuity payable under a will is not "a right to future maintenance" as contemplated by section 60 (i) (n) and is, therefore, not exempt from attachment. 159 I.C. 644 (1)=37 P.L.R. 261=1935 L. 811. Where a right of maintenance is sought to be attached, the true test to lay down is whether such a right is purely personal, non-heritable and non-assignable, or it is an alienable and heritable right which takes the shape of an annuity or has been granted in lieu of a share in an estate. If it is the former, it will be protected under the provisions of the Code, but if it is the latter, it will not be exempt from attachment. 17 L. 378=163 I.C. 103=1936 L. 55. See also 1937 Nag. 202. Hindu impartible estate—Junior member's right to profits in lieu of maintenance—Attachability. 1935 N. 133=31 N.L.R. 239=156 I.C. 65. See also 17 L. 378=1936 L. 55. Property which consists of no more than a reservation of a right to receive maintenance but no interest in which is created, can be attached. 14 L.R. 371 (Rev.)=17 R.D. 505. Arrears of maintenance payable under an order of a Criminal Court under section 488 of the Cr. P. Code, are neither a "debt" nor "saleable property" within the meaning of section 60, and are not therefore liable to attachment in execution of a decree for money. The right created by the order under section 488, Cr. P. Code, is a personal right and not assignable. 39 C.W.N. 281=62 C. 404=1935 C. 578. Interest in property in lieu of maintenance

not attachable. 30 M. 266; 7 I.C. 80; 29 I.C. 578. Right to maintenance—Property granted under a compromise can be attached. 43 A. 617. Right to maintenance of a widow—Standing crops on land in her possession—If can be attached. 22 M.L.J. 204. (See also 15 M.L.J. 7; 10 B. 342, Dist.) A heritable right to receive a certain monthly allowance in lieu of a share of landed property is not a mere right to maintenance. 10 C. 521. See 27 C. 38 and 10 B. 342; 15 A. 371. The right to future maintenance as contemplated by the Legislature means a personal right for the maintenance or personal enjoyment of the grantee. It does not cover a heritable but non-transferable interest in land. 158 I. C. 710=1935 O.W.N. 1134. A mere life interest with restraint on alienation is not saleable property. 1937 Mad. 864. The expression "right to future maintenance" means the right of one person to receive from another food lodging, clothing and other necessities of life. A periodical money payment to which a judgment-debtor is entitled under an agreement and with which he has to procure for himself the necessities of life is alienable and subject to attachment. A monthly allowance reserved to a mortgagor towards his maintenance under a deed of usufructuary mortgage of all his properties is not exempt from attachment under section 60 (n). 158 I.C. 170=1935 M.W.N. 776=42 L.W. 345=1935 M. 815=69 M.L.J. 264. A hereditary grant of an allowance of paddy out of the melwaram of certain land, is not a right to future maintenance. 30 M. 279. Also an annuity granted by a will. 10 C.W. N. 1102. See 15 M.L.J. 7. Although a Jahagir for maintenance is inalienable and therefore unattachable in execution of the decree, a receiver can be appointed to manage the Jahagir for the benefit of the decree-holders subject to a suitable allowance for the maintenance being made in favour of the judgment-debtor. The executing Court need not fix the suitable allowance when making the order of the appointment of a receiver. It will have to be fixed on the amount of profits which come into the hands of the receiver and not upon any estimated income of the property. 150 I.C. 635=1933 N. 266. Where a widow sued in *forma pauperis* to recover from her co-widow possession of certain property and the suit ended in a compromise by which the defendant agreed to pay to the plaintiff a certain monthly allowance by way of maintenance and the same was charged on the house and the Government sued to recover the Court-fees by attachment of the house out of which the maintenance was recoverable, *held*, that the Court had no power to order equitable execution against the property, because that would be frustrating the order for maintenance which was exempt from attachment under section 60. 57 B. 507=146 I.C. 340=35 Bom.L.R. 615=1933 B. 350.

ALLOWANCE TO DISINHERITED SON—EXEMPTION FROM ATTACHMENT.—A wealthy father disinherited his son in the sense that he



(o) any allowance declared by <sup>1</sup>[any Indian Law] to be exempt from liability to attachment or sale in execution of a decree; and

(p) where the judgment-debtor is a person liable for the payment of land-revenue, any movable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

<sup>2</sup>[*Explanation I.*—The particulars mentioned in clauses (g), (h), (i), (j), (l) and (o) are exempt from attachment or sale whether before or after they are actually payable <sup>3</sup>[and in the case of salary other than salary of a public officer or a servant of a railway company or local authority the attachable portion thereof is exempt from attachment until it is actually payable.]

<sup>4</sup>[*Explanation II.*—In clauses (h) and (i), “salary” means the total monthly emoluments, excluding any allowance declared exempt from attachment under the provisions of clause (l), derived by a person from his employment whether on duty or on leave.]

<sup>5</sup>[*Explanation III.*—In clause (l) “appropriate Government” means—

(i) as respects any public officer in the service of the Central Government, or any servant of a Federal Railway or of a cantonment authority or of the port authority of a major port, the Central Government;

(ii) as respects any public officer employed in connection with the exercise of the functions of the Crown in its relations with Indian States, the Crown Representative; and

(iii) as respects any other public officer or a servant of any other railway or local authority, the Provincial Government.]

(2) Nothing in this section shall be deemed—

#### LEG. REF.

<sup>1</sup> Substituted for “any law passed under the Indian Council Acts, 1861 and 1892” by A.O., 1937.

<sup>2</sup> Original *Explanation* re-numbered *Explanation (1)* by S. 2, Act IX of 1937, with effect from 1st June 1937.

<sup>3</sup> These words were added by *ibid.*

<sup>4</sup> Explanation was added by S. 2, Act IX of 1937, with effect from 1st June 1937.

<sup>5</sup> This *Explanation* was added by para. 3 and Sch. I, A.O., 1937.

#### NOTES.

did not give him any share in his property under his will, but provided for his food and lodging. The testator further provided that out of the income of his property his son should get Rs. 100 per month as his pocket money. On a construction of the will, held, that the sum of Rs. 100 which was described as pocket money of the son might be treated as his “future maintenance” out of which he was to supply himself with such necessities of life as, having regard to his position in life, would be required for his sustenance and physical well-being, and was, therefore, exempt from attachment under section 60 (1) (n). 38 P.L.R. 702=1936 L. 944. *The right of a widow under the Hindu Law to reside in her husband's family house* is a “right restricted in its enjoyment to her personally” within the meaning of section 6 (d), T. P. Act, and cannot therefore be attached and sold in execution of a decree against her under section 60, C. P. Code, read with section 6 (d), T. P. Act. 42 L.W. 763=1935 M. 848=69 M.L.J. 317.

Although the *right of residence* enjoyed by a judgment-debtor in certain landed property, is not attachable and saleable, such right is, in a proper case, liable to be dealt with in execution of a decree by adopting the remedy of *equitable execution*, namely, the appointment of a receiver who would act under the orders and supervision of the Court and realize the income of the property, and after defraying the incidental expenses and his own remuneration would devote the proceeds towards the satisfaction of the decretal amount. 165 I.C. 519=1936 L. 830.

SEC. 60 (o).—See 28 M. 84 and 21 B. 588 (F.B.).

SEC. 60 (2).—Schedule II, S. 60, C.P. Code, does not encroach on the provisions of Army Act. 37 B. 26=14 Bom.L.R. 777. Deduction of the pay of an officer of His Majesty's forces. 1 O.L.J. 127=23 I.C. 935=17 O.C. 99 (33 A. 529; 37 B. 26, Diss.). Salary of officer of the Regular Forces. 37 B. 26=17 I.C. 13=14 Bom.L.R. 777. (33 A. 529, Foll.) S. 60 does not apply to the case of an officer of His Majesty's Regular Forces and his salary is not liable to attachment under S. 60. 33 A. 529. But see also 43 B. 368; 50 I.C. 427; 21 Bom.L.R. 137. Military Assistant Surgeons in Indian Subordinate Service are warrant officers and so soldiers and therefore their pay is altogether exempt from attachment. 10 I.C. 719.

MISCELLANEOUS.—According to the Buddhist law, the wife ceases to have any interest in the joint property of her husband and herself, from the time of divorce and so



<sup>1</sup> \* to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land.<sup>2</sup>\*

3\* \* \* \* \*

61. The Provincial Government, <sup>4</sup>\* \* \* may, by general or special order published in the Official Gazette declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the Provincial Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family, shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree.

62. (1) No person executing any process under this Code directing or authorizing seizure of property in dwelling-house shall enter any dwelling-house after sunset and before sunrise.

(2) No outer door of a dwelling-house shall be broken open unless such dwelling house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw; and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

63. (1) Where property not in the custody of any Court is under attachment

#### LEG. REF.

<sup>1</sup>Letter and brackets '(a)' repealed by S. 3 and Sch. II, Act X of 1914.

<sup>2</sup>The word "or" omitted by *ibid*.

<sup>3</sup>Clause (b) was repealed by *ibid*.

<sup>4</sup>The words "with the previous sanction of the Governor-General in Council" omitted by S. 2, Act XXXVIII of 1920.

#### NOTES.

attachment of the property after divorce is futile. 33 I.C. 118=9 Bur.L.T. 74. Insurance Policy—Wife named as beneficiary—Attachment. 37 B. 471. Movable property—Belonging to judgment-debtor in the hands of another—Attachment. 4 Pat.L.J. 141=48 I.C. 943.

SEC. 62.—A bailiff can break open the outer door of a shop in order to execute a writ of attachment. 3 B. 89. On this section, *see also* 1925 A. 140.

SEC. 62 (3)—When a warrant was being executed at the instance of the applicant (judgment-creditor) the judgment-debtor was not in the house; but his *pardanashin* lady was. The applicant was warned that she would resent intrusion. In spite of it the applicant pushed open the door and the lady who was behind the door fell down and received injuries. *Held*, that the applicant being merely a person executing a decree

accompanying the person executing process and not being himself, the person executing process, was not entitled to push open the door; it was for the bailiff to take such action as was necessary under S. 62 and so the applicant was guilty of an offence under S. 352 of the Penal Code. 145 I.C. 259.

*Per Mehta, A.J.C.*—Even if the applicant thought he was justified in considering himself as a person executing the warrant, S. 79 of the Penal Code could not avail him since he did not give the notice to the lady required by Cl. (3) of S. 62. 145 I.C. 259=34 Cr.L.J. 963. In sub-S. (3) of S. 62 which deals with entering *parda* quarters, there is no limitation, as there is in sub-S. (2) that the rooms should be in the occupancy of the judgment-debtor. The Code apparently contemplates that it is sufficient that the decree-holder or the person making the attachment should consider that there may be property of the judgment-debtor in those rooms. 154 I.C. 631=1935 A.L.J. 367=1935 A. 490.

SEC. 63.—*N.B.*—*See also* Notes under S. 73, *infra*.—OBJECT OF SECTION is to prevent confusion in execution proceedings. 18 B. 458.

SCOPE OF SECTION.—This section refers to attachments and has no relationship with the



Property attached in execution of decrees of several Courts.

in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

#### NOTES.

sections relating to sale and delivery of the property. 3 A. 353 (359). On this section, *see also* 22 A. 182; 18 B. 458; 25 C. 46; 21 C. 200; 6 M. 357; 16 B. 683; 49 B. 655; 27 Bom.L.R. 363.

**SCOPE AND APPLICABILITY.**—In order to bring a case within the purview of S. 63, it is necessary that several decree-holders, who are executing their decrees against the same judgment-debtor, in different Courts, must have attached the same property or certain common properties belonging to the judgment-debtor. In such cases, the sale proceeds of the attached property would have to be distributed amongst all the attaching decree-holders by the superior Court or the Court which has first made the attachment in accordance with the section. Where, therefore, the rival decree-holders have not attached any of the properties belonging to the judgment-debtor, they cannot invoke the provision of S. 63. I.L.R. (1939) 1 Cal. 488. There is no warrant for holding that S. 63 does not give jurisdiction to a Court to sell attached property except in execution of its own decree. The jurisdiction of the Court of the highest grade to sell property attached by an inferior Court in execution of a decree, proceedings in which have been called up to the superior Court under S. 63, is necessarily included in the use of the word "realize." "Realize such property" in S. 63 must obviously refer to bring such property to sale. Nowhere in S. 63 is there any restriction as to how and in what manner and in what petition the Court of highest grade should realize the property; in this respect as in respect of claim petitions S. 63 must be held to override S. 38. S. 38 is after all a general section dealing with execution. It contemplates only one decree-holder and one decree. S. 63 deals with more decree-holders than one and the same property being attached by more Courts than one. Where the facts come within the definition of the situation as given by S. 63, it is obviously S. 63 which must be applied, and S. 63 cannot be controlled or governed by S. 38. 1939 M. 169 = I.L.R. 1939 M. 248 = (1939) 1 M.L.J. 112.

**SECTION EXPLAINED.**—S. 63 contemplates a case where attachments of the same property have been made by different Courts at the instance of different decree-holders of the common judgment-debtor, and provides for the distribution among them of the proceeds of the attached property by one of such Courts only. The distribution is to be made by the superior Court, but if all the Courts are of the same grade, the distribution is

to be made by the Court which first attached the property. In such a case a sale by an inferior Court of the property under attachment by a superior Court or by the Court of the same grade, which attached later in point of time, sale under later attachment pending an earlier attachment is valid; but it is the duty of the Court, which sells the property to send the sale proceeds to the Court of superior grade or the Court which attached the property first, as the case may be. When the assets are not so sent by the Court selling the property, the procedure according to the view of the Calcutta High Court is to move the District Judge for asking the Court holding the sale to send the sale-proceeds to the proper Court for distribution. 40 C.W.N. 1307 = 1936 C. 723.

**APPLICATION OF SECTION.**—Section applies only as between Civil Courts. 43 A. 612. There must be subsisting attachments of property in execution of decrees of more Courts than one at the same time under execution. 6 A. 255 (258). Where property is under attachment by two Courts of different grades and is sold by the Court of lower grade the sale is not invalid. 38 C.L.J. 266; 32 I.C. 41; 32 I.C. 927; 1924 M. 889. *See also* 153 I.C. 853 = 11 O.W.N. 1618 = 1935 O. 154; 1936 M. 91 = 59 M. 303 = 69 M. L.J. 908; 42 L.W. 733 = 1935 M.W.N. 1046 = 1935 M. 988; 33 M.L.J. 217; 46 C. 64. The fact that the several decrees under execution by different Courts are passed by the same Court does not make S. 63 inapplicable. S. 63 would still apply to the case; the words "of more Courts than one" in the section must be read as qualifying the word "attachment" and not the word "decrees." The object of the section is to deal with several attachments no matter whether the decrees are passed by the same Court or by different Courts. The phrase 'in the execution of decrees' is explanatory of the word "attachment." 59 M. 1028 = 1936 M. 797 = 71 M.L.J. 328. The word "proceeding" in cl. (2) is wide enough to include an order of the inferior Court allowing a set-off which cannot be recalled or cancelled by the superior Court. 35 B. 473. Where property of the judgment-debtor is attached by more Courts than one, the Court of the superior grade is alone entitled to realise such property and determine all claims thereto. 37 L.W. 366 = 1933 M. 342 (2) = 65 M. L.J. 347. When the same property is sold in an execution by two different Courts the sale by the Court which attached later but sold first is valid unless it was done with the knowledge of the prior attachment. When a property has been sold by a Court



## NOTES.

having jurisdiction to do so, there is nothing left, which can be sold again by another Court. The second purchaser has therefore absolutely no title to the property. 152 I. C. 902=1934 P. 511. An attachment by the High Court and one by the Small Cause Court stand on the same footing and the fact that the Small Cause Court decrees have not been transferred to the High Court and that the money is lying in the High Court is of no consequence. In other words, S. 73 of the C.P. Code must be read subject to S. 63. (21 C. 200 and 6 R. 131, F.) 61 C. 240=152 I.C. 69=1934 C. 559. *See also* 37 Bom.L.R. 78; 11 O.W.N. 1618; 69 M. L.J. 908; 1935 M. 988=42 L.W. 733=1935 M.W.N. 1046; 59 B. 310=37 Bom.L.R. 78=1935 B. 176.

**COURT OF HIGHEST GRADE.**—The grade of a Court depends upon the pecuniary or other limitations of the jurisdiction of the particular Court. 19 B. 127; 134 I.C. 273=1931 N. 127. In the North-Western Provinces, the Court of a Munsiff is of higher grade than a Court of Small Causes. 16 A. 11 (F.B.). A Small Cause Court which has a higher pecuniary jurisdiction than the Additional Small Cause Court in the same area, is a Court of higher grade within the meaning of S. 63, C.P. Code, and the additional Court has no jurisdiction to deal with an application for a share in the assets realised by the former Court. 1936 N. 270. Assets held by Court of inferior grade transferred to superior Court—Rateable distribution—Inferior Court not agent of superior Court. 29 Bom.L.R. 319. Application for rateable distribution under S. 73 must be made to the superior Court. 53 A. 759=1933 A. 2=133 I.C. 426 (51 M.L.J. 661, F.). *See also* 55 B. 473=1933 B. 350=133 I.C. 817. An attaching creditor in the inferior Court need not have his decree transferred to the superior Court for execution before he applies for rateable distribution in the latter Court. 132 I.C. 832=1931 R. 111 (2).

**MEANING OF WORDS.**—The words "of property not in the custody of any Court" seem to be more applicable to movable than to immovable property. 7 C. 410. But *see* 7 M. 47. "Realise" means "realize" by sale. 3 A. 356 at 359. Rights of attaching decree-holders of different Courts. 29 I.C. 21. *See also* 26 M.L.J. 406; 6 P.L.J. 332. Money attached before judgment is liable to rateable distribution in execution of decrees against the same defendant. 26 I.C. 941. An attachment of immovable property in execution of a money decree followed by order for sale does not confer on the judgment-creditor any charge on the land. 27 M.L.J. 150 (P.C.) (Reversing 15 I.C. 238). *See also* 15 C. 202 (210); 37 L.W. 366.

**SECS. 63 AND 73.**—S. 73, C.P. Code, is not to be regarded as the only section for

rateable distribution in the Code. The section must be read in conjunction with section 63. While both sections 63 and 73 aim at the fair distribution of the proceeds of sale among the judgment-creditors of the common judgment-debtor, there is a fundamental distinction between the two sections. The fund available for distribution under section 73 is the entire fund realised or received by the executing Court, leaving out of consideration the proviso to the section. On the other hand the funds available for distribution under section 63 are the proceeds of common property attached by the judgment-creditors. It is the fact of attachment, and attachment of the identical properties by the several decree-holders that brings section 63 into operation. Where one of several decree-holders executes his decree against the judgment-debtor in a particular Court and sells his properties, if other persons holding decrees against the same judgment-debtor apply for execution to the same Court before the receipt of the proceeds of sale, the whole sale proceeds will have to be rateably distributed among all the decree-holders under section 73. The latter decree-holders need not take any further steps beyond applying for execution to the Court which sells and realises the assets. 40 C.W.N. 1307=1936 C. 723. *See also* 1939 A.L.J. 4=1939 All. 159. Section 73 cannot be regarded as a self-contained rule. To so read the section would defeat and render nugatory the provisions of section 63. Section 63 must be treated as constituting an exception to section 73. Where, as stated in section 73 the property is under attachment in execution of decrees of more Courts than one, if the other conditions specified in section 73 are fulfilled, the right to rateable distribution arises. 59 M. 1028=44 L.W. 358=1936 M. 797=71 M.L.J. 328. Section 73 does not require the transfer of a decree to the Court where the process of realization of assets takes place as a condition precedent to an application under section 63, and therefore *a fortiori* it is not necessary for the decree-holder seeking rateable distribution to apply for execution of his decree to the Court where the realization takes place. If such realization takes place in a Court of inferior grade, it is the duty of that Court to send the sale proceeds to the superior Court. 1937 O.L.R. 534=1937 O.W.N. 1040. Sections 63 and 73 must be read together and since the Court of highest grade has been empowered to determine "any claim" in respect of property, it must include claims for rateable distribution under section 73. Consequently there is no need for second application for execution in the Court of the highest grade by the decree-holder applying for rateable distribution in that Court. 1937 N. 80. Prior attachment of the property is not essential under section 63. Under section 73 also prior attachment is not necessary so far as the creditors seek-



(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

64. Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

#### NOTES.

ing rateable distribution are concerned. All that is required is an application for execution before the assets are received by the Court entitled to receive them. 1937 N. 80. Where several decrees, some in favour of one decree-holder and others in favour of another, are passed by the same Court and sent for execution to different Courts, one of which is a superior and the other an inferior Court, and both those executing Courts attach the same properties, each decree-holder acting in ignorance of the proceedings taken by the other, the fact that the inferior Court holds the sale in pursuance of its attachment and allows the decree-holder to set-off the purchase price against the decree amount before the date fixed for sale by the superior Court will not deprive the decree-holder in the superior Court of his right to apply to the superior Court under section 63, on his becoming aware of the sale, to call for the proceeds of the sale from the inferior Court and to distribute them rateably. In such a case the decree-holder purchaser in the inferior Court may properly be given a choice either to elect to have a re-sale, or to pay into Court so much of the price as may become due to the rival decree-holder on rateable distribution. 59 M. 1028 = 1936 M. 797 = 71 M.L.J. 328. Where property is sold in execution of a decree by a superior Court, and decree-holders, who have obtained decrees against same judgment-debtor in an inferior Court and applied for execution to that Court before the date of sale, apply after the sale to the superior Court for rateable distribution, the superior Court which realises the assets is under a duty to distribute the assets which are realised by the sale and thereby to execute not only its own decree but also those of the inferior Court. The applications made to the inferior Court for execution of the decrees passed by it are in order and valid. Where the right to rateable distribution has to be determined by a Court under section 63, an application for execution made to the Court which passed the decree before the realisation of assets is quite sufficient for the purposes of section 73; and it is not necessary that such application should be made to the Court holding the assets. The words "application to the Court for the execution, etc.," mean application to the appropriate Court including an inferior Court which granted the decree sought to be executed. 59 B. 310 = 37 Bom.L.R. 78 = 1935 B. 176.

SECS. 63 AND 73 AND O. 21, R. 72.—The right of set-off under O. 21, rule 72 is subject to the provisions of section 73. The application under section 73 must be made before the sale and it is not enough to say that it should be made before the entire sale proceeds are paid. If there is no application to the Court which holds sale and the Courts allows set-off, the order of the Court is not improper, although in contravention of section 63. 41 C.W.N. 350 = 1937 C. 55.

Sec. 64.—There cannot be a partial raising of attachment by consent of parties out of Court. Section being absolute in its terms a sale by consent or connivance of the decree-holder is not excepted by it. 101 I.C. 591 (1) = 1927 M. 648. But see 1934 R. 313, *infra*. A 'private transfer' in S. 64 means transfer carried out without the intervention of the attaching Court or of some Court superior to it or again of some Court to which the proceedings have been lawfully transferred. 1941 A.M.L.J. 51. Where the form which the decree takes is entirely dependent on the agreement of the parties and it is by private agreement between them that particular properties are transferred to one of them the transfer is definitely a private transfer although it is embodied in the decree of the Court. 1934 R. 313. The object of section is to prevent fraud on decree-holders. 30 B. 337; 33 I.C. 492; and also to preserve intact the rights of attaching creditors against attached property by prohibiting private alienations pending litigation. 29 C. 154. This section avoids only private transfers and not awards by arbitrators. 35 M.L.J. 441; 63 M.L.J. 664 (P.C.). S. 64 does not invalidate a sale of the attached property in pursuance of an agreement to sell made prior to the attachment. But the attachment holds good in respect of such right as the vendor had in the property at the time of the attachment, and if there is an unpaid balance of the purchase-money the attachment fastens to the judgment-debtor's right to recover that money; that is to say, to the unpaid vendor's charge under S. 55 (4) of the T. P. Act. But the property having passed by sale from the judgment-debtor cannot be sold in execution of the decree in pursuance of the attachment. 1935 M. 872 = 69 M.L.J. 678. See also 1936 N. 163. All that S. 64 provides is that any private transfer by the judgment-debtor of the property attached shall be void as against the attaching creditor and shall not prejudice his rights. The section cannot be read as



## NOTES.

putting an end to the power of sale altogether. Where a sale is made in pursuance of a contract entered into prior to the attachment, cannot be said to be contrary to the terms of S. 64, C. P. Code. The right of the judgment-debtor in the property which is all that is attached, is on the date of the attachment qualified by his obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that obligation. A sale in pursuance of pre-existing contract is only the fulfilment of the obligation to which the judgment-debtor was already subject, whether the sale is carried out by him or by the Official Receiver in insolvency under the orders of the Insolvency Court on the insolvency of the judgment-debtor. A sale by the Official Receiver in pursuance of an order of Court would be all the more effective, as the order of Court would in effect be a decree for specific performance, though passed by the Insolvency Court. I.L.R. (1939) Mad. 853=49 L.W. 460=A.I.R. 1939 Mad. 702=(1939) 2 M.L.J. 822. The meaning of "private transfer" in S. 64 is a transfer which is brought about solely by the act of parties and not as a result of a judicial decision. If in reality there has been a transfer by the private act of parties, it does not cease to be private by being given the appearance of a public adjudication, *e.g.*, where the parties intimate the arrangement to the Court in the form of an award and pray for a decree in terms of the same. Such a transfer is essentially a private one and the Court is merely asked to give its permission to it. 183 I.C. 313=41 Bom.L.R. 473=A.I.R. 1939 Bom. 212. S. 64 and O. 38, R. 10 must be read together. S. 64 applies to an effective attachment; under O. 38, R. 10, an attachment before judgment is not effective as against rights subsisting at the date of the attachment. A conveyance of property executed after its attachment before judgment by a creditor, in pursuance of a contract made before the attachment, should prevail over the attachment. 41 Bom.L.R. 943=1939 Bom. 492. S. 64, which declares private alienation of property after attachment to be void, does not cover the enforced execution of a conveyance in obedience to a decree of a Court. 1936 N. 163. *See also* 41 P.L.R. 305=1939 Lah. 380. In the case of attachment before judgment as in the case of attachment in execution of a decree any private alienation of property during the continuance of attachment is void. 26 C. 531. Purchase made during pendency of attachment is void and purchaser does not obtain a lien. 34 I.C. 34. S. 64 avoids an alienation made while an attachment remained subsisting and enforceable. 4 Pat.L.T. 409; 20 S.L.R. 111; 1927 L. 103. A private sale of property pending an attachment by decree-holder which has subsequently been raised is valid as against a non-attaching decree-holder

who had applied for rateable distribution during the continuance of the attachment. 49 I.C. 134=5 P.R. 1919 (32 M.L.J. 707, Foll.). *See also* 39 C.W.N. 1076 (claims enforceable under the attachment). No doubt a person claiming rateable distribution of assets cannot get the benefit of the Explanation to S. 64 unless he has himself got an attachment on the assets from which he seeks to benefit. But such a person would be entitled to the benefit of S. 64 if he had obtained an order directing the attachment of the property of the judgment-debtor before he mortgaged the property in favour of a third person as the effect of the order of attachment under O. 21, R. 54 (3) is that it should be deemed that there had been an attachment of the property from the very date of the order. 152 I.C. 364=1934 A.L.J. 1091=1934 A. 1069. Alienation pending attachment is inoperative only as regards the attaching creditor. 144 I.C. 681=1933 N. 230. Obligations touching the property attached incurred by the debtor prior to the attachment are not affected by the section. 23 C.L.J. 115=34 I.C. 953=21 C.W.N. 158. *See also* 1 L.W. 977; 36 M. 348. If a mortgage-deed is executed during the continuance of an attachment in execution of a decree, it is no doubt void as against all claims enforceable under the attachment. Where however a portion of the amount advanced under the deed is paid to prior encumbrancers who have a charge on the property at the time of the attachment, the deed is valid to the extent of the amount thus paid. The mortgagor's equity of redemption as it is on the date of attachment should alone be considered to have been attached. The interest in the property vested in the prior mortgagees is not affected by the attachment and so far as that interest passes to the new mortgagee, the mortgage is not contrary to the attachment within S. 64. 154 I.C. 437=1935 A.L.J. 749=1935 A. 391. Sale-deed of property executed prior to attachment but registered after attachment. 1937 N. 143. A judgment-debtor sold his property on the day it was attached but after the attachment. That attachment was irregular as it did not conform with the provisions of O. 21, R. 54 (2) and (3). The transferee obtained the transfer for consideration in good faith and without knowledge of the attachment. *Held*, that the attachment was ineffective as against the transferee. 146 I.C. 693=1933 R. 198 (2). If a mortgage-deed is executed during the continuance of an attachment in execution of a decree, it is no doubt void as against all claims enforceable under the attachment. Where however a portion of the amount advanced under the deed is paid to prior encumbrancers who have a charge on the property at the time of the attachment, the deed is valid to the extent of the amount thus paid. The mortgagor's equity of redemption as it is on the date of attachment should alone be considered to have been attached. The interest



## NOTES.

in the property vested in the prior mortgagees is not affected by the attachment and so far as that interest passes to the new mortgagee, the mortgage is not contrary to the attachment within S. 64. 1935 A.W. R. 169. Where an attachment in execution of a decree is made subject to the mortgagee rights of the mortgagee holding a mortgage on the property, a subsequent compromise, whereby the mortgagors agree to transfer a portion of the mortgaged property to the mortgagee in consideration of his reducing the mortgage charge and releasing the rest of the property from the mortgage is not illegal by reason of S. 64, more specially so when the mortgagee had already become entitled to possession even prior to the attachment. A.I.R. 1938 Lah. 737. See also 1937 M.W.N. 45. Where a purchaser has entered into possession and paid the price without a registered deed of sale attachment of land in execution of decree against vendor is not effectual against the purchaser. 4 Bur.L.J. 166=1925 R. 382. A private transfer does not avoid transactions which in no way prejudice the execution creditor. 29 C. 154 (166) (P.C.). See also 1931 M. 573. An alienation is not altogether void but only subject to sale that may be effected pursuant to attachment. 24 L.W. 836=99 I.C. 656=1927 M. 190. See also 39 C.W.N. 1076; 1937 N. 1=I.L.R. (1937) Nag. 291; 1937 Mad. 843= (1937) 2 M.L.J. 728; 1937 M.W.N. 366; 1940 A.L.J. 744=1940 All. 50; 1938 Mad. 465. It must be strictly construed, and before property can be subjected to the restriction imposed, there must be a perfected attachment. 7 C. 702. See also 2 A. 58; 3 A. 698. The mere order to make an attachment does not amount to an actual attachment. The attachment is not complete until it has been effected in the manner prescribed by the rules, i.e., a copy of the order prohibiting the debtor from making payment of the debt until the further order of the Court has been sent to the debtor and duly served upon him. If this requirement has not been fulfilled there is in fact no attachment of the debt and the provisions of S. 64 are not applicable. 152 I.C. 795=1934 P. 619. See also [51 M. 349 (P.C.), Rel.]; 41 Bom.L.R. 1104=1939 Bom. 508; 1933 A.L.J. 1501=1934 A. 165=147 I.C. 509. No property can be declared to be attached unless, first, the order for attachment has been issued, and secondly, in execution of that order the other things prescribed by the rules in the Code have been done. Hence where a copy of the warrant of attachment is not affixed the attachment is invalid and S. 64 can have no application. 145 I.C. 813=1933 R. 267. See also 1939 Bom. 508. The attachment does not affect subsisting equitable rights which could be enforced against the property at the date of the attachment. 8 M.L.J. 266. See also 1937 Mad. 843=(1937) 2 M.L.J. 728. It does not create in favour of the attaching

creditor, any interest in, or charge upon the property, as against other creditors. 15 C. 202 at p. 210. See also 144 I.C. 252=37 L.W. 366=1933 M. 342=65 M.L.J. 347; 27 M.L.J. 150 (P.C.). Effect of attachment—If creates right in attaching creditor. 25 I.C. 759 [15 C. 202; 25 C. 179 (P.C.), Foll.]; 1936 N. 209. A charge created under a compromise decree is no better than a private transfer for purposes of S. 64, and must be deemed to be void as against a decree-holder who has got the property attached prior to such compromise decree. 1937 M. W. N. 45. See also 1938 Lah. 737. An attachment is not ineffective in relation to that part of the property which does not vest in the judgment-debtor at the time of the attachment but vests in him immediately after the attachment. As soon as it vests in him any defect that existed in the attachment before is *ipso facto* removed. If, therefore, the judgment-debtor transfers that property thereafter by sale, the transfer can be impugned under S. 64. 42 P.L.R. 356. A private alienation of property after an order for attachment which has not been effected, is valid unless proof is given that all the requirements of O. 21, R. 54, C. P. Code, have been complied with and the proclamations have been made. 26 I.C. 204; 1 O.L.J. 549. See also 36 I.C. 732; 19 N.L.J. 94; 3 O.L.J. 422; 42 M. 565=36 M. L. J. 284. The words "private transfer" mean a voluntary sale, gift or mortgage, in contravention of the attachment order, and not the enforced execution of a conveyance or assignment in obedience to the decree of a Court qualified to pass it. 4 A. at p. 225 (F.B.). Where the alienation is made with the consent of the judgment-creditor and the money is applied towards the discharge of the judgment-debt, it is not void. 7 W.R. 430. An adjustment of the attaching creditor's claim whereby the debt of the garnishee is made over to the creditor is valid. 1931 M. 573. A private transfer of property under attachment is not absolutely void but is void only as against claims enforceable under attachment. 63 I.C. 108. Order allowing claim to attached property—Transfer by successful claimant before suit to set aside claim order is void. See 1939 Pat. 138=17 Pat. 588. Partition is not alienation and so is not affected by the pending attachment. 1929 A. 726. As to *waiver of right* conferred by the section, see 13 P. 446=1934 P. 685.

## PRIVATE TRANSFERS—ILLUSTRATIVE CASES.

—An agricultural lease made by a judgment-debtor of attached property is an alienation. 18 A. 123. Purchaser of land in possession—Execution and registration of conveyance only after attachment—Effect. 92 I.C. 777=1925 R. 382. A renewal of a mortgage already existing on the property is not an alienation. 4 M. 417. But a mortgage created for the first time is: 9 W.R. 544. Consent given by the heirs of a Mahomedan who by his will bequeaths



## NOTES.

more than one-third of his property, does not amount to an alienation. 26 B. 496. Where an alienation is effected by operation of law, as in the case of a vesting order under the Insolvent Act, the attachment cannot prevent the operation of the statute. 8 M. 556. *See also* 17 M. 180; 33 C. 666. A subsequent vesting order by a competent Court in favour of the Official Receiver prevails over a prior attachment. 54 M. 727=61 M.L.J. 774. Attachment by British Indian Court is not avoided by the subsequent adjudication of a foreign Court. 60 I.A. 167 (P.C.). *Quære*: As to the effect a British Indian adjudication order would have had on the prior attachment and whether under the Code an attachment creates a lien or charge or confers title. *See* 60 I.A. 167=1933 P.C. 134=56 M. 405=64 M.L.J. 562 (P.C.); 39 C.W.N. 1076. An adjudication of a person as insolvent by a foreign Court operates as a private transfer within the meaning of S. 64. On such adjudication, the only property that vests in the receiver is the movable property which the insolvent was free to assign on the date of the adjudication and such property vests by virtue of private international law. But the adjudication does not affect the rights of a creditor who has attached, before adjudication, the movable property of the insolvent. He remains entitled to the benefits of his attachment. But an attachment after adjudication by a foreign Court is entirely a different matter. The receiver of the foreign Court is entitled to all the free assets of the insolvent, assets which were free at the date of the adjudication, and they must be deemed to be the moneys left over after satisfaction of the claims of the creditors who had attached before the adjudication. The provisions of sections 64 and 73 do not override the rule of private international law, and creditors who attach after the foreign adjudication cannot claim anything out of the assets on the ground that they have claims enforceable under the attachment. 50 L. W. 701=1940 Mad. 47=(1939) 2 M.L.J. 859. When the adjudication is made, the insolvent's property, vests in the Receiver and the Receiver's rights are not affected by the prior attachment, whether the attachment is before judgment, or after the decree. The attachment by itself does not give the attaching creditor any charge or lien on the property, nor does it give him any priority in respect of the property attached as against the Official Assignee or Receiver; the only effect of the attachment is to prevent private alienation. The attaching decree-holders therefore are not entitled to execute their decree under the provisions of O. 21, R. 53. 145 I.C. 695=29 N.L. R. 303=1933 N. 229. Where during the pendency of a suit the defendant agreed and paid a certain amount into the hands of the

plaintiff's pleader in part satisfaction of the money to which the plaintiff may become entitled and the plaintiff subsequently obtained a decree but meanwhile another creditor filed an application in insolvency and the defendant was adjudged insolvent after the decree in the earlier suit had been made, *held*, that the money deposited with the plaintiff's pleader in the earlier suit did not form part of the assets of the insolvent and the original plaintiff was entitled to appropriate the same towards his decree. 145 I.C. 826=37 C.W.N. 475=1933 C. 625. Decree creating a mortgage during a subsisting attachment is not void against attaching decree-holder. 41 M.L.J. 557=45 M. 103. But *see* 41 M.L.J. 393=45 M. 84. As to effect of attachment under Court's permission, *see* 67 M.L.J. 741. An alienation in compliance with a decree for specific performance prior in date does not contravene this section. 139 I.C. 610=34 Bom.L.R. 117=1932 B. 301. If there is valid attachment of a debt, the satisfaction of the decree in which the debt might have been merged would be void under section 64 against all claims and objections under the attachment. 152 I.C. 795=1934 P. 619. Under section 64 it was to be shown that the transfer was "contrary to the attachment" which is the same thing as saying that it must be prejudicial to the interests of the attaching creditor or the auction-purchaser. Letting land to statutory tenants on a smaller rent basis, *held* to be prejudicial to the creditor. 152 I.C. 757=1934 A. 902. Under section 64 when a property has been attached, any subsequent alienation is against all claims enforceable under that particular attachment. The section does not go beyond this. An attachment effected after a private alienation is not assisted by an attachment before the alienation. If the execution proceedings in which the second attachment has been made have been instituted before assets have been brought into Court, the creditor would be entitled to rateable distribution if the property is sold in the earlier execution proceedings, but if the sale takes place as the result of the attachment effected after the private alienation a person who buys the property at the Court auction would not obtain a good title. I.L.R. (1940) Mad. 526=51 L.W. 270=A.I.R. 1940 Mad. 385=(1940) 1 M.L.J. 482 (F.B.). Rival attachments—Private transfer to satisfy one decree if void. 13 Bom.L.R. 1189. But *see also* 37 B. 138.

ATTACHMENT WHEN EFFECTIVE.—*See* 30 I.C. 857. Effect of attachment—An attachment of property does not confer title therein, but merely prohibits its transfer. 39 P.R. 1915=29 I.C. 572; nor creates a charge. 1930 M. 4. *See also* 60 I.A. 167 (P.C.); 39 C.W.N. 1076. Attaching creditor must be classed with unsecured creditors in insolvency proceedings. 1929 C. 524. *See also* 42 L.W. 834=69 M.L.J. 799.



*Explanation.*—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

## NOTES.

An order of attachment takes effect only from the date of its actual promulgation under O. 21, R. 54, and not from the date of the Court's order. 32 I.C. 276; 42 M. 365; 41 M. 161; 39 I.C. 857; 39 I.C. 562; 42 M. 844=37 M.L.J. 375; 51 M. 349 (P.C.); but also see 33 I.C. 492. Knowledge of purchaser of the order immaterial. 1929 B. 395. A prohibitory order restraining the payee of a promissory note from receiving the money has not the effect of an attachment. Such attachment is invalid and section 64 does not apply. 46 M. 415=44 M.L.J. 206. Section does not apply to alienations in contravention of *ad interim* injunction. 1930 L. 858. The Court can make an order striking off an execution proceeding, and at the same time continuing an attachment. 11 C.W.N. 163. For instances which might tend to show that an attachment has expired, see 22 C. 909 (P.C.). Attachment before judgment—Subsequent sale of property in execution of another decree—Application for sale by person who attached before judgment. 38 M.L.J. 441. See also 166 I.C. 873=17 Pat.L.T. 847=1937 P. 50. The rule enacted in section 64 refers only to a private transfer of the attached property by the judgment-debtor. It does not extend to a transfer or sale under an order of Court in execution of a decree, though the decree in execution of which the property is sold is passed subsequent to the attachment under the prior decree. The sale is not void. The mere fact that the previous attachment is not notified in the sale proclamation does not render the sale liable to be set aside. An attachment is not an incumbrance or a charge on the property and the omission to notify a prior attachment in the sale proclamation is not a material irregularity vitiating the sale. 17 Pat.L.T. 847=A.I.R. 1937 Pat. 50. When a suit is dismissed an attachment before judgment terminates without any order of Court and if the judgment is reversed on appeal or annulled on review the judgment does not revive it so as to affect alienations made before the date of such reversal. Even where the plaintiff on the reversal of the decree of the first Court dismissing his suit appeals and on appeal gets a decree in his favour and re-attaches the property in suit, his claim is not one enforceable under the original attachment. 1934 A. 165=1933 A.L.J. 1501. Where property is attached before judgment and the order of attachment is set aside but the attachment is restored the parties are restored to the position they occupied when the property was originally attached. A private sale of the property in the interval is void. 42 A. 39. See also 1933 A. 953; 40 C. 598 (P.C.). An *interim* order of at-

tachment before judgment passed when the minor defendant is not properly represented will operate for the purpose of preventing alienation though the order cannot be made absolute without a proper guardian. A purchaser of the property in the interval can intervene in the proceedings and show that the order should not be made absolute. 106 I.C. 142=1928 M. 1. The holder of a money decree, who has attached immovable property of his judgment-debtor before judgment, cannot bring that property to sale in satisfaction of his decree, when the judgment-debtor has, before the attachment, agreed to sell the property to a third party, and the sale has been completed by a conveyance after the attachment. The attachment before judgment of property subject to a contract of sale merely gives the attaching creditor a right to the balance of the purchase-money, if any. He would also have the benefit of the vendor's lien under section 55 (4) (b), T.P.Act. 43 Bom.L.R. 206. A re-attachment in execution as a matter of greater caution, of certain immovable properties which had been attached before judgment does not amount to an abandonment of the original attachment. 26 I.C. 81=1 L.W. 932. Nor will mention in the sale proclamation of a mortgage executed after the attachment amount to a waiver of plea under section 64. 1928 B. 44. Attachment ceasing under O. 21, R. 57. Re-attachment—Alienation during interval is valid. 97 I.C. 547; 7 R. 20. An alienation which is void by reason of its being made contrary to an attachment cannot revive or be validated by reason of the attachment ceasing as a result of the execution being struck off. 39 C.W.N. 733. When an execution application is struck off, the attachment made under it cannot be treated as subsisting. 18 A. 49. See also 6 A. 33; 7 A. 617; 19 A. 482; 23 C. 829. The assignee of a decree need not apply for a fresh attachment. 16 A. 132; 17 M. 58. The death of the judgment-debtor does not cause the attachment to cease. 12 A. 440. When a judicial sale takes place all previous attachments effected on the property sold cease. 12 C. 317. What are "claims enforceable under the attachment". See 20 A. 421; 23 M. 478; 14 M.I.A. 543; 6 A. 33; 2 A.L.J. 265; 167 I.C. 48=1937 N. 1. See also 10 W.R. 99. Objections under this section are available only to those having claims enforceable under the attachment. 1929 P. 1.

*EXPLANATION.*—This explanation is new and supersedes. 16 B. 91 at p. 100; 15 C. 771 and 25 A. at p. 434. Object of explanation. 93 I.C. 366=1926 S. 177. Explanation gives priority to claims under section 72, C.P.Code, only in connection with the attachment under which they are en-



## SALE.

65. Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.
- Purchaser's title.

## NOTES.

forceable. If an attachment is withdrawn or ceases to exist there is no right to rateable distribution. 66 I.C. 642=8 O.L.J. 358. Section 64, Explanation clearly indicates that applications for rateable distribution go hand in hand with execution application. Consequently, where the Judge orders an execution petition to be filed but mentions in the order that the attachment shall continue but no separate order for the attachment to subsist is made on the application for rateable distribution which is also ordered to be filed as infructuous, the decree-holder can take advantage of the order regarding subsistence of attachment on the execution application. 1941 Pesh. 18. The combined effect of section 64 and the explanation which has been added thereto is to extend the protection of that section to the claimants for rateable distribution against private alienations of property after attachment, just as much as to the decree-holder at whose instance the attachment is made. 164 I.C. 1031=1936 O.W.N. 861. One of the objects of section 64 is to prevent an alienation which might defeat the claim of the attaching creditor. Where, therefore, an alienation has been made after the attachment and the judgment-debtor satisfies the debt of the attaching creditor out of the sale proceeds, then such an alienation cannot be said to be 'contrary to such attachment'. And other creditors who have not applied for attachment but have applied for rateable distribution are not entitled to the benefit under section 64. The explanation to section 64 does not apply unless the claim of the subsequent decree-holders can be said to be a claim for rateable distribution within section 73 and the essential condition of enforcement of such claim is that there should be assets held by the Court. 4 A.W.R. 1236=1934 A. 1057. See also 1933 N. 349. Under section 64, an applicant for rateable distribution is placed on the same footing as the attaching decree-holder. But if the attachment were to cease, the position of the person who merely applied for rateable distribution might become precarious and he would be unable to proceed further to realise his decree debt. But under the amendment of O. 21, R. 55 by the Allahabad High Court, even if the attaching decree-holder is satisfied or withdraws his claim, that would not affect the rights of one who had already applied for rateable distribution. Under the rule, the amount decreed is deemed to include the amount of any decree against the judgment-debtor, notice of which had

been given to the sale officer. Consequently a private transferee of the attached property cannot, by satisfying the claim of the attaching decree-holder, claim a paramount right so as to override the claims of a decree-holder who had, prior to such transfer, applied for rateable distribution. 150 I.C. 770=1934 A. 896. See also 1937 Pat. 609. Meaning of "enforceable" in explanation. 49 M. 38. "Claims enforceable under the attachment", meaning of. 1937 N. 1; 39 C.W.N. 1076; 1937 Pat. 609. Attachment before judgment—Alienation pending attachment—Subsequent insolvency of defendant and discharge—Right of attaching creditor to proceed against attached property. 42 L.W. 834=69 M.L.J. 799.

SEC. 64 AND O. 21, R. 2.—Where there is an adjustment within the meaning of O. 21, R. 2, the provisions of section 64 have no application to a transfer by way of mortgage effected by the judgment-debtor for satisfaction of the decree under which the property was attached in execution; for a transfer made contrary to the provisions of section 64 is only void as against claims enforceable under the attachment. When there is an adjustment for full satisfaction of the decree out of Court, there is no further claim which could be enforced under the attachment and therefore the transfer cannot be void. 188 I.C. 757=A.I.R. 1940 Pesh. 18.

SEC. 64 AND O. 21, R. 83.—A sale by the Court in pursuance of an attachment cannot be said to be the same thing as a sale by a judgment-debtor independently or in spite of the attachment. Title in the first case is conveyed by operation of law and any alienation by the judgment-debtor, if contrary to the attachment is void against all claims enforceable under the attachment, while title in the other is conveyed by the judgment-debtor himself who cannot derogate from his grant even if made after the attachment. A sale by the judgment-debtor with the permission of the Court and after obtaining a certificate from Court under O. 21, R. 83, C.P. Code, is a private sale and is not a sale either by or under the orders of the Court. 52 L.W. 862=1941 Mad. 208=(1940) 2 M.L.J. 1038.

SEC. 65.—Execution sale—What passes under. 1930 L. 937. Title of purchaser when accrues; liability to Government revenue; see 40 C. 89=23 M.L.J. 311 (P.C.). As to when title vests in the purchaser, see 88 I.C. 693=1926 N. 17. A suit for a relief which can only be given on declaration of title as against persons claiming title under a purchase certified by the Court, such persons being parties and con-



Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.

66. (1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as maybe prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

#### NOTES.

testing the claims, is barred under S. 66. 67 C.L.J. 320=A.I.R. 1938 Cal. 874. Where a person purchases certain property in a Court-auction held in execution of a decree and the sale is subsequently confirmed in his favour, the property vests in him from the date of confirmation of sale, whatever proceedings may be taken in connexion with the confirmation of the sale by the judgment-debtor whose property is sold. The vesting of the property in auction-purchaser is not postponed till the final decision of the proceedings started by the judgment-debtor. 177 I.C. 555=A.I.R. 1938 Pesh. 49. Under S. 65, C. P. Code, and S. 8, T. P. Act, a purchaser in a Court sale is entitled to the property from the date of the sale and not from the date of the confirmation thereof. [40 C. 89 (P.C.), Ref.] 145 I.C. 174=1933 M. 482. See also 1937 O.W.N. 1153. The auction-purchaser in execution of a rent decree and not the judgment-debtor is liable for rents accruing between the date of the sale and its confirmation, as under S. 65 the title of the former dates from the date of the sale. 23 I.C. 101=18 C.W.N. 136; 140 I.C. 560=9 O.W.N. 948. See also 1937 M.W.N. 1009; 1940 Lah. 230=I.L.R. (1940) Lah. 91. See O. 21, R. 92. The right of an auction-purchaser of a share in a village to mesne profits dates from the date of sale and not from the date of mutation of names in the Revenue Register. 45 I.C. 248=5 O.L.J. 31. See also 24 A. 475; 1936 R.D. 49. Standing crops go with the sale of land, unless otherwise provided for. 13 M. 15. Failure to obtain sale certificate from court, does not vitiate title of the auction-purchaser. 25 I.C. 8. See also 95 I.C. 965. The words of S. 65, make it clear that confirmation of a sale, is an integral part of the transaction of a sale, as the purchaser can acquire no title without confirmation. An order prohibiting the sale would therefore prohibit confirmation of a sale which has taken place already but which had not been confirmed before the prohibitory order was passed. 188 I.C. 269=A.I.R. 1940 Pat. 565. Gift by auction-purchaser before confirmation takes effect if he authorises donee to take possession. 2 Luck. 496=102 I.C. 72=1927 O. 261. As to effect of reversal of decree before grant of sale certificate, see 29 A. 591. See also 56 M. 808=1933 M. 598=65 M.L.J. 253. On a sale being held (but not confirmed) the attachment does not *ipso facto* come to an end. The Judge executing the decree is not therefore divested of his jurisdiction to deal with the application under O. 21, R. 58, in consequence of the sale having been held and his

order raising the attachment cannot be challenged for want of jurisdiction. 145 I.C. 142=1933 S. 198.

SEC. 66: SCOPE OF SECTION.—As to whether the section has retrospective operation, see 36 C.L.J. 396=27 C.W.N. 305. See also 43 A. 416; 47 C. 1108; 1925 N. 41; 30 C.W.N. 160; 40 C.W.N. 470. A suit for a declaration of title brought after the present Code of 1908 came into force against the transferee from the heir of the certified purchaser, where the sale took place and was confirmed before its enactment, is governed by S. 317 of the old Code, and not by S. 66 of the present Code, and is, therefore, maintainable. 39 P.L.R. 152=1937 Lah. 471. The consequence of S. 66 is that unless the auction-sale could be impugned on the ground of fraud or of some other grave irregularity which made it a nullity, the plaintiff's suit that the purchase was on plaintiff's behalf cannot be maintainable. Fraud must be strictly pleaded and particulars of any fraud relied upon must be stated in the pleading. It is very important that one who seeks to set aside a purchase completed under sanction of the Court should state the grounds on which he claims to impeach it and should not be allowed after trial of the case to rely on other grounds which had not been the subject of trial or adjudication in the Court which took the evidence. 181 I.C. 94=A.I.R. 1939 Rang. 122. Section should be strictly construed. 34 P.L.R. 487=146 I.C. 932=1933 L. 636. See also 1937 M. 362. S. 66 applies only where plaintiff's claim is based on auction-purchase and not where it is prior to and independent of the sale. 36 I.C. 681; 1931 B. 578=33 Bom.L.R. 1296. S. 66 applies only when the plaintiff attempts to enforce his secret title *as against* the certificated purchaser. It has no application if the heirs of the ostensible purchaser do not appear in the case and deny plaintiff's 'benami' purchase. (75 I.C. 197, Foll.) 165 I.C. 709 (2)=1936 A.L.J. 1169=1936 A. 750. S. 66, excludes any claim based upon an averment that an auction purchase had been made by the defendant on account of the plaintiff as well as on his own account. Where no case independent of this purchase and basing title upon possession is traceable in the pleadings, the plaintiff could not get any relief. 190 I.C. 677=52 L.W. 755=A.I.R. 1940 P.C. 202 (P.C.). What brings a case within the purview of S. 66, is that there must be a suit against the certified purchaser or anybody deriving title from him, on the ground that the purchase was made on behalf of the plaintiff or his predecessor. If relief is sought against the certified purchaser or his representative, and



(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a

#### NOTES.

the plaintiff claims title on the ground that the purchaser was his *benamidar*, the mere fact that the plaintiff once got possession of the property and was subsequently dispossessed by the certified purchaser or his representative, would not enable him to get round the bar of S. 66, unless the possession continued for twelve years and thus gave the plaintiff a title quite independent of the purchase made at the execution sale. 42 C.W.N. 497. S. 66, is a bar to a claim by a person who alleges that the actual purchase was either on behalf of himself exclusively or of himself jointly with the certified purchaser, whether the purchase is alleged to be in execution of an express agreement or otherwise; and the fact that the principal claims only to have provided a part of the purchase-money and to be entitled to only a share in the property purchased does not make any difference in principle. 18 Pat. 181=20 Pat.L.T. 117=A.I.R. 1939 Pat. 207. The fact that the certified purchaser was a *benamidar* for the plaintiff even before the auction-sale is no answer to an objection under S. 66. 42 C.W.N. 1059=A.I.R. 1938 Cal. 602. S. 66, applies although the plaintiff is already in possession and is seeking for its confirmation and not for recovery of possession on the strength of the auction-purchase. 42 C.W.N. 1059=A.I.R. 1938 Cal. 602. The objection under S. 66, applies to a suit against an assignee of the certified purchaser. 42 C.W.N. 1059=A.I.R. 1938 Cal. 602. Where three persons agree to purchase certain property at a Court-auction sale and it is so bought out of funds contributed by each in certain agreed shares, but the certificate was issued in the name of one of them, a suit by the others for possession is not affected by S. 66, for it has no application to such a case. 1940 Nag. 1=1939 N.L.J. 539. It may be that where the auction-purchaser is no party and is indifferent as to which of the two contending parties is held to be entitled to the property purchased by him he being admittedly a mere stake-holder, S. 66 does not apply. Such a proposition does not apply to a case where the defendant is a transferee under a valid title-deed from the auction-purchaser. S. 66 applies not only to cases in which the property is claimed against an auction-purchaser himself but also where it is claimed against his representative in interest. 157 I.C. 615=1935 A. 143. The primary object of S. 66, C. P. Code, is that the certified purchase should be deemed to be conclusive and no one should be allowed to challenge it, unless he comes within the exceptions mentioned in the section itself, and those exceptions are contained in sub-S. (2) under which a wrong insertion of the name of the purchaser in the sale certificate made

fraudulently or without the consent of the real purchaser can be rectified and under which third persons are absolutely protected. It is immaterial whether the plaintiff claims the whole of the property purchased at the auction or only a share in that property. Where, therefore, the plaintiff brings a suit claiming joint possession over one-half of the property on the ground that it was purchased by the auction-purchaser on his own behalf and on behalf of the plaintiff, the suit is not maintainable. 167 I.C. 683=1937 A.L.J. 52=1937 A. 176. As to applicability of section, see 90 I.C. 116 (Section not applicable to sale by receiver with permission of Court which appointed him); 83 I.C. 382=1924 O. 218 (Title of persons beneficially interested in the purchase not affected) (Section not applicable to sales in execution of rent decrees under Chota Nagpur Tenancy Act. 18 Pat.L.T. 397=1937 Pat. 324). See also 1941 Nag. 84=1940 N.L.J. 603 (Revenue sales); 84 I.C. 98=1925 O. 20; 8 P. 585. (Section does not exclude evidence as to auction-purchase being *benami* when such evidence is relevant.) 133 I.C. 551; see also 162 I.C. 553=17 Pat. L. T. 591=1936 P. 429. Claim based on agreement to reconvey made before and after sale is enforceable. 62 C.L.J. 88. A suit based on the ground that the plaintiff was the real purchaser at a Court-sale and that the certified purchaser was not really so, is barred by S. 66. It is immaterial whether the plaintiff is in possession and seeks confirmation of possession or whether he is out of possession and seeks to recover it. But if the real owner is in possession of the property and the certified purchaser wants to take advantage of his name being in the sale certificate and brings the suit on that basis the real owner can successfully defend it on the ground of his being the real purchaser. But if the plaintiff bases his suit on some other title subsequently acquired, e.g., adverse possession, the suit does not come under S. 66. 12 P. 616=14 Pat.L.T. 208=1933 P. 264. S. 66, raises an irrebuttable presumption in favour of the auction-purchasers. But there is nothing to prevent him from creating a trust in favour of, and constituting himself a trustee for, the person who supplies the purchase-money. Even if there be no registered instrument, twelve years' enjoyment by the beneficiary will confer a prescriptive right in him. 4 A.W.R. 676=1934 A. 990. The auction-purchaser's right arising from the sale cannot, by reason of S. 66, be questioned in suit. But a plaintiff can claim title to the property covered by the purchase not on the ground of the purchaser being *benamidar* for himself, but on the ground that the purchaser subsequently transferred or agreed to transfer his title to himself or that he ac-



third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner.

## NOTES.

quired the same otherwise, for example by prescription. 1934 A. 990; 62 C.L.J. 88; 1937 M. 362. S. 66 (1) has to be strictly applied. Its object is to prohibit on grounds of public policy a suit against the certified purchaser on the ground specified in the section. It does not render benami transactions illegal. If the cause of action is not based on the benami purchase but on a contract or title acquired subsequent thereto, S. 66 is not a bar. 1937 M. 362. In the absence of anything definite to show the contrary, the purchase made by a joint decree-holder, though in his own name, would undoubtedly enure for the benefit of all the persons interested in the joint fund which has been utilized in the acquisition of the property. Other persons would be beneficially interested in the purchase, and would be "entitled to recover a share of the properties purchased at auction," conditional on the payment of a proportionate share of the costs incurred in the litigation. And this right can be relinquished without a written instrument, as such right is short of ownership. 1933 A. 854 (2)=148 I. C. 502=1934 A.L.J. 107. A suit for execution of a sale-deed and for recovery of possession on the ground that defendant's father purchased the properties as benamidar for the plaintiff falls within S. 66, and is barred. 29 I.C. 138; 54 M.L.J. 462 (P.C.). S. 66 applies not only to cases in which the property is claimed against an auction-purchaser himself but also where it is claimed against his representative in interest as, for example, a transferee from him under a valid titled-deed. 4 A.W.R. 974=1935 A. 143. The section provides that no suit shall lie against the certified purchaser on the ground that the purchase was on behalf of the plaintiff. 44 I.A. 201=44 A. 159 (P.C.). Cases of suits by certified purchasers are beyond the letter and scope of this section. 21 A. at p. 40. The section protects the certified purchaser only so long as he retains the possession given by Court. When he parts with it to the true owner he cannot sue for possession. If he ousts the true owner in possession for more than 12 years the true owner's suit for possession is based upon adverse possession under the limitation and is not barred by this section. 56 I.A. 330=51 A. 675=57 M.L.J. 177 (P.C.). A benami certified purchaser can sue in his own name even when the true owner's name is disclosed. See 22 B. at p. 679. The object of S. 66 is to put an end to benami purchases at Court sales in execution. 43 M. 643=39 M.L.J. 11 (P.C.); 12 Beng. L.R. 317. An agreement subsequent to a purchase is not affected by the section and is specifically enforceable. 43 M. 643=39 M.L.J. 11 (P.C.); 42 M. 615 (F.B.); 31 Bom.L.R. 1271. But see 54 I.C. 726=24

C.W.N. 27; 42 M. 616 (F.B.). But an agreement made prior to the execution sale is affected by the section and a claim to enforce it will be barred. 35 C.W.N. 940=54 C.L.J. 147 [43 M. 643 (P.C.) Dist.] A suit by a judgment-debtor against an auction-purchaser to enforce an agreement before the sale to reconvey the properties to the judgment-debtor is barred. 50 I. C. 546. The section is intended to prevent fraud, and cannot apply to cases in which its application would promote fraud. 12 C. 204. But see 16 M. at pp. 292-93. The section has no application where it is found that the certified purchaser was, at the date of the purchase, managing the plaintiff's family as its agent, and that he bought the lands as such. 17 M. at pp. 286, 287. See also 18 M. 436. But see 22 A. 434. A person is entitled to be regarded as the certified purchaser at any time after the acceptance of his bid at the sale, even though a sale certificate has not issued to him. 25 W.R. 493; 19 I.C. 909=19 C.L.J. 330; 29 I.C. 716; 53 I.C. 961. Section is no bar when the certified purchaser does not contest plaintiff's claim. 82 I.C. 344=1925 A. 47. The section should be construed strictly: 5 Bom.L.R. 329; 2 L.L.J. 358; and literally. 2 I.A. 154; 1923 C. 228.

APPLICABILITY OF SECTION.—A plaintiff purchaser, at a Court-sale, is not entitled to recover the property from the defendant of whom he was found to be the benamidar, and the benami transaction was found to be free from fraud. 36 B. 116. See also 56 I.A. 330; 108 I.C. 130=26 A.L.J. 245. The section applies only to sales in execution of decrees of Civil Courts, held under the Code. 14 C. at p. 585. S. 66 has no application in a case where the benamidar himself does not claim under the sale certificate. 27 C.W.N. 208=1923 C. 302. A cause of action against the benamidar which arose under the old Code, 1882, is not affected by the new Code. 50 I.C. 335=23 C.W. N. 604. See also 18 C.L.J. 616=8 C.W. N. 1331. Section applies to the case of a purchaser at a sale in enforcement and execution of certificate under S. 2 of the Public Demands Recovery Act. 16 C.W.N. 973=16 C.L.J. 412. Where at an auction, a person purchased property in the name of one and it was alleged by another that it was in trust for him, a suit between these two claimants is not within the prohibition contemplated by S. 66. 33 I.C. 1000. Section does not apply to cases where a plaintiff who purchases property in the name of another, has been in adverse possession for over 12 years. 19 C. 199. The section applies whether the ostensible purchaser at an auction-sale purchases the whole or part of the property sold. 57 I.C. 684. Benami purchaser attesting sale by the true owner, effect of—Whether operates as estoppel.



## NOTES.

See 36 M. 564=23 M.L.J. 301. A manager guilty of fraud cannot take advantage of the section as against the ward. 30 I.C. 212. As to fraud, see also 36 B. 116. Joint decree-holders — Co-decree-holders purchasing at execution sale—Rights of others. See 37 A. 545 (P.C.) (affirming 32 A. 541=6 I.C. 364). 29 I.C. 447 is not now good law. See also 29 A. 557. Section 66 has no application to cases where the manager of a Hindu family or a tenant-in-common purchases with funds belonging to the joint family or to all the tenants-in-common. 17 I.C. 434=1912 M. W. N. 1071. See also 43 M.L.J. 363=45 M. 856; 37 I.C. 111. S. 66 is intended to discourage *benami* purchases at execution sales held by the Court by penalising the person who purchases *benami* in the name of another. The penalty applies equally to any one claiming through him. It does not apply where the name of the *benamidar* has been inserted in the sale-deed fraudulently or without consent of the real purchaser. The section refers to private agreements or understandings between the *benamidar* and the person who employs him. It has, therefore, no application to a case where the plaintiff says that he and first defendant, the *karta*, purchased certain property with joint family funds; that the latter allowed the property to be sold for arrears of rent; that in the auction the property was purchased by second defendant, son of the first defendant; that however was only *benami*; it was really purchased by the first defendant and that it continued to be the partible property of the joint family. The plaintiff is an innocent person and no party to the fraud; he is not hit by S. 66. 61 C. 440=150 I.C. 1051=38 C.W.N. 494=1934 C. 567. Where properties sold in execution of a decree were purchased with the funds of the manager of a joint Hindu family in the name of his son-in-law, S. 317 of the C. P. Code, 1882, bars the claim of the members of the joint Hindu family to the properties as being really joint family acquisitions. 44 I. A. 201=33 M.L.J. 180=40 A. 159 (P.C.). See also 35 A. 80=40 I.A. 40=24 M.L.J. 345 (P.C.). Purchase at Court-auction by two persons with joint funds—Sale certificate in the name of one—It is a joint transaction constituting the parties co-purchasers and not a *benami* transaction and this section does not apply to it. 50 B. 660. But see 1934 C. 322. Some persons purchased a property in execution sale in the name of one of them. They had contracted themselves that they shall be the owners of the property in shares proportionate to their contribution. The *benamidar* sold away more than his share of the property. One of the contributors filed the suit for declaration of his share in the property. Held, that S. 66 was a bar to such a suit. The operation of S. 66 could not be ousted by the existence of any private agree-

ment or undertaking. 61 C. 371=150 I.C. 77=1934 C. 322. Purchase *benami* for plaintiff—Sale set aside with consent of *benamidar* on application by judgment-debtor—Plaintiff dispossessed by judgment-debtor—Suit against *benamidar* and judgment-debtor is maintainable. S. 66 is no bar to such suit. 42 C.W.N. 497.

SUIT FOR REPRESENTATIVES OF REAL PURCHASERS.—S. 66 is intended to bar the institution of a suit against the certified purchaser by the beneficial owner or one standing as successor-in-title of the beneficial owner. 16 I.C. 489=10 A.L.J. 97. Also see 25 I.C. 821=12 A.L.J. 1145; 157 I.C. 615=1935 A. 143. S. 66, C. P. Code, applies to the successor-in-title of the certified purchaser. 55 I.C. 499=16 N.L.R. 87 (31 B. 61; 35 B. 342, Ref.). Also see 19 I.C. 909=19 C.L.J. 330. Third parties—S. 317 of the old Code did not apply to persons claiming through the certified purchaser. 46 I.C. 216. Third parties—Suit by beneficiary against the *benami* certificated purchaser. See 54 I.C. 127=24 C.W.N. 51. Third parties — Property mortgaged by judgment-debtor—Sale in execution—Suit by mortgage against the judgment-debtor and execution purchaser. 54 I.C. 967=37 M.L.J. 586 [37 A. 545 (P.C.), Ref.].

SUIT FOR POSSESSION.—A plaintiff at a Court-sale is not entitled to recover the property from the defendant of whom he was found to be the *benamidar* and the *benami* transaction was found to be free from fraud. 36 B. 116. Also see 35 A. 138; 29 I.C. 787; 40 C. 20; 28 M.L.J. 251 (Auction-purchaser not trustee for real purchaser). S. 66 is no bar to a suit brought by the principal against the agent for the recovery of properties purchased by the agent in his own name but with the principal's money and for the principal's benefit in a Court-auction though without the knowledge of the principal. 49 I.C. 734=9 L. W. 276 [19 W.R. 356 (P.C.); 37 A. 545, Foll.].

SUIT FOR DECLARATION.—A suit by a son, member of a joint Hindu family, for a declaration that a Court auction-purchase in the name of his mother, made out of family funds is *benami*, is barred under this section. 43 A. 711. But it has, however, been held that the real purchaser in a *benami* sale who remains in possession is not precluded by S. 66, from suing for declaration that he is the owner. 25 I.C. 810; nor from remaining in possession of the property till the certified purchaser pays him a binding mortgage-debt which he paid off *bona fide* on the basis of his supposed title. 133 I.C. 536=1932 A. 32=1931 A. L. J. 601.

PLEADINGS.—The plea of bar under the section may be put forward and given effect to at any stage of the suit, even in appeal for the first time if it does not depend upon disputed facts. 37 I.C. 111; 35 C.W.N. 940=54 C.L.J. 147=136 I.C. 538.



67. <sup>1</sup>[(1) The Provincial Government <sup>2\*</sup> \* \* \* may, by notification in the Official Gazette, make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money, where such interests are so uncertain or undetermined as, in the opinion of the Provincial Government to make it impossible to fix their value.

<sup>3</sup>[(2) When on the date on which this Code came into operation in any local area, any special rules as to sale of land, in execution of decrees were in force therein, the Provincial Government may, by notification in the official Gazette, declare such rules to be in force, or may, <sup>2\*</sup> \* \* \* by a like notification, modify the same.

Every notification issued in the exercise of the powers conferred by this subsection shall set out the rules so continued or modified.]

#### DELEGATION TO COLLECTOR OF POWER TO EXECUTE DECREES AGAINST IMMOVABLE PROPERTY.

68. The Provincial Government may, <sup>2\*</sup> \* \* \* declare, by notification in the Official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immovable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immovable property, shall be transferred to the Collector.

#### LEG. REG.

<sup>1</sup> Original S. 67 re-numbered as S. 67 (1) by S. 3, Act I of 1914.

<sup>2</sup> The words "with the previous sanction of the Governor-General in Council" omitted by S. 2 and Sch. I, Act XXXVIII of 1920.

<sup>3</sup> Sub-section added by S. 3, Act of I of 1914.

#### NOTES.

SEC. 67.—The rules framed are not retrospective in their operation. 15 B. 322; and may provide for an appeal from the Collector's orders. 12 A. 564. The rule promulgated by the Chief Commissioner of Coorg under S. 67 (2), embodying the restriction upon sales of land in execution of decrees of civil Courts is a rule merely governing the execution of decrees within the province of Coorg and applies only to sales of land within the jurisdiction of the local Government of Coorg. The power to enact such special rules contemplates only the enactment of rules restricting execution of money decrees within the local area and not in British India. 1941 Mad. 45=52 L.W. 851=(1940) 2 M.L.J. 420. Sanction of Commissioner to sale of agricultural land in execution—Unnecessary. 19 I.C. 479=89 P.R. 1913; 66 I.C. 893.

SEC. 68: SCOPE OF SECTION.—Under S. 68, only those decrees can be transferred for execution to the Collector which direct the sale of any immovable property or such decrees in execution of which any property could be attached and sold. It is only when the property attached is capable of being sold and is a revenue-paying estate that the Civil Court can transfer the decree to the Collector with a clear direction to sell the property. If the property is non-transferable, the Civil

Court is not competent to transfer the decree to the Collector. If the Civil Court is not competent to order the sale of the property, the Collector can have no jurisdiction over such property. 31 N.L.R. 239=156 I.C. 65=1935 N. 133. See also 162 I.C. 362=1936 O. 280. Under S. 68, a Court is bound to transfer execution proceedings to the Collector if it finds that at the date of the order for sale the judgment-debtor or any one of several judgment-debtors (when there are more than one) is an agriculturist. The date at which the status of the debtor is to be considered is the date on which the order for sale is passed. If on a date prior to the order for sale the judgment-debtor agrees under a compromise to give up his contention regarding his status, he cannot be regarded as having waived his right to claim the transfer of the proceedings to the Collector, after the order for sale is passed, if he could prove that on the date of the order for sale he was an agriculturist. But if the judgment-debtor fails to put forward his contention that he is an agriculturist to claim transfer of proceedings to the Collector when he is given notice under O. 21, R. 66 for settlement of the terms of the proclamation, and the Court makes an order for sale and issue of proclamation, that order becomes binding on the judgment-debtor and conclusive unless he takes steps to appeal from that order and get it set aside. It is not open to him subsequently after the lapse of a long time to claim a transfer to the Collector. 41 Bom.L.R. 1166=A. I. R. 1939 Bom. 526. The Collector is bound to carry out the decree, subject to the discretion given to him by S. 1 of Sch. III and the following sections and subject to the



## NOTES.

provisions contained in Ss. 4, 5 and 6 of Sch. III. 11-A at p. 95 (F.B.). *See also* 7 B. 332; 1938 O.W.N. 758. All that the executing Court has to see is whether it is a case in which a decree-holder asks for the sale of the agricultural property and if that is the case, the decree has to be transferred to the Collector for execution as soon as the Court orders that the property should be sold. 147 I.C. 1201=3 A.W.R. 579=1934 A. 253. Under the provisions of S. 68, the Local Government has no power to transfer to the Collector an execution case pending in a Civil Court in which that Court has already sold the property but the sale has not been confirmed. The power of the Local Government is confined only to those cases in which the property has not been sold but only an order for sale has been passed. 148 I.C. 464=1934 O. 138=11 O. W.N. 411. If it is declared by notification that a decree for sale of a particular kind of property should be transferred to the Collector for execution, a sale of the property, if made by a Civil Court, is void as such a notification ousts the jurisdiction of the Court so far as regards the execution of the decree. 151 I.C. 244=1934 A.L.J. 859=1934 A. 314. The functions of the Court under O. 21, R. 2, cannot be delegated to the Collector or his subordinates, though the decree has been transferred to the Collector for execution. 37 Bom.L.R. 93=1935 B. 158. Rules framed under R. 17 as to transfer of decrees for execution. 45 B. 1132. Collector—Power of, to execute decree transferred. 61 I.C. 579=18 N.L.R. 131. The functions of the Court under O. 21, R. 2, C. P. Code, cannot be delegated to the Collector or his subordinates, though the decree has been transferred to the Collector for execution. 59 B. 345=37 Bom.L.R. 93=1935 B. 158. S. 68, C. P. Code, does not state that the Collector shall become the Court executing the decree. The Court executing the decree remains the Court which sends the decree for execution to the Collector and the powers conferred by the C. P. Code on the Court executing the decree remain with that Court and do not pass to the Collector. 1938 O. W.N. 758=1938 Oudh 188. The Collector executing a decree transferred to him, under S. 68, is not a Court, and he has no power to certify an adjustment of the decree under O. 21, R. 2. An adjustment recorded by the Collector during execution cannot consequently be treated as certification under O. 21, R. 2. 19 N.L.J. 175; 60 B. 729=164 I.C. 9=38 Bom.L.R. 505=1936 B. 277. As to powers of Civil Court and Collector, *see also* 38 Bom.L.R. 221. When execution proceedings are transferred to the Collector under S. 68, for sale of immovable property, and the judgment-debtor is a minor, the Civil Court, and not the Collector has the power to give permission to the decree-holder to bid at the sale, which is required under O. 21, R. 72. 60 B. 688=38

Bom.L.R. 276=1936 B. 189. A Court has authority to re-call its own record transmitted to the Collector for execution. 7 B. at p. 336; and can control the proceedings of the Collector. 8 B. 301; 11 B. at p. 482; 7 A. 407. *See* 9 A. 43 and 11 A. 94. The Collector does not become the Court executing the decree by the mere fact of the execution of the decree having been transferred to him. 133 I.C. 609=1931 A. 320 (2)=1931 A.L.J. 166. *See also* 1933 S. 112=142 I.C. 579. After transfer to Collector no new process of attachment can be issued against the same property. 92 I.C. 906=1926 O. 318. As to jurisdiction of Civil Court to interfere with the powers of the Collector, *see* 2 O.W.N. 73=1925 O. 448. *See also* 50 A. 827=1928 A. 558=26 A.L.J. 769. A Civil Court can order the temporary alienation of the land of an agricultural tribe in satisfaction of a money decree. 74 I.C. 194=4 Lah.L.J. 476. Alienation of land by judgment-debtor without permission is void. 153 I.C. 612=11 O.W.N. 1626=1935 O. 156; 11 O.W.N. 1571=1935 O. 121. The Collector must decide the best method of satisfying the decree whether by management by the Collector himself or by sale or by letting. But he has not got the discretion to decide whether the decree has been satisfied. 37 B. 32. But *see* 46 A. 228. All that is delegated to the Collector is to consider the proper mode in which a decree may be satisfied by an agriculturist debtor so as to save, if possible, the sale of his property and the Court passing the decree can enquire into the question whether the decree-amount is satisfied or not and order a further execution when the Collector has returned the papers under an erroneous belief that the whole amount had been liquidated. 142 I.C. 579=26 S.L.R. 506=1933 S. 112. *See also* 1938 O.W.N. 758. When a decree has been transferred for execution to a Collector, an application to record satisfaction under O. 21, R. 2 should be made to him. 16 A. 228. But *see* 37 B. 32. Decree transferred to Collector for execution—Decree-holder certifying payment through mistake or fraud of judgment-debtor—Collector entering satisfaction—Jurisdiction of trial Court. 167 I.C. 401=1937 O.W.N. 231. A suit lies in a Civil Court for confirmation of a sale held by a Collector and to set aside an order passed by him cancelling it. 25 A. 355. In view of S. 68 and Allahabad Government Notification No. 1887 1-238, dated 7-10-1911 which authorises the Collector and Collector alone to sell ancestral property a sale of it by the Civil Court *Amin* is without jurisdiction. 143 I.C. 522=1933 A. 192=1932 A.L.J. 1118. *See also* 154 I.C. 933=1935 A.W.R. 249=1935 A. 468; 8 Luck. 504=10 O.W.N. 517=145 I.C. 363=1933 O. 274; 1937 All. 550. The executing Court does not become *functus officio* entirely after land covered by the notification is ordered to be sold. Hence, it is not necessary to transfer the execution of the



Provisions of Third Schedule to apply.

69. The provisions set forth in the Third Schedule shall apply to all cases in which the execution of a decree has been transferred under the last preceding section.

Rules of procedure.

70. (1) The Provincial Government may make rules consistent with the aforesaid provisions—

#### LEG. REF.

\* Substituted for "the Governor-General in Council" by A.O., 1937.

#### NOTES.

decree as a whole to the Collector merely because some land falling within the purview of the notification had been ordered to be sold. However, as soon as any land falling within the purview of the notification is ordered to be sold, the execution of the decree so far as that land is concerned must be transferred to the Collector. 191 I.C. 704=A.I.R. 1940 Lah. 345. The Notification under S. 68, No. 365-R (Revenue Department), dated 17th January, 1939, applies even to pending execution proceedings in which an order for sale of such land has been passed, provided, of course the sale had not been actually carried out before the notification. 191 I.C. 704=A.I.R. 1940 Lah. 345. As to U. P. Notification, see 148 I.C. 464=11 O.W.N. 411=1934 O. 143. See also 1936 R.D. 197. An ancestral grove with a house which has been assessed by Government can be sold in execution by the Collector only. 36 A. 33. Execution sale—Ancestral property sold as non-ancestral property whether can be set aside. 24 A.L.J. 281=44 A. 380. "Ancestral land" as defined in (All.) General Rules, Ch. IV, R. 8 (a) means property owned continuously from 1—1—1860 by the proprietor. Land gifted to the judgment-debtor after that date is not, therefore, "ancestral land" and the sale thereof need not be by the Collector. 1933 A.L.J. 91=1933 A. 138. Where a certain land is saleable under the Bundelkand Land Alienation Act, this section cannot be invoked to transfer the decree to the Collector. 48 A. 392=1926 A. 339=24 A.L.J. 397. Where the mortgaged property is ancestral, the Civil Court is bound under S. 68, to transfer the proceedings in execution of the mortgage decree to the Collector. 162 I.C. 362=1936 O. 280.

APPEAL.—No appeal lies to the High Court from an order passed by the Collector in an execution proceeding transferred to him. 7 Bom.L.R. 682; 5 A. 314 (F.B.). The transfer of the decree to the Collector does not oust the jurisdiction of the civil Court in all matters. A Collector ceases to have jurisdiction to sell or to confirm the sale after the Court passing the decree recalls it. Whether the Collector fails to comply with the Civil Court's order in disregard or in ignorance of it, that order must prevail against anything done by the Collector subsequent to that order. The Collector's power to proceed with the case is suspended by virtue of any order of stay that might be

passed by the Court passing the decree. A Civil Court's order comes into effect as soon as it is passed so as to suspend the Collector's power to proceed with the execution; irrespective of its being communicated to the Collector. 1940 N.L.J. 473=A.I.R. 1940 Nag. 372.

SECS. 68 TO 72 AND O. 21.—S. 72 must be read as alternative to S. 68 and so read it only indicates the source of the authority of the Collector to exercise powers under Sch. III in local areas where the Local Government has not issued a notification under S. 68. The Civil Court has under S. 72 power to authorise the Collector exactly as the Local Government has it under S. 68. The Civil Court cannot under S. 72 exercise the powers of Collector under Sch. III due to the express provisions of Ss. 72 (2) and 70 (2). 167 I.C. 807=1937 N. 41. The rules in Ch. 40 of the Revenue Manual do not apply to the execution of decrees of Revenue Courts, because Ss. 68 to 72, C.P. Code, have been specifically excluded by the Second Schedule to the Agra Tenancy Act. Decrees of the Revenue Courts passed under the Agra Tenancy Act must be executed in the manner laid down in O. 21, C.P. Code. 1937 R.D. 37. See also 1938 Oudh 62.

SEC. 70.—A Collector acting under the section is a Revenue Court and can pass order under S. 476, Cr.P. Code. 14 A.L.J. 1077=38 I.C. 419. After a sale is confirmed by the Collector and retransmitted to the Civil Court, he has no power left to interfere with the sale. 48 A. 568. The function of the Collector on receipt of a C Form issued by the Civil Court according to the rules prescribed under the C.P. Code and in the C.P. Revenue Book circular, Vol. 2—III 8, is either to execute it by sale of the land attached or to realise the amount due under the decree by a lease or similar arrangement. It is beyond his function, when the sale is closed and the auction confirmed, to entertain a compromise relating to the sale. 26 N.L.J. 93. But see 1935 A. L.J. 919. A Collector, who is empowered by rules framed by the Local Government under S. 70 (1) to set aside the sale of immovable property held in execution of a decree transferred to him by the Civil Court, has jurisdiction to set aside such sale even after the sale has been confirmed by him and the record of the execution case has been retransmitted to the Civil Court, if he is satisfied that the decree-holder, by the exercise of fraud, kept the judgment-debtor ignorant of the execution proceedings culminating in the sale of the property and of the confirmation of sale, and that as a consequence of his fraud the decree-holder



(a) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for re-transmitting the decree from the Collector to the Court ;

(b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector ;

(c) providing for orders made by the Collector or any gazetted subordinate of the Collector, or orders made on appeal with respect to such orders, being subject to appeal to, and revision by, superior revenue-authorities as nearly as may be as the orders made by the Court, or orders made on appeal with respect to such orders, would be subject to appeal to, and revision by, appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector.

#### NOTES.

succeeded in purchasing the property of the judgment-debtor for much less than its real value. An order passed by a Collector confirming a sale is a judicial order and he has inherent power to recall and cancel his order if he is satisfied that it is necessary to do so for the ends of justice or to prevent an abuse of the proceedings held by him. The retransmission of the decree to the Civil Court no doubt puts an end to the jurisdiction of the Collector to take further proceedings in execution of the decree, but it cannot divest him of the inherent jurisdiction possessed by him to correct his judicial orders or to review the same. 158 I.C. 753=1935 A.L.J. 919=1935 A. 868. See also 1937 All. 550. No suit lies to set aside sale by Collector. 3 O.W.N. 739=97 I.C. 1036=1926 O. 612. An order of the Commissioner passed on appeal from the Collector setting aside the objections of the judgment-debtor or auction-purchaser cannot be questioned in a Civil Court. 139 I.C. 498=1932 O. 273 following 6 O.W.N. 1214. Where a decree is transferred to the Collector for execution under S. 68, the jurisdiction of the Collector and the Commissioner to confirm or set aside a sale is restricted by Rr. 998 and 1011 of the Manual of the Revenue Department. If therefore the Commissioner in an appeal from the order of the Collector sets aside the sale on a ground which is not provided for by any of the rules, the order of the Commissioner is without jurisdiction and is subject to adjudication by the Civil Court under the general provisions of S. 9, C.P. Code. The cognizance of the suit by the Civil Court is not barred by Cl. 2 of R. 998. 1938 O.W.N. 40=A.I.R. 1938 Oudh 62. Where a decree for sale under a mortgage has been transferred for execution to the Collector under S. 68, C. P. Code, a mortgage of the property comprised in the decree by the judgment-debtor without the written permission of the Collector is absolutely void under parra. 11, Sch. III, C.P. Code. 153 I.C. 612=11 O.W.N. 1626. See also 11 O.W.N. 1571; 162 I.C. 362=1936 O.W.N. 489=1936 O. 280. A subdivisional officer conducting a sale cannot depute the Nazir to hold the sale, as it is

contrary to the imperative provisions of R. 10 (11) of the C. P. Revenue Book Circular framed under S. 70 (1). It is also illegal to continue a sale already commenced for about 9 days without directing the bidders to be present on the days on which it might be recommenced. A bid made by a prospective purchaser on a previous day cannot also be accepted behind his back several days later, so as to make him liable for loss on re-sale on his failure to pay the price. That is neither proper nor equitable. 18 N.L.J. 11. R. 13 of the rules framed under S. 70 (1), only invests a Collector with powers specifically referred to in the notified rules and not with all powers conferred by rules under O. 21 or otherwise by the C. P. Code. The Collector is not a Court within the meaning of the term occurring in O. 21, R. 2. A collector is justified in filing the proceedings, when there is an amicable settlement admitted by both parties. But he cannot legally come to a decision regarding a disputed adjustment. 1941 N. L.J. 300. Where a Collector accepted a bid after receipt of the order of the High Court staying proceedings, the acceptance is in contravention of the order of stay and as such its cancellation is quite legal. 1938 N.L.J. 120. Rule 11, Cl. (ii) of rules framed by the C.P. Government under S. 70 (1), C.P. Code, requires the Tahsildar who conducts the sale to adjourn it to the Collector before the final bill is accepted. It is meant to secure the approval of the Collector. But this does not authorise the Collector, when he does not accept the last bid, to hold an informal sale for the disposal of the property. If he wants to obtain fresh bids, the procedure laid down for holding sales ought to be followed. 1938 N.L.J. 105. See also 1938 Nag. 49. In respect of the execution of decrees transferred to the Collectors, the power to revise is vested in the Financial Commissioner's Court under R. 16 of the rules framed by the Governor in Council under S. 70, C.P. Code. It limits the power of revision to such matters as are provided for in S. 115, C.P. Code. 1938 N.L.J. 262.



(2) A power conferred by rules made under sub-section (1) upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exercisable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court.

Jurisdiction of Civil Courts barred.  
Collector deemed to be acting judicially.

71. In executing a decree transferred to the Collector under section 68 the Collector and his subordinates shall be deemed to be acting judicially.

72. (1) Where in any local area in which no declaration under section 68 is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share.

#### NOTES.

EXECUTION.—Objections to sale of property—Court, power of, to amend application—Date of application. 37 I.C. 78=3 O. L.J. 529. Execution transferred to Collector—Judgment-debtor a minor—Permission to bid at sale to decree-holder is to be given by the Civil Court not Collector. 60 B. 688=38 Bom.L.R. 276=1936 B. 189. Rules framed by C.P. Government under S. 70—Collector deputed Nazir to conduct sale not legal—Bid on one day—Acceptances several days later not proper. Bidder not liable for loss on resale. 18 N.L.J. 11.

SEC. 70 (2).—Where a decree is transferred to the Collector for execution, a Civil Court cannot entertain an application under O. 21, R. 72 inasmuch as that power has been conferred on the Collector. 42 B. 621=20 Bom.L.R. 708.

SEC. 72:[See also NOTES UNDER S. 68.] SCOPE AND APPLICABILITY OF SECTION.—On this section, see 103 I.C. 884 (1)=1927 N. 324; 1937 N. 1; 1937 N. 41. Section 72 clearly empowers the Court to authorize the Collector to grant a lease of the property for a term of years in full satisfaction of the decree. 1937 A.L.J. 801=1937 All. 699. The intervention of the Collector contemplated by section 72 is a preliminary requisite to the application of that section. Section 72, however, can only be applied in cases where the land is saleable. Where the land is protected from sale by a special enactment, S. 72 can have no application. 161 I.C. 628=1936 Pesh. 90. Section does not apply to decree directing sale of land, in pursuance of contract affecting the same. 2 A. 856. See also 9 C. 290 at p. 293. Action of Collector under section is administrative. 1 L. 192=58 I.C. 603 (F.B.). The sanction of the Revenue authorities not necessary for sale of revenue-paying land, in execution. 69 P.L.R. 1918=46 I.C. 864. See also 1 P. R. 1919=52 I.C. 356. Under section 72 the Collector is empowered to represent to the

Court that the public sale of land is objectionable and that a temporary alienation of land would satisfy the decree. He has however no authority to represent that a temporary alienation is objectionable and even if he represents that a public sale is objectionable, it is for the Court to decide whether his objection should be maintained. 157 I.C. 953=1935 Pesh. 113. The Collector has no authority to suggest satisfaction of the decree in part by transfer of certain debts from the judgment-debtors to the decree-holders, or that mortgagee rights should similarly be transferred to the decree-holder. He has also no right to compel the decree-holder himself to take the lands on lease at a valuation fixed by the Collector. 160 I.C. 571=1936 Pesh. 14. A District Judge executing a decree is not bound to accept the recommendation of a sub-divisional officer to the Collector to arrange to have the decree satisfied by a temporary alienation. 9 P.L. R. 1915=27 I.C. 630. The object of section is to save land by temporary alienation and the Court executing decree cannot vary its terms by authorising satisfaction in instalments. 2 N.W.P. 347. See also 6 N.W.P. 39. A Civil Court is competent in execution proceedings to grant a farm of the land of a judgment-debtor belonging to an agricultural tribe. If the Court in granting such a lease makes the lease money payable by instalments, it might be said that the Court has acted in an unwise or indiscreet manner by not demanding the entire lease money at once but it cannot be said that the Court has passed an order which it had no jurisdiction to pass. Such an order is not illegal or without jurisdiction and the provisions of section 36 apply to the case and the Court can enforce payment of the lease money by applying the provisions of the Code relating to execution of decrees. (1920 L. 456, Foll.) 38 P.L.R. 936=1936 L. 696. See also 1938 A.L.J. 444 (Applicability of section to land prohibited from sale by Bundelkhand Land



(2) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable.

#### DISTRIBUTION OF ASSETS.

73. (1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons :

#### NOTES.

**Alienation Act.** Regarding suit to set aside sale by Collector, see 1 Luck. 558; 1926 O. 612=3 O.W.N. 739. Collector reporting inability to execute. Executing Court should not file execution application but should proceed with the execution. 96 I. C. 199 (1)=1926 L. 632.

**CONCURRENT APPLICATION FOR EXECUTION OF DECREE—FORM OF EXECUTION TO BE ADOPTED.**—When several applications for execution are pending against the same judgment-debtor, and all the applications have been made within the time required to give them a right to share in any realizations, it is obviously inequitable to adopt a form of execution which will favour one of the decree-holders at the expense of the rest. 1935 L. 964. Where more applications than one are pending, and the Collector has represented that the public sale of the property under attachment is objectionable, the correct procedure would seem to be for the Court to give the Collector details of the pending applications and to ask the Collector to suggest a method of temporary alienation which will provide as far as possible for the satisfaction of these decrees. 1935 L. 964.

**FORM OF LAND IN FAVOR OF DECREE-HOLDER—NATURE AND EFFECT.**—A farm of land in favour of a decree-holder is more in the nature of an adjustment of a decree the decree-holder receiving a tenure of the land in satisfaction of his decree as a whole and it stands on a different footing from a lease which is given out either on payment of an initial lump sum, or of rent at stated intervals. A decree-holder may be prepared to surrender his rights under the decree in return for receiving a limited tenure of the land rather than face a continuation of the execution proceedings. 1935 L. 964. Where a decree-holder took out proceedings in execution of his decree and applied for a temporary alienation of the land of the judgment-debtor and the executing Court granted the application and referred the matter to the Collector for suggesting the period for which temporary alienation could be effected, and before the Collector made his proposal, another decree-holder took out proceedings in his own decree and applied under section 73, for "rateable distribution" in the temporary alienation, the proper course for the Court is to refer that application also to

the Collector and to ask him to suggest a method of temporary alienation which will provide as far as possible for the satisfaction of both the decrees. An order sanctioning a temporary alienation of the judgment-debtor's land in favour of the former decree-holder alone in full satisfaction of his decree is erroneous and cannot be sustained. 169 I.C. 511.

**SEC. 73: [See also NOTES UNDER S. 63.] SCOPE AND APPLICABILITY OF SECTION.**—Conditions as to the applicability of the section, and right to rateable distribution. See 30 I. C. 49=21 C.L.J. 624; 19 I.C. 226=19 C. W.N. 535; 42 M.L.J. 473; 48 M.L.J. 459; 42 I.C. 897=1917 M.W.N. 859; 1929 R. 198. Per *Iqbal Ahmad, J.*—The object underlying the enactment of section 73, C.P. Code, was to prevent multiplicity of execution proceedings while at the same time ensuring equitable distribution of assets between various decree-holders who had the right to have their decrees satisfied out of those assets. A.I.R. 1941 All. 110 (F.B.). Per *Iqbal Ahmad, J.*—Section 73 enacts a mere rule of procedure and not a rule of substantive law. It merely enacts a rule by which decree-holders, in specified cases, can resort to a cheap and speedy procedure for the realization of their decrees. It does not, however, clothe a decree-holder with a right which he does not possess. It does not enlarge the rights given to a decree-holder by his decree, nor does it cut down the rights to which a decree-holder may be entitled by the decree in his favour. Hence section 73 cannot be invoked to entitle a decree-holder to satisfy his decree from assets which he could not touch if section 73 was not on the statute book. Conversely the provisions of section 73 cannot be utilized to deprive a decree-holder from satisfying his decree from assets which he would have been otherwise entitled to follow in execution. A.I.R. 1941 All. 110 (F.B.). Court has power to order rateable distribution in suitable cases even apart from section 73. 1936 C. 390. Section 146 cannot enlarge the scope of section 73 as it is expressly made subject to the other provisions of the Code. 159 I.C. 575=40 C.W.N. 26=1935 C. 738. The amendment of S. 60 by S. 3 of Act IX of 1937 does not affect the provisions of section 73. Thus a decree-holder has still a right under section 73 to come in for a share in the rateable distri-



## NOTES.

bution of salary attached under a decree, though his suit in which the decree is obtained may have been brought after June, 1937. 176 I.C. 682=A.I.R. 1938 Sind 144. See also 1939 A.M.L.J. 157. Section 73 is to be read together with section 63. Where the property of a judgment-debtor has been attached by two Courts of the same grade but the property has been sold by one of them, the proceeds so received shall be deemed to have been received by it on behalf of all the Courts in which there have been attachments in execution of the decrees, prior to the actual receipt of the assets, and the decree-holders in all such Courts are entitled to rateable distribution under section 73. In such cases no application for execution is necessary to be made to the Court which held the assets, before the receipt of the assets. A.I.R. 1938 Lah. 754. See the cases cited on the point under section 63. Section 73 has been so worded as to include cases in which it is possible that the purchase-money may not be actually deposited. 1933 A.L.J. 1102=1933 A. 666. Section 73 is applicable not only where sale is made by the Court, but also to cases in which execution of a decree is transferred to the Collector and sale is made by him, whether the Collector receives the purchase-money in cash or the decree-holder is declared to be the purchaser and the purchase-money is to be set-off against the decretal amount. 1933 A.L.J. 1102=1933 A. 666. O. 21, R. 48 does not override section 73. See 43 C.W.N. 169=1939 Cal. 485. Where an execution sale held by the Collector was set aside and the purchasers having obtained order for refund of their purchase-money applied for rateable distribution of the assets realised by the sale of property in execution of a decree against the decree-holder: *Heid*, that section 73 did not apply as the applicants had not made applications to the Civil Courts in execution. 151 I.C. 1027=1934 N. 243. The legislature added the word "passed" in the new section in order to make it clear that the words "against the same judgment-debtor" had reference to the decrees themselves, and not to the various applications for execution contemplated by the section. A.I.R. 1941 All. 110 (F.B.). S. 73 does not take into account at all whether payment orders have been passed for the different decree-holders who have decrees against the same judgment-debtor. All that the section considers necessary are that assets should be held by a Court and that more persons than one have made applications to the Court for the execution of decrees. The mere fact that the Court has passed a payment order in favour of one of the decree-holders is no consideration which should bar the right of rival decree-holders to rateable distribution. The principle of S. 73 is that as long as the assets are still held by a Court there should be

rateable distribution. 151 I.C. 266=1934 A. 652. Where the assets are not liable to be rateably distributed, S. 73 (2) has no application. 42 M.L.J. 473. See also 1933 P. 277. A decree against the judgment-debtor for assets of his father gives no priority over the decrees against him personally. 42 I.C. 897=1917 M.W.N. 859. See also 60 C. 923, *infra*. Scope of the section has been purposely broadened under the new Code of 1908. 70 I.C. 541=35 C.L.J. 327. Execution application praying for a relief which the Court could not grant is no ground for rejecting decree-holder's application for rateable distribution. 49 M.L.J. 753=1926 M. 179=91 I.C. 11. An order under this section affects only interests existing at the time. The insolvency of the debtor introduces a new state of things from the date of the insolvency. 27 C. 351. A judgment-creditor has no priority over the Official Assignee in respect of property attached by him previous to the vesting order. 29 C. 428. Applicability to a Solicitor's claim for costs. 29 Bom.L.R. 1196=1927 B. 542=51 B. 855. The section applies to cases where a District Court transfers execution proceedings in a Small Cause Court to the Court of a Sub-Judge. 18 B. 61. See also 15 M. 345. The section applies to cases where property has been attached in execution of a decree of a Presidency Small Cause Court, and the same property has been attached in execution by the High Court. 20 B. 377. See also 1938 Sind 175. Where sale proceeds are held by the Sub-Judge, First class, the Senior Sub-Judge is competent, without intervention of the District Judge, to call for the sale proceeds to his Court to be rateably distributed amongst decree-holders qualified under S. 73. A.I.R. 1938 Lah. 801. Nature of proceedings under the section is one of non-judicial character, and the Court cannot enquire into the validity or otherwise of the decrees under which payments are claimed. 19 N.L.R. 172=1924 N. 39; 6 R. 582. Under S. 73, all the judgment-debtors need not be indentical, and if one or more of the judgment-debtors be the same, rateable distribution can be got as regards their share of the property. 156 I.C. 631=41 L.W. 490=1935 M. 399; 4 Pat.L.T. 373=74 I.C. 626; 5 R. 757. See also 9 C. 920; 30 C. 583. But the holders of decrees against one of the brothers in a joint family are not entitled to rateable distribution from out of the sale proceeds of the property pertaining to the share of another brother realised in execution of decrees against both the brothers. 54 M.L.J. 278=1928 M. 362. A decree was obtained by one against party R whilst the decree obtained by the other party was against the sons of R. *Held*, that the two decrees were not passed against the same judgment-debtor. 159 I.C. 575=40 C. W.N. 26=1935 C. 738; 25 B. 494; 33 M. 465; 1930 C. 454, Foll. The words "same judgment-debtor" in S. 73, must be cons-



## NOTES.

trued liberally. A strict literal construction cannot be adopted in the sense that the decree must be against the same person '*eo nomine*.' A decree passed against a deceased person during his lifetime and sought to be executed against his legal representatives and a decree passed against the legal representatives of the deceased after his death, in respect of a claim against the deceased, are both decrees against the "same judgment-debtor" for the purposes of S. 73. 59 M. 93=69 M.L.J. 711 (F.B.). A literal interpretation should not be given to the word "judgment-debtor" in S. 73. Where therefore a person is sued as family manager it must be taken that he represents all the members of the family (even if consisting of father and sons) and they are constructively parties to the suit and hence must be deemed to be judgment-debtors for the purpose of the suit. 160 I.C. 559=43 L.W. 624=1936 M. 123; following 59 M. 93. For rateable distribution it makes no difference in law that the parties are two in one case and three in the other so long as the same share of the two parties, who are common in both decrees, is sought to be attached. Hence where there is a decree by a decree-holder against three persons and another decree-holder obtains a decree against two of them and a sale is held in execution of his decree, former decree-holder is entitled to rateable distribution in the sale proceeds. A.I.R. 1938 Lah. 801. See also 18 Lah. 637=1937 Lah. 937 (decree against a firm and decree against a partner in his individual capacity). 1937 M.W.N. 465; 1938 Cal. 316; 39 Bom.L.R. 815=1937 Bom. 461 (decree against a person in his lifetime and decree against his legal representative after his death) see also 1938 Cal. 316=42 C.W.N. 310; 1940 Rang.L.R. 492=1940 Rang. 243; 1939 All. 545. The expression "the same judgment-debtor" in S. 73, C.P. Code, denotes identity, not only of individuality but of character or interest. Decrees against the same person cannot always be regarded as decrees against the same judgment-debtor for the purposes of S. 73. A decree against a person individually and a decree against that person as representative of a deceased person cannot be held to be decrees against the same judgment-debtor within the meaning of S. 73, so as to entitle the holders of the two decrees to rateable distribution. 43 Bom.L.R. 699. Per *Iqbal Ahmad and Verma, JJ.*—The expression "passed against the same judgment-debtor" must be liberally construed. The object of S. 73 being to provide for rateable distribution of assets upon which two or more decree-holders have equal claims, the words "passed against the same judgment-debtor" must be interpreted as referring more to the property which a judgment-debtor represents "than to the person against whom execution has been sought." Per *Bajpai, J.*—The personality, the

character and the capacity of the judgment-debtor should not be ignored and undue preference should not be given to the property from which the assets are realized. The decree holders must have obtained their decrees against the same persons and it may become a matter of no importance that by reason of the death of the judgment-debtor in one decree the property that can be seized in execution in both the decrees happens to be the same. If the two decrees were not against the same persons, S. 73 would not be applicable. A.I.R. 1941 All. 110 (F.B.). A decree obtained against a Hindu father and a decree against the father and his sons are decrees against the same judgment-debtor for purposes of S. 73. 44 L.W. 615=1936 M. 948=71 M.L.J. 541. See also 41 L.W. 490=1935 M. 399, where the question was raised but not decided. But see (1937) 1 M.L.J. 180=1937 Mad. 253, 45 L.W. 501=1937 Mad. 504; 52 L.W. 191=1940 Mad. 826=1940 2 M.L.J. 23; 1939 All. 545. The expression, "the same judgment-debtor" in S. 73, must be construed strictly. A decree against a father and son, members of a Hindu joint family, and a decree against the father alone as manager of the joint Hindu family cannot be regarded as decrees against the same judgment-debtor within the meaning of S. 73. 43 Bom.L.R. 695. A decree against a Hindu father and a decree against the father and his son, are decrees, against the same judgment-debtor for purposes of section 73. If the son's interest in the family property is sold in execution of the decree against the father and son, the holder of the decree against the father alone is entitled to rateable distribution under section 73. 51 L.W. 357=1940 Mad. 525=(1940) 1 M.L.J. 553. Where a creditor has obtained a decree against a Hindu coparcener and attached his undivided interest in the joint family property during his lifetime, and the undivided interest is sold in execution after the death of the coparcener-judgment-debtor, other creditors who have obtained decrees against the same coparcener but have not obtained attachment of the undivided interest during his life time cannot claim rateable distribution under section 73, from out of the sale proceeds. The assets realised by the sale are liable to rateable distribution only among such creditors as have attached the coparcener's share during his life time in execution of their decrees against him. I.L.R. (1940) Bom. 146=42 Bom.L.R. 218=A.I.R. 1940 Bom. 190. If a decree is obtained against a man as heir of a deceased person and another decree is obtained against him in his personal capacity, the two decrees are against the same judgment-debtor within the meaning of section 73. Consequently, if one of the two decree-holders takes out execution and assets are realised, the other is entitled to rateable distribution. 63 C. 923=40 C.W.N. 570=1936 C. 210. See also 1937



## NOTES.

M.W.N. 465. Claims under this section are claims enforceable by attachment, against which assignments made under section 64 are void. 7 C. 34. Section does not apply to deposits by judgment-debtor for a particular decree. 81 I.C. 7=1925 N. 157. Set-off claimed under O. 21, R. 72 is subject to rights of persons who are entitled to rateable distribution. If no such person is in existence on the date of sale or fifteen days thereafter set-off takes effect. 1931 M. 103=130 I.C. 458=1930 M.W.N. 568. But see 1925 O. 287. In the pendency of an application under this section, set-off under O. 21, R. 72 cannot be ordered. 52 C.L.J. 19. Proviso to section 73 (1) (b) applies also when the decree-holder and mortgagee are the same provided the decree debt and mortgage debt are distinct. Where they are the same, proviso does not apply. Money-decree passed in mortgage suit—Title to mortgaged property held to be in third person—Mortgagor subsequently acquiring title. Decree-holder first applied for execution of money decree and later for sale of the properties. *Held*, section 73 (1) (b) not applicable—Remedy against property is by suit. 53 M. 670=122 I.C. 366=1930 M. 138. Judgment-debtor's property attached and placed in charge of Superatdar—Failure to produce property—Warrant issued—Payment made to avoid attachment. *Held*, the amount was liable for rateable distribution among the other creditors. *Held also*, that the amount realized from the Superatdar was, in the eye of the law, the sale proceeds of the judgment-debtor's property which was admittedly attached in execution of the decree against him. Simply because the Superatdar failed to restore the property which was entrusted to him, the nature of the execution case was not changed; for all practical purposes the Superatdar represented the judgment-debtor. 148 I.C. 944=1934 N. 62.

JURISDICTION.—Under section 73, a Court acts in an administrative capacity. It cannot therefore inquire into the validity of a decree; any order to that purpose is entirely without jurisdiction. 152 I.C. 482=1934 P. 545. An application for rateable distribution can be entertained by the original Court even when the petition for execution is transferred from that Court under O. 21, R. 6. 35 P.L.R. 305=1934 L. 113 (1). A custody Court has no authority to make any rateable distribution unless it be the attaching Court as well. Under O. 21, R. 52 it can only determine the question of priority and thereafter act under the instructions of the attaching Court. 146 I.C. 791 (1)=37 C.W.N. 820=1933 C. 814. In a case where a decree shows on the face of it that the judgment-debtor is an "agriculturist" or it may be, if the decree shows on the face of it that it is time barred, the executing Court can refuse to allow rateable distribution. 39 Bom.L. R. 1212.

RATEABLE DISTRIBUTION—FORMAL APPLICATION, IF NECESSARY.—Per *Sulaiman, C.J.*—Section 73 does not make it necessary for a decree-holder to make any formal application for a rateable share in the assets. All that is necessary is that he should have made an application to that Court for the execution of his decree for payment of money. 4 A. W.R. 1236=1934 A. 1057. See also 1937 M.W.N. 480. All that section 73 requires is that an applicant for rateable distribution must have applied, before the receipt of assets by the Court, for execution of his decree. A transferee of a decree for money is entitled to claim and get rateable distribution if he applies for execution before the receipt of assets even though the transfer in his decree is not recognised by the Court before such receipt. The section says nothing about the recognition of the transfer by the Court in the case of an application for execution by the transferee. 1941 M.W.N. 699=(1941) 2 M.L.J. 219.

WHO CAN APPLY.—See 20 S.L.R. 111. Only *bona fide* decree-holders can apply for rateable distribution, and a Court is bound to ascertain this fact. 11 C. at p. 44. See also 13 B. 154. Application for rateable distribution is not an application for execution. 64 I.C. 53=17 N. L. R. 143. Application for execution is necessary to entitle decree-holder to rateable distribution. Mere petition for rateable distribution is not enough. 87 I.C. 1025=1925 N. 382. The application must be to the Court holding the assets. It is not necessary to have the decree transferred for execution to the Court holding the assets. 132 I.C. 832=1931 R. 111 (2) (5 R. 757 held overruled by 6 R. 131.) Attachment, not sufficient. 90 I. C. 527=1926 C. 249. But see 1936 C. 390 holding that the Court has power to allow rateable distribution apart from section 73 in such cases. A person by simply obtaining an order for attachment before judgment is not entitled to rateable distribution. 30 I.C. 38=28 C.L.J. 614; 12 B. 400. Section 73 only permits "application to the Court for the execution of decrees for the payment of money" and not by persons who have obtained orders for payment of money which are capable of being executed. The definition of decree in section 2 (2) does not include an order which is defined in section 2 (14). Therefore a person holding an order for refund of purchase money is not entitled to put in his application for rateable distribution, even though the order in his favour is capable of execution as a decree under section 36, C.P. Code. 17 N.L.J. 146. The holder of a decree for unascertained mesne profits, who has applied to the Court to ascertain the amount thereof comes within the purview of this section. 5 M. 123. On this point, see also 40 L.W. 291=151 I.C. 609=1934 M. 604=67 M.L.J. 303; 23 A. 106; 4 B. 429. Where money due to a judgment-debtor is attached in the hands of this debtor



## NOTES.

and paid by him into Court, a rival decree-holder attaching it in Court is entitled to rateable distribution. 5 M.L.J. 151. *See also* 5 L.L.J. 279=1924 L. 132. (Sale postponed to enable judgment-debtor to raise money by private alienation). A mortgagee decree-holder who will be entitled to realize the balance by personal decree can apply for rateable distribution under this section. 152 I.C. 770=38 C.W.N. 850=1934 C. 764.

WHEN SHOULD APPLICATION BE MADE "BEFORE THE RECEIPT OF SUCH ASSETS."—As to cases bearing on this point, *see* 13 C. 225; 21 C. at p. 817; 6 B. 588; 28 M. 380; 6 Bom. L. R. 376; 87 I.C. 783=1925 C. 966; 37 L.W. 366=65 M.L.J. 347. (44 M. 100, Ref.), "Receipt" means receipt of the whole of the assets realised by one order for sale. 95 I.C. 205=1926 N. 380. The bringing in of the purchase-money realised by execution sale does not constitute "realisation" or "receipt" within section 73 and in cases where the decree-holder purchaser is allowed to set-off the purchase-money towards his decree amount, the assets are realised within the meaning of section 73 on the date of the sale itself and not on the last day of the period of 15 days allowed to a purchaser to deposit the amounts. 159 I.C. 228=42 L.W. 564=1935 M. 893. *See also* 1937 C. 55. For purposes of rateable distribution of assets under section 73, C.P. Code, in cases of execution by the Collector, the assets must be deemed to have been received by the Court on the date when they were received by the Collector. 1937 N. 16. Before rateable distribution can be ordered to an applicant it must be found as a fact whether the application was made before or after the deposit of sale proceeds. It is not enough if the application is made on the same day as when the sale proceeds are deposited into Court. It cannot be assumed from that that the application was made prior to the deposit. 1937 M.W.N. 239=45 L.W. 501=A. I. R. 1937 Mad. 50. Until the Court has received a decree it has no jurisdiction to entertain an application for execution. Where the decree was received by the executing Court the next day after the application for execution was filed, the application is not sustainable in law so as to be the basis of a claim for rateable distribution. 27 L.W. 423; 101 I.C. 908=1927 P. 252. Attachment by different Courts—Mode of distribution. *See* 29 Bom.L.R. 689; 37 Bom.L.R. 78; 1938 Lah. 801; 1938 A.W.R. (H.C.) 870. Assets held by inferior Court—Superior Court can call for them before they are paid out by the inferior Court—The call made after payment—Inferior Court cannot rectify error *ex debito justitiæ*. 123 I.C. 193 (M.). *See also* 1938 Sind 175; 1938 Lah. 801; 1934 A. L. J. 4=1939 All. 159. As to rateable distribution where attachments are made by a superior Court and inferior Court and the property is

sold by either Court, *see* the cases cited under section 63. To determine the question of priority the material point of time is not the date of sale of the mortgaged property but the date of receipt of assets by the Court. 62 I.C. 167=33 C.L.J. 7. *See also* 44 C. 1072; 1932 B. 622. The creditors are not entitled to preferential treatment by reason of priority of attachment. The Court will apply the rules of justice, equity and good conscience in the determination of the relative claims of the creditors. 44 C. 1072; 65 M.L.J. 347=144 I.C. 252=37 L.W. 366. Where assets held by a Court of inferior grade is transferred to a superior Court, rateable distribution is to be made as on the date of receipt of assets by the superior Court. 29 Bom.L.R. 319=101 I.C. 411=1927 B. 247. Where a property was sold in execution by a Collector, during Civil Court vacation, an application by another decree-holder made on the reopening day of the Court cannot be deemed to have been made before the realization of the assets in the vacation, section 10, General Clauses Act, being not applicable to the case. 1937 N. 16. As to effect of private sale to one of the decree-holders, *see* 1933 N. 349.

NATURE OF APPLICATION MADE—"APPLICATION FOR EXECUTION."—A decree-holder who has obtained attachment before judgment is not entitled to rateable distribution in case he has not applied under O. 21, r. 10 to execute his decree. 33 C. 639; 12 B. 400; 30 I.C. 38=28 C.L.J. 614. *See also* 159 I.C. 228=42 L.W. 564=1935 M. 893; 1938 Rang.L.R. 565; 1940 Rang.L.R. 421. Fresh attachment is not necessary when attachment already exists. 53 A. 125=1931 A. 92. An order under section 73, is a judicial and not an administrative order. 15 Luck. 332=1940 O. W.N. 132=A.I.R. 1940 Oudh 237. Under section 73, the Court can only divide the assets among such persons as may have made application to the Court for the execution of decrees. So where a creditor merely gets an attachment before judgment, he is not entitled to claim rateable distribution of assets realised in execution before he took out execution proceedings. 52 L.W. 807=1940 M.W.N. 1151=(1940) 2 M.L.J. 844=1941 Mad. 125. *See also* 1938 Rang.L.R. 565. The word 'application' in section 73 cannot be unqualified. It must mean an application made in accordance with law, not barred by limitation, not yet satisfied, and capable of being satisfied and it must also mean an application still subsisting and pending, and not already disposed of, whether on the merits or by default. 13 R. 514=158 I.C. 515=1935 R. 135. An application for execution of a decree presented before the sale-proceeds are deposited in Court will entitle the applicant to rateable distribution under section 73, C. P. Code, though the application, being defective, is returned, and re-presented only after the deposit of sale-proceeds, because on re-presentation, it must be deemed to be a valid presentation on the date of the original presentation. 1936 M. 91=59 M. 303=69



## NOTES.

M.L.J. 908. But see 1929 N. 148=25 N.L.R. 94. The application for execution must be on the file and undisposed of, when the assets are received. 4 M. 383; 1937 N. 16. The date on which the application is required to be pending is the date on which the assets are received. The fact that an execution application filed before the receipt of the assets is dismissed for default later, i.e., before the rateable distribution is actually effected is immaterial. 17 Pat.L.T. 855=1937 P. 92. Merely because a Court after dismissing the application, orders the attachment to continue, it cannot be said that the application is pending, for purpose of claiming rateable distribution. 1936 N. 277. Where in pursuance of an execution application the judgment-debtor is arrested and brought to Court, but is released at his request for the grant of time to pay off the decree amount on furnishing security, a formal order dismissing the execution petition cannot be taken to be a judicial order legally or validly disposing of the execution application, but has to be regarded only as an order for administrative or statistical purposes. The execution application must therefore be deemed to be still pending for purposes of section 73, in spite of the grant of time to the judgment-debtor and in spite of the dismissal order. The decree-holder would therefore be entitled to claim rateable distribution on the basis of that application in the case of a sale and realisation of assets at the instance of another decree-holder brought about subsequent to the dismissal. 43 L.W. 703=1936 M. 437=70 M.L.J. 683. Application for attachment of fund in Court though defective in form by not conforming to O. 21, r. 11 is sufficient for entitling creditor to rateable distribution. 52 M. 760=57 M.L.J. 97=1929 M. 703 (F.B.). An informal letter asking the Judge to pay the money, sent by a Collector in respect of a decree for the Government is not an execution application. 8 R. 294. Necessity for execution application. See 95 I.C. 151=1926 L. 538; 90 I.C. 527=1926 C. 249; 20 S.L.R. 111=1926 S. 177. Execution application praying for relief which Court could not grant, if disentitles applicant to rateable distribution. 49 M.L.J. 753=91 I.C. 11=1926 M. 179. Where a decree-holder who has obtained a decree against the same judgment-debtor and attached the same property in a Court of lower grade has the execution proceedings transferred to the Court of superior grade in which the assets are realised, he is entitled to a rateable share in the assets realised by the latter Court without a fresh application for execution or even for grant of a rateable share. 163 I.C. 59=38 P.L.R. 281=1936 L. 519.

"DECREES FOR PAYMENT OF MONEY".—A decree does not lose the character of being a money decree against one judgment-debtor because, under it, a sale of the property of the other judgment-debtor is also decreed. 10 A. 35 at p. 38. It is essential that the decree should have been obtained against

the same judgment-debtor. 42 C. 1; 25 B. 494; 47 I.C. 296; 27 C.L.J. 100; 14 C.L.J. 50. It is not necessary that all the judgment-debtors in the several decrees should be identical. 4 P.L.J. 373; 9 C. 920; 30 C. 583; 22 M. 241. A person who holds a decree against a Hindu father, and a person who holds a decree against the father and son holds a decree against the same judgment-debtor in case the property is the ancestral property of the family. 26 M. 179 (181). See also 29 B. 528. Clause (a) and the second proviso have reference only to sales in execution of simple money decrees, and to the mode in which sale proceeds are to be rateably distributed among simple money-decree-holders. 5 A. at p. 568. Neither this section nor O. 34, r. 13 is applicable to a case where the question is whether the surplus amount can be paid to a subsequent encumbrancer. 25 A.L.J. 190=1927 A. 467=49 A. 636. See also 1938 Sind 157 (Right to rateable distribution of person holding award of Registrar under Co-operative Societies Act). An order passed under section 186 of the Companies Act cannot be deemed to be a decree within the meaning of that word in section 73. Any person in whose favour such an order has been passed, cannot claim rateable distribution. 15 Luck. 332=1940 O.W.N. 132=A.I.R. 1940 Oudh 237. A holder of a decree is entitled under section 73, to claim rateable distribution against the official Liquidator as the holder of a payment order under section 186 of the Companies Act. Section 199 of the Companies Act puts the payment order on the same footing as a decree so far as the execution goes and rateable distribution under section 73 is clearly a method of enforcement of a decree or of an order in the nature of a decree. 43 P.L.R. 310. A composite mortgage decree, i.e., a decree for sale containing a direction that if the sale proceeds are insufficient to satisfy the decretal amount the decree-holder will be entitled to realise the balance by personal decree, is a "decree for the payment of money" within the meaning of section 73 of C. P. Code, and the holder of such a decree is entitled to claim rateable distribution, when it is found that the mortgaged properties had been sold and exhausted and found insufficient to satisfy the decree. 152 I.C. 770=38 C.W.N. 850=1934 C. 764. The words "an encumbrance" cannot be read as "an incumbrance or incumbrances". 12 A. 546. See also 7 A. 378. When in execution of a mortgage decree a sale proceeds in lots, the sale need not be stopped as soon as the sum due under the decree is realized, if several other decree-holders have applied for rateable distribution. 17 M.L.J. 80. The right to claim a refund of assets arises only after such assets have been actually paid to a person not entitled to receive the same. A suit for a declaration that another decree-holder is not entitled to rateable distribution is not maintainable. 7 M.L.J. 277; 3 C.L.J. 385. See also 15 B. 438. The words "assets liable to be rateably distributed" mean assets reduced



## NOTES.

to a form in which they are available for immediate application towards the satisfaction of the decree which is being executed. 16 B. at p. 98. A debt due by a third party to the judgment-debtor, when paid into Court, is available for distribution. 19 M. 72. Rents of property under attachment, which have been realized by a Receiver appointed at the instance of one decree-holder, are available for distribution. 26 C. 772. But rent taken in lieu of interest, by a mortgagee, does not fall within the scope of the section. 9 M. 57. The 25 per cent. deposited by the purchaser at the date of sale would not be available for distribution until the balance is paid. 18 C. 242. The fact that under certain circumstances it is possible for the Court to set aside the sale and to return the purchase-money to the purchaser, does not render the purchase-money not available for distribution. 16 B. 16. When property has been ordered to be sold in several lots, and only some of the lots have been sold, the sale proceeds of those lots alone, are available for distribution before the remaining lots are sold. 26 M. 179.

**NOTICE.**—Notice of an application for rateable distribution need not be given to the other decree-holders. 27 A. 132.

**PRESUMPTION.**—Where payment of assets into Court and application for rateable distribution are made on the same day, there is no presumption as to the order of events and the officer distributing the assets should ascertain which act was prior in time. 47 I.C. 296=1918 M.W.N. 520.

**ASSETS.**—This term means all a man's property of whatever kind which may be used to satisfy debts or demands against him. 16 B. at p. 98; 16 I.C. 640=14 Bom.L.R. 633; 26 C.W.N. 169=70 I.C. 539=1922 C. 19. Section 73, does not apply to monies paid into Court in a suit when no question of execution arises. The expression "assets held by a Court" in the section means assets received in execution; and when the assets have been paid in for a specific purpose, they cannot be applied generally in execution so as to defeat the specific purpose. I.L.R. 1939 Bom. 133=41 Bom.L.R. 176=1939 Bom. 112. The expression "assets held by the Court" in section 73, obviously implies the idea of assets realised or converted into cash, for, unless the property has been converted into some form which renders it available for immediate distribution, the Court cannot be said to have received or held such assets. A cheque may, in certain circumstances, amount to an asset within the meaning of the section. Where the money representing the sale proceeds of the attached goods of the judgment-debtor is lying in the Treasury to the credit of the District Judge, a cheque drawn on the treasury by the District Judge for payment to the attaching decree-holder and delivered over to the executing Court and accepted by it will amount to an asset, when the only form of payment which the decree-holder desires is that the cheque should be endorsed over to him. After the receipt of such a cheque, the Court can-

not entertain an application for rateable distribution by any other decree-holder. 45 C.W.N. 674. *See also* 1937 Pat. 651. It also means proceeds of execution sale. 26 M. at p. 181. Assets must be realized in execution under process of Court or in one of the modes prescribed by the Code. 13 I.C. 907=15 A.L.J. 49; 36 B. 156. But *see also* 70 I.C. 541=35 C.L.J. 327; 14 L.W. 582=70 I.C. 20=1921 M.W.N. 817; 1937 N. 80. It has however been held that the language of the section is wide enough to cover cases where moneys are in the hands of the Courts by whatever process the same has been realised. 41 M. 616=35 M.L.J. 150. But *see also* 30 C. 262. Even though the Collector to whom the decree is transferred for further execution, by a Civil Court, is not a Court, still in view of the duties of the Collector in this matter, though he is not an agent of such Court, the moneys received by him in execution of such decree are moneys received by him for and on behalf of such Court. The moneys so received, while they are in his hands, are "assets" held by such Civil Court. 173 I.C. 98=A.I.R. 1938 Nag. 14. A decree-holder who has attached a property can follow the money realised by sale of it for arrears of revenue over and above the arrears due and is entitled to rateable distribution along with another decree-holder who has attached such money. 1937 N. 80=I.L.R. (1937) Nag. 219. All money paid by a judgment-debtor into Court under stress of execution before sale, whether to avoid attachment or whether made at an earlier later stage, should be treated as assets held by the Court liable to rateable distribution under section 73. Money paid into Court under O. 21, r. 89 ought not to be exempted from this category. 12 P. 772=14 Pat.L.T. 357=1933 P. 303. *See also* 42 C.W.N. 840=1938 Cal. 521. Even where the attaching Court and the custody Court are the same, the assets would not reach the attaching Court under section 73 until it has been actually ordered to be credited to the decree in question. (44 M. 100, Ref.) 144 I.C. 252=37 L.W. 366=1933 M. 342 (2)=65 M.L.J. 347. Any money belonging to a person other than the judgment-debtor or any money paid into Court by a third party under a misapprehension cannot be described as 'assets' under section 73. A fund or sum of money cannot be regarded as "assets" unless it is in some sense the property of the judgment-debtor and can be legitimately applied to the payment of his debt. 13 P. 446=1934 P. 685. Where a judgment-debtor pays an amount into Court for a specific purpose, *e.g.*, for payment to a particular decree-holder for the purpose of postponing an execution sale, that cannot be regarded as assets held by the Court liable to rateable distribution under section 73. 41 Bom.L.R. 997=A.I.R. 1939 Bom. 468. *See also* 41 Bom.L.R. 176=1939 Bom. 112.

**Quære.**—Whether a payment under O. 21, r. 55, C. P. Code, can be regarded as "assets" held by the Court under section 73; 13 P. 446=1934 P. 685. *See also* 18 Pat. 404=



## NOTES.

20 Pat.L.T. 646=1939 Pat. 392. The following are assets liable to rateable distribution:—(1) Salary of Government servant when attached. 16 I.C. 640=14 Bom.L.R. 633. *See also* 43 C.W.N. 169=1939 Cal. 485; 1939 Bom. 112=41 Bom.L.R. 176; 1941 N.L.J. 331. (2) Money deposited by surety for release of an attachment before judgment. 26 C.W.N. 169=70 I.C. 539=1922 C. 19. Where there has been a realisation from the surety in respect of a decree, a different decree-holder as against same judgment-debtor, is not entitled to rateable distribution out of that realisation. 1940 Nag. 302=1939 N.L.J. 534. (3) Money paid to sheriff in execution of decree. 47 C. 515; 40 C. 619 or in garnishee proceedings. 1930 C. 623. *But see* 36 B. 156; 53 I.C. 599=21 Bom.L.R. 975. (4) Sale proceeds in the hands of decree-holder purchaser. 43 I.C. 715; 44 C. 789. (5) Sale proceeds of movables realised by Nazir. 45 I.C. 108=33 P.R. 1918. (6) Money paid into Court under a prohibitory order. 42 I.C. 436=167 P.W.R. 1917. (7) Money paid into Court by judgment-debtor, though no process is issued. 54 A. 516; 140 I.C. 293=1932 N. 156; 23 I.C. 241=1914 M.W.N. 309; 1930 S. 300=25 S.L.R. 178. (8) Money realized in execution of personal decree. 15 I.C. 406=1912 M.W.N. 407. (9) Rents realised by receiver. 52 I.C. 305=22 O.C. 194. (10) Deposit by a defaulting purchaser. 49 M. 570=97 I.C. 86. (11) Land acquisition compensation deposited in Court for apportionment. 49 M. 38=97 I.C. 496. (12) Moneys paid by judgment-debtor under O. 21, r. 43. 28 Bom. L.R. 237=93 I.C. 852 (2)=1926 B. 242; purchase-money due from a decree-holder in respect of which a set-off has been allowed for appropriation towards the decree amount. 133 I.C. 737=1931 B. 252=33 Bom.L.R. 503. The following are not assets liable to rateable distribution:—(1) Money paid privately by judgment-debtor to decree-holder. 13 I.C. 907=15 A.L.J. 49. (2) Money paid into Court under O. 21, r. 55. 36 B. 156; 53 I.C. 599. *But see contra* 17 C. 515; 18 Pat. 404=1939 Pat. 392. (3) Money paid to bailiff to avert levy of attachment of movables. 53 I.C. 599=21 B.L.R. 975 (36 B. 156, Foll.; 28 M. 380; 22 B. 264; 38 M. 221; 27 M. 346, Ref.). *But see contra* 47 C. 515; 40 C. 619. (4) Money paid by judgment-debtor on arrest to bailiff to get himself released. 39 I.C. 623=19 Bom.L.R. 274. (5) Amount deposited under O. 21, r. 89 to set aside sale. 14 C.L.J. 50=10 I.C. 527=15 C.W.N. 872; 42 I.C. 507; 1916 M.W.N. 195; 45 I.C. 782=7 L.W. 573; 30 C. 262. (6) Money not paid into Court. 3 P.W.R. 1920=54 I.C. 41=11 P.L.R. 1920. (7) Money paid as security under O. 41, r. 5. 36 P.L.R. 1916=29 I.C. 791. (8) Money paid for a specific purpose, as money paid to avoid arrest or arrest before judgment. 29 I.C. 714=8 Bur.L.T. 22; 61 I.C. 424=14 S.L.R. 164; 41 Bom.L.R. 997=1939 Bom. 468; 41 Bom.L.R. 176=1939 Bom. 112. (9) Money realized under attachment before judgment. 32 A. 578, i.e., such attachment confers no

special right or priority on the party who obtains the order. (*Ibid.*) *See also* 32 I.C. 944.

FUND IN COURT.—If a fund in Court has been attached by several creditors, none can claim preferential treatment owing to priority of attachment. 33 C.L.J. 7=62 I.C. 167. No book entry transferring the money to the credit of any execution, is necessary to treat the money as receipts for purpose of section. 156 I.C. 409=1935 P. 201. When a Court in execution of a decree attaches a fund in the Court the latter Court holds the fund subject to the direction of the execution Court and to transfer it to that Court. The fund as soon as it is transferred to the execution Court becomes "assets held by that Court" within section 73. All decree-holders who have applied are entitled to rateable distribution. 44 M. 100=39 M.L.J. 608 (F.B.). *See also* 42 M. 692; 42 M.L.J. 361; 31 I.C. 616=19 C.W.N. 345. Under section 73, it is the Court which holds the assets that can distribute them rateably. That Court is not bound to transfer the darkhast pending before it to another Court at its bidding. 41 Bom.L.R. 997=A.I.R. 1939 Bom. 468. Where the fund in Court was the surplus sale proceeds payable to the defendant mortgagor after sale under a mortgage decree, the fund was not available for rateable distribution and the attaching decree-holders were to be paid fully in the order of their attachment. 26 M.L.J. 364. *See also* 38 M. 221; 158 I.C. 201=1935 M. 713=69 M.L.J. 121. The proceeds of a sale held in pursuance of an attachment of a company before its liquidation, must be distributed in accordance with the provisions of C. P. Code. 43 C. 586. When certain property belonging to the judgment-debtor was in the hands of the Tahsildar, two creditors obtained decrees against him, one of them in Munsiff's Court and the other in a Sub-Court within the same district. The former obtained an order for attachment earlier in date than the latter but before the money could be received from the Tahsildar, the latter also applied for attachment. *Held*, that the property could not be deemed to be "assets held by a Court" on the date when the attachment order was issued by the Munsif to the Tahsildar or even when it was received by the Tahsildar, and that therefore the decree-holder in the Munsif's Court was not entitled to priority merely on the ground of his being the first attaching decree-holder. 144 I.C. 252=37 L.W. 366=1933 M. 342 (2)=65 M.L.J. 347. *See also* 1939 A. 159=I.L.R. (1939) A. 162. The position is made very clear by the addition of Proviso (ii) to r. 52 of O. 21 in Madras according to which the receipt by a Court which has attached first shall be deemed to be on behalf of all the Courts in which there have been attachments of the property prior to the receipt of such assets. (*Vide* amendment of rule by Madras High Court.) Where goods of a judgment-debtor attached by creditors remain in the possession of the Nazir in premises occupied by the judgment-debtor



## NOTES.

as lessee, and the lease is not terminated after the attachment, there is no privity between the Nazir and the landlord. But the landlord is entitled to claim the rent for the period during which the attached goods were kept in the premises as part of the costs of realization to be deducted from the sale proceeds before distribution to the creditors under section 73. 187 I.C. 55=1940 Sind 17.

**RIGHT TO RATEABLE DISTRIBUTION.**—Execution before Collector. 36 B. 519. Right to rateable distribution—Conditions to be satisfied. 46 M. 506=44 M.L.J. 413 (On appeal from 42 M.L.J. 350); *see also* 18 I.C. 55; 14 C.L.J. 50=15 C.W.N. 872. When there are two decree-holders of one judgment-debtor and the objection of the judgment-debtor that the property was non-transferable against one is disallowed and against the other it is allowed, the latter is entitled to rateable distribution of the sale proceeds on execution by the former. 30 I. C. 49=21 C.L.J. 624. Where there are several attachments before judgment and the moneys are realised before any of the plaintiffs obtains a decree, the money should be held to the credit of all the suits and distributed between all the attaching creditors who subsequently obtained decrees. 15 L. W. 531=68 I.C. 714=1922 M. 236. If more persons than one holding a decree against the same judgment-debtor attach one and the same decree obtained by the judgment-debtor against another before the money due under the attached decree is deposited in Court by the judgment-debtor of the attached decree, i.e., before the assets are paid into Court, the provisions of section 73, C. P. Code, are attracted, and the assets after the deduction of the costs of realisation are to be rateably distributed among the several decree-holders. The decree-holder who starts the first execution cannot claim the benefit of the entire amount deposited by reason of O. 21, r. 53 (2), which rule contemplates only cases where a decree for money is attached by a sole decree-holder. 40 C.W.N. 1249. If the order for rateable distribution is set aside on appeal, there is no power to order restitution under section 144. 42 M.L.J. 473.

**PERMISSION TO SET-OFF** granted to the other decree-holder would not affect the right to such distribution. 59 I.C. 80=12 L.W. 328. *See also* 1937 A.L.J. 1371=1938 All. 130; (1940) 2 M.L.J. 677 (P.C.). The right of the decree-holder to have, and the power of the Code to allow set-off of the purchase money against the decretal amount where the decree-holder himself is the auction purchaser is subject to the right of any other decree-holder who may be entitled to rateable distribution. 1933 A.L.J. 1102=1933 A. 666. *See also* 1935 M. 904; 1937 C. 55; 1937 All. 422; 1938 All. 130; 17 Pat. L.T. 847. Under O. 21, r. 72 leave to set off can be given before the sale has been held. Thus it can be given at the same time as the permission to bid is granted to the decree-holder. When a decree-holder has been

given permission to bid at an auction-sale and to set-off the amount of his bid, if successful, against the amount due to him under his decree and when the successful bid is less than the decree amount, the whole of the set-off must be deemed as made on the date of sale and the whole of the amount must be deemed to have been received or realised *eo instanti* the sale is made. In such a case, section 73 will give no benefit to other decree-holders who apply for rateable distribution after the conclusion of the sale, however soon after its conclusion their application may be made. 38 L.W. 579=1933 M. 804=65 M.L.J. 569; I.L.R. (1937) Nag. 466=1937 Nag. 383; 1940 Pesh. 36; 42 L.W. 564=159 I.C. 228=1935 M. 893; 1937 C. 55. But *see* 164 I.C. 568=1936 Pesh. 164 where the date of confirmation of sale was considered the date on which the assets were received. Whenever there is a pending application for execution, the applicant in which would be entitled to rateable distribution, there cannot be any receipt of assets or realisation of assets by the Court unless the decree-holder purchaser's rateable share (when the purchase is by him) is determined and the balance is deposited by him into Court. The rule under which, in an ordinary case, where no question of rateable distribution can arise and a set-off has been allowed to a decree-holder purchaser, the date of sale is to be regarded as the date of realisation of assets, cannot apply to a case where there is a valid claim to rateable distribution. There can be no set-off except subject to the right of rateable distribution and in such cases the assets cannot be deemed to have been realised by the Court till the amount has actually been deposited under orders of the Court. 43 L.W. 703=1936 M. 437=70 M.L.J. 683. **RIVAL DECREE-HOLDERS.**—Permission to one to bid and to set-off—Right of the other decree-holders to rateable distribution not affected. 59 I.C. 86=12 L. W. 328; 134 I.C. 616=1931 P. 405. Decree against two persons—Assets realised in execution—Right of holder of another decree against one of these persons alone to rateable distribution confined to assets of the common judgment-debtor. 28 Bom.L.R. 78=93 I.C. 222=1926 B. 150; 1938 Pesh. 63.

**RIVAL DECREE-HOLDERS.**—Application for rateable distribution whether maintainable after realization of assets by executing Court. 62 I.C. 857. The crucial date for determining the right for rateable distribution under section 73, C. P. Code, is the date on which the assets are received. On this date all the decree-holders whose applications were pending for execution in the Court and who had not received satisfaction became entitled to share the assets rateably. Their right to share having accrued to them, it could not be lost by the mere fact that their application was dismissed in default later on. 1940 N.L. J. 340=A.I.R. 1940 Nag. 302. *See also* 1941 A.M.L.J. 19. **Right of one decree-holder to impeach decree of rival decree-holder—**



Provided as follows :—

(a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale ;

(b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold ;

(c) where any immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

first, in defraying the expenses of the sale ;

secondly, in discharging the amount due under the decree ;

thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any) ; and

#### NOTES.

Fraud and collusion—Suit for declaration and injunction before distribution of assets. 43 M. 381=38 M.L.J. 108. Rival decree-holders—Assets held by Munsiff—Power to order rateable distribution—Small causes decree. 25 M.L.J. 601. Mortgage decrees which provide for recovery of the deficiency of the decree after sale of hypotheca from the person and other properties of the mortgagor are decrees “for the payment of money” within the meaning of section 73 and entitle the mortgagee to apply for rateable distribution. 39 M. 570=29 M.L.J. 96. See also 74 I.C. 140; 160 I.C. 892=1936 Pesh. 52. As between two attaching decree-holders one executing his own decree and the other executing the attached decree, the one who had applied for execution of the attached decree was entitled to rateable distribution since in effect he was executing his own decree. 1913 M.W.N. 1021=21 I.C. 611.

DISMISSAL OR WITHDRAWAL OF EXECUTION APPLICATION.—A decree-holder is not entitled to rateable distribution if the application for execution is dismissed or time-barred or the decree is satisfied. 30 I.C. 49=21 C.L.J. 624; 24 I.C. 83=18 C.W.N. 1311. Claims enforceable under the attachment cease to have effect on withdrawal of attachment. 66 I.C. 642=8 O.L.J. 358. The section only requires that application for execution should be made before the assets have been received and that the decree-holder at the time the assets are to be distributed has not obtained satisfaction. There is no warrant in the section for the view that the application should be pending. 143 I.C. 87=1933 Pesh. 52.

ENQUIRY INTO RIVAL CLAIMS.—Suit by one decree-holder for refund of moneys awarded to others before actual distribution does not lie. 46 I.C. 101=16 A.L.J. 530. See also 1940 Nag. 267. The inquiry by the Court under this section is non-judicial. A Court under this section cannot inquire into

the validity or *bona fides* of a decree on the strength of which rateable distribution is claimed. 62 C. 715=39 C.W.N. 490=1935 C. 290 (F.B.); 40 M. 431=32 M.L.J. 553. See also 5 P. 445=1926 P. 497. Under section 73, when rival decree-holders apply for rateable distribution of assets the Court can investigate whether any of the decree-holders is a *bona fide* decree-holder or is a benamidar for the judgment-debtor. 17 C.W.N. 326=16 C.L.J. 582=16 I.C. 795 (11 C. 42; 13 B. 154, Foll.). See also 23 M.L.J. 699. As to whether an executing Court can inquire into the validity of a decree under any circumstances, see 1934 P. 545=152 I.C. 482. Also 40 M. 341=32 M.L.J. 553; 104 I.C. 735=1927 M. 944.

FRAUD AND COLLUSION.—The Court will not grant rateable distribution if collusion or corrupt bargain is proved. A decree-holder can show that a decree obtained by another decree-holder was obtained by collusion with the judgment-debtor. 23 M. L.J. 699. See also 17 C.W.N. 326=16 C. L.J. 582=16 I.C. 795; 43 M. 381=38 M. L.J. 108. But see 1926 P. 497. An executing Court when rateably distributing the proceeds of a sale in execution, cannot go into the question whether the decree has been obtained by fraud. 46 B. 635 (Overruling 13 B. 154). See also 43 M. 381=38 M.L.J. 108.

SEC. 73 (1), PROVISOR (b).—There were three decrees against the same judgment-debtors, one, a simple money decree and the other, two decrees for sale based on mortgage. In the course of execution proceedings, the money decree-holder and one of the mortgage decree-holders agreed as follows:—“Sale proceedings be carried out in the execution case of money decree and in the remaining two executions, at the time when sale takes place, rateable distribution be made”. Held, that the reasonable interpretation to be placed upon the agreement was that when the sale took place in execu-



fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

### NOTES.

tion of the money decree, the mortgage decree-holder would be entitled to the same interest in the proceeds of the sale of the property mortgaged with him as he had in the property sold, in accordance with section 73 (1), proviso (b). 166 I.C. 714=1937 O.W.N. 127=1937 Oudh 270.

SEC. 73 (2).—Section 73 (2) applies only where the assets liable to be rateably distributed are paid to persons not entitled to receive the same. Where the sum in dispute is no part of the assets liable to rateable distribution the section has no application. 145 I.C. 362=14 Pat.L.T. 287=1933 P. 277. See also 42 M.L.J. 473. The terms of sub-section (2) to section 73 are wide enough to cover a case where the plaintiff claims that he is entitled to all the assets in the custody of the Court and that the defendant, who claims and obtains rateable distribution, is not entitled thereto. 184 I.C. 589=A.I.R. 1939 All. 545. Although R. 89 specifically mentions payment to the decree-holder, that is only an injunction to the judgment-debtor as to what amount he has to pay for the purpose of getting the sales set aside. The sale may be held at the instance of one of the execution creditors, but any amount received from the judgment-debtor in Court under pressure of the sale (e.g., under O. 21, R. 89) must enure for the benefit of all the execution creditors who have acquired a claim to rateable distribution under section 73. 1933 N. 347. A suit under section 73 (2) is in substance one in which the plaintiff claims to be placed in the same position in which he would have been placed had the Court which originally dealt with the application for rateable distribution not made a mistake, and it is governed by the principle that it is the duty of the Court "to take care that the act of the Court does no injury to any of the suitors." The Court has therefore power in such a suit to award interest even prior to suit. 1937 M.W.N. 465 (2). A suit to recover money wrongly paid to a defendant under section 73 is a suit for money paid to him for plaintiff's use and must be brought within three years from the date of payment and not within six years under Art. 120 of Limitation Act. 39 M. 62=27 M.L.J. 640 (37 M. 381, Foll.). See also 1937 M.W.N. 480. Application for rateable distribution—Death of applicant—Substitution of legal representatives—Application for rateable distribution by legal representatives

—Dismissal—Suit by legal representatives not maintainable. 30 C.W.N. 735=96 I.C. 378=1926 C. 967.

APPEAL.—No appeal lies against an order passed under this section. 14 A. 210; 5 P.L.J. 415=57 I.C. 421; 134 I.C. 195=1932 L. 96 (42 C. 1, Foll.); 162 I.C. 349=1936 A.L.J. 559=1936 A. 626. If an order is made under section 73 it is an order in execution proceedings and not a decree, being between two rival decree-holders and is therefore not appealable, the judgment-debtor being not concerned with the dispute. A.I.R. 1938 Lah. 801. See also 1938 Pesh. 63. An order refusing a prayer for rateable distribution is one under section 73 and not under section 47. Sub-section (2) of section 73 gives the aggrieved party a right to bring a regular suit. No appeal is allowed from such order. 176 I.C. 459=40 P.L.R. 49=A.I.R. 1938 Lah. 307. An order refusing to execute an order allowing an application for rateable distribution is appealable. 133 I.C. 166=1931 P. 359 (1 Pat.L.T. 296, Dist.). But an order determining a question of rateable distribution as between rival decree-holders in which the judgment-debtor has no interest is not appealable as it does not fall under section 47. 55 B. 473; 1940 Rang.L.R. 718; 1940 N.L.J. 215=1940 Nag. 267; 134 I.C. 195 (12 C. 1, Foll.). But see 133 I.C. 737=1931 B. 252=33 Bom. L. R. 503, where the question arises between the judgment-debtor on the one hand and the decree-holders on the other in which case the order would fall under section 47. An order of the execution Judge treating an execution application as *ultra vires* holding that the agent who filed it has no *locus standi* is appealable under section 47. 177 I.C. 872=A.I.R. 1938 Pesh. 63. See also 1935 L. 302 cited under section 47, *supra*.

REVISION.—Neither can the High Court revise the order. 4 M.L.J. 87. But see 4 M. 383. See also 5 P.L.J. 415=57 I.C. 421; except in very exceptional circumstances, see 60 I.C. 371; 48 L.W. 807= (1938) 2 M.L.J. 1001; 17 I.C. 254=176 P.L.R. 1912; 33 P.L.R. 975. Taking a wrong view of section 73 in an application for rateable distribution is not declining to exercise jurisdiction. Hence no revision is competent from the order. 156 I.C. 409=1935 P. 201 (2). An order under section 73 is not merely a ministerial order; it is a judicial order. But the order cannot be interfered with in revision as the party



(3) Nothing in this section affects any right of the Crown.

#### NOTES.

has another remedy by way of suit. 27 S. L.R. 190=1933 S. 329. Revision is not proper remedy, but a regular suit. See 25 I.C. 592=1914 M.W.N. 738; 1926 M.179; 1928 M. 362; 14 L. 243. Also 41 L.W. 490=1935 M. 399, cited under section 115. Where a decree-holder by attachment in execution of his decree brings into Court a sum of money, and another decree-holder who had already put in his execution application, seeks to obtain rateable distribution, a refusal to so rateably distribute the sum is a failure to exercise a jurisdiction, for the sum is an asset in the hands of the Court and the other requisite is also present, and hence should be set aside. 177 I.C. 269. See also 1934 M.W.N. 738. Where an insolvent after adjudication and before discharge presented an application for rateable distribution in execution of a decree obtained by him prior to the insolvency, on the question as to the maintainability of the application by him. Held, that the application was competent. (68 M.L.J. 392, Foll.) and that a revision lay to the High Court. 48 L.W. 807=1938 M.W.N. 1247=(1938) 2 M.L.J. 1001.

**RIGHT OF SUIT.**—Revision lies in the case of obvious mistake. 104 I.C. 735=1927 M. 944. A suit lies to recover money paid to a wrong person under a valid judgment or equitable distribution under section 73. 39 A. 322. A rival decree-holder need not wait for the distribution of the assets before bringing a suit for a declaration that the decree of one of the decree-holders was obtained by fraud and collusion and that he was not entitled to share in the rateable distribution. 43 M. 381=38 M.L.J. 108. When a decree-holder desires to execute his decree by attaching in execution a decree obtained by his judgment-debtor against another person, and that other person has a cross-decree against the holder of the attached decree, the provisions of O. 21, R. 18, come into play and a set-off has to be allowed. Section 73 does not come into play in such a case. 174 I.C. 53=1937 A.L.J. 1371=A.I.R. 1938 All. 130. Petition under section 115 is not the best way to settle questions coming under section 73 where money is paid to third parties after the application and they are not parties to the application. Regular suit is proper remedy. 25 I.C. 592=1914 M.W.N. 738. See also 65 I.C. 230; 106 I.C. 258=1927 M.W.N. 795; 104 I.C. 735=1927 M. 944. The omission by the person claiming rateable distribution to invite the attention of the Collector to his own right of rateable distribution does not deprive him of his right to claim rateable distribution in a regular suit. The fact that the decree which is noted to be satisfied will have to be reopened does not affect the question. 1933 A.L.J. 1102

=1933 A. 666. Unless it is ascertained, or definitely alleged on substantial grounds, that the assets realised—or to be realised in execution of decrees of rival decree-holders would be insufficient to discharge in full the claims of all the decree-holders under section 73. No decree-holder has a right to maintain a suit to have the decree of his rival declared void on the ground that it was fraudulently obtained and to ask the Court to grant an injunction restraining the defendant from executing his decree against the common judgment-debtor or his property. (43 M. 381, Dist.); 145 I.C. 206=1933 N. 214.

**PRACTICE AND PROCEDURE.**—In the case of decrees against several persons money realised from judgment-debtors who are common to both decrees is alone liable for distribution among the decree-holders; but section 73 does not permit rateable distribution of money paid by one judgment-debtor to a decree-holder who has no claim against him. 145 I.C. 362=14 Pat. L.T. 287=1933 P. 277. See also 1938 Sind 175. Where money due to the judgment-debtor is already under attachment by an order obtained by the decree-holder, there is no necessity for him to have it again attached when the application for execution and rateable distribution is transferred to another Court and the money is received by such Court. 147 I.C. 1071=11 O.W.N. 161=1934 O. 110. Rateable distribution can be allowed in favour of a decree-holder who has obtained a decree against the same judgment-debtor and attached the same property in a Court of lower grade although the decree is transferred to the Court in which the assets are realized and there is no application for execution of the decree in that Court. 55 A. 622=1933 A.L.J. 921=1933 A. 563. Decree against two sets of defendants—Satisfaction of decree—Subsequent decree-holder against one judgment-debtor—Adjustment of rights. 151 I.C. 170=1934 M. 426=66 M.L.J. 699.

**SEC. 73 (3): PRIORITY OF CROWN DEBTS.**—The enactment of section 73 (3) gives a statutory recognition to the doctrine of priority of Crown debts which has been laid down so long ago as (1866) 5 B.H.C.R. 23. See also 1937 Rang.L.R. 344=1937 Rang. 380; I.L.R. (1940) Lah. 124=42 P.L.R. 96=1939 Lah. 488 (Priority in respect of court-fees due to Crown in pauper suit). In the context, it can refer only to cases in which the Government is in the same position as any other decree-holder, and not to cases where it has a first charge, and its intention obviously is to say that in such circumstances the Secretary of State will not really be governed by the provisions of Cls. (1) and (2) but will be entitled to the benefit of the doctrine of priority. 59 M. 872=1936 M. 802=70 M.L.J. 601 (33 C.



## RESISTANCE TO EXECUTION.

74. Where the Court is satisfied that the holder of a decree for the possession of immovable property or that the purchaser of immovable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.

## PART III.

## INCIDENTAL PROCEEDINGS.

*Commissions.*

75. Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—

- (a) to examine any person ;
- (b) to make a local investigation ;
- (c) to examine or adjust accounts ; or
- (d) to make a partition.

76. (1) A commission for the examination of any person may be issued to any Court (not being a High Court) situate in a province other than the province in which the Court of issue is situate and having jurisdiction in the place in which the person to be examined resides.

(2) Every Court receiving a commission for the examination of any person under sub-section (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed, shall be returned

## NOTES.

1040 and 69 M.L.J. 832, Rel. on). *See also* 147 I.C. 863=1933 S. 368. Section 73 (3) does not confer any jurisdiction on the executing Court to entertain a claim on behalf of the Government in the absence of any decree in support of it. The sub-section only saves the rights of the Government, independent of the section, such as they might be, and merely appears to have reference to the right of priority which can be ordinarily claimed in respect of debts due to the Crown. 156 I.C. 826=1935 L. 319 (2).

SEC. 74.—A decree for partition is a decree for the possession of property. 16 M. 127. Possession is not limited to actual possession. 25 B. 478. Detention in civil prison can be ordered only at the instance of the decree-holder or purchaser and the Court cannot order it of its own motion. 26 M. 494. The "resistance" or "obstruction" is the resistance to or obstruction of the officer charged with the execution of the warrant. 14 A. 417 (419).

SEC. 75.—Order 26 does not in any way amplify the scope of section 75. 3 L. 209. Section 75 does not authorize a Court to delegate to a Commissioner the trial of any material issue which the Judge is bound to

try. 3 L. 209 (16 M. 350, Foll.). *See also* 89 I.C. 343=7 P.L.T. 161=1925 P. 576; 129 I.C. 416=1930 C. 764=53 C.L. J. 229. The judicial functions of a Court cannot be delegated to a Commissioner and the powers of Court to issue a commission is strictly defined in section 75. 15 C.L. J. 17=13 I.C. 440=17 C.W.N. 369. *See also* 30 Bom.L.R. 131; 31 Bom.L.R. 108. Section does not contemplate a succession of commissions all covering the same ground. Issue of commission to two persons to render proper account of improvements is irregular and of doubtful legality. 1929 M. 681. An appellate Court has power to issue a commission for a local investigation without recording its reasons. 135 I.C. 243=1932 A. 270. Purposes for which a Court could issue a commission are confined to those specified in the section. 139 I.C. 804=1932 A. 264. The issue of commission is a matter in the discretion of the Court; and if the discretion is wrongly exercised the question ought to be raised before the Court of first appeal. It cannot be agitated for the first time in second appeal. 1933 P. 542. *See also* 44 C.W.N. 304 (Power of Court to issue commission to ascertain value of specific movable properties sued for).



together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order.

Letter of request.

77. In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within British India.

78. <sup>1</sup>[Subject to such conditions and limitations as may be prescribed], the provisions as to the execution and return of commissions issued by <sup>1</sup>[or at the instance of]—

Commissions issued by foreign Courts. for the examination of witnesses shall apply to commissions issued by <sup>1</sup>[or at the instance of]—

(a) Courts situate beyond the limits of British India and established or continued by the authority of His Majesty or of <sup>2</sup>[the Central Government or of the Crown Representative], or

(b) Courts situate in any part of the British Empire other than British India, or

(c) Courts of any foreign country <sup>3</sup>[\* \* \* \* \*]

#### PART IV.

##### SUITS IN PARTICULAR CASES.

*Suits by or against* <sup>4</sup>[the Crown] or Public Officers in their official capacity.

<sup>4</sup>[79. Subject to the provisions of sections 179 and 185 of the Government of India Act, 1935, in a suit by or against the Crown the authority to be named as plaintiff or defendant, as the case may be, shall be—

(a) in the case of a suit by or against the Central Government, the Governor-General in Council before the establishment of the Federation of India, and thereafter, the Federation ;

(b) in the case of a suit by or against a Provincial Government, the Province; and

(c) in the case of a suit by or against the Crown Representative, the Secretary of State.]

#### LEG. REF.

<sup>1</sup> Inserted by S. 2, Act X of 1932.

<sup>2</sup> Substituted for the words "Governor-General in Council" by A.O., 1937.

<sup>3</sup> The words "for the time being in alliance with His Majesty" omitted by S. 2, Act X of 1932.

<sup>4</sup> Substituted by A.O., 1937 for "the Government."

<sup>5</sup> Substituted for the original section by A.O., 1937.

#### NOTES.

SEO. 79.—FORM OF SUIT against the "Secretary of State" must be under the designation "The Secretary of State for India in Council." I.C. 14; 40 I.A. 48 (51 and 52). For applicability to land acquisition proceedings, see 1929 L. 10. Suit lies when the Secretary of State acts under colour of legal title and not as a sovereign authority. When property comes to him under a decree of Court, it is not taken by an act of sovereignty but under colour of legal title. 5 P. 539=1926 P. 321. In all suits against Government, the Court should see that the defendant is properly described. 7 M. 478. The section gives no cause of action but only declares the mode of procedure when a cause of action has

arisen. 6 Bom.L.R. 131; 27 B. 189. The head of a Government department is not liable for wrongful acts of officials in that department unless it can be shown that the act complained of was substantially the act of the head of the department himself. 51 B. 749. The Government while filing a suit through the Secretary of State against a private person should not regard itself as standing in the same position as a private litigant. In the public interests, it should insist that its officers should take upon themselves a due share of responsibility in satisfying themselves that the allegations on which the suit is sought to be founded are reasonably true and not be led away by emphatic assertions made by private parties or even by their offer of indemnity as to costs. 46 L.W. 748=A.I.R. 1937 Mad. 523=(1937) 2 M.L.J. 178. A suit against a state-administered or a state-owned Railway should be instituted against the Secretary of State for India in Council. 10 P. 466; 1931 P. 393; 52 B. 548; 1932 A.L.J. 1033. In a suit against a State Railway Company unless the Secretary of State is made a party, the Railway Company is not liable. 1933 P. 630.



80. No suit shall be instituted against <sup>1</sup>[the Crown], or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been <sup>2</sup>[delivered to, or left at the office of—

Notice.

#### LEG. REF.

<sup>1</sup> Substituted for "the Secretary of State for India in Council" by A.O., 1937.

<sup>2</sup> Substituted for the original words by A.O., 1937.

#### NOTES.

SEC. 80.—The object of the section in providing for notice is to afford the Secretary of State or the Public Officer concerned an opportunity to reconsider his legal position, and to make amends, if so advised, without litigation. 40 B. 392; 24 M. 279; 7 C. 499; 6 C. 8 (F.B.); 54 C. 969 (1023); 23 L.W. 464=91 I.C. 368=1926 M. 408; 58 C. 850. See also 156 I.C. 591=37 Bom. L.R. 341=1935 B. 229. Section 80 is clear and peremptory that notice must be served on the Secretary of State as a condition precedent to the institution of a suit against him, although he is impleaded only as a *pro forma* defendant and although no relief is claimed as against him. The section applies to all suits in which the Secretary of State is made a party defendant, whether or not any relief is claimed against him. 15 P. 353=17 Pat.L.T. 152=1936 P. 339. See also 177 I.C. 709=1939 P. 32. The provisions of S. 80, C.P.Code, are mandatory and contain a clear and unqualified prohibition upon the institution of suit without the statutory notice. It is not in the public interest that the provisions as to notice can be waived at the whim of the officer concerned. Where there is an averment in plaint that a notice under section 80 is 'sent' to the officer concerned, the averment is not in compliance with section 80 as the words 'delivered' or 'left' are not used as provided by section 80. A.I.R. 1937 Sind 291. The requirement as to notice under section 80 applies to all cases in which the Secretary of State is a defendant. Absence of such a notice entails a failure of the whole suit, irrespective of the existence of other defendants. In such a case the plaint is defective and should be rejected as a whole under O. 7, R. 11 (d). Such a course is preferable to dismissal of the suit. 1938 Pat. 127=18 Pat.L.T. 921. See also 22 Pat. L.T. 392. A suit filed within two months, i.e., before the expiry of the full two months, is premature and ought to be dismissed. It is not open to the Collector representing the Crown to waive the plea as to the want of a proper notice under section 80. 53 L.W. 233=(1941) 1 M.L.J. 328. Section 80 was intended to afford protection to officials against personal responsibility for official acts. If it is sought to make an officer personally liable for certain acts done or purporting to be done by him in his official

capacity it is essential before a suit is commenced that there should be a notice served upon him under section 80. The object of the notice is to give him an opportunity to reconsider his position with regard to the claim and to make amends or settle the claim if he is so advised. 44 C.W.N. 74=A.I.R. 1940 Cal. 1. See also 1938 Nag. 415. Section 80 imposes a statutory and unqualified obligation upon the Court. The Code, though a Procedure Code, must be read in accordance with the natural meaning of its words. Section 80 is express, explicit and mandatory, and it admits of no implications or exceptions. If a suit is instituted before the expiry of two months prescribed by section 80, the suit is clearly unsustainable *in limine* and must be dismissed. But a plea that a suit has been instituted during the currency of the notice may be waived. Where the applicability of S. 80 depends upon proof of certain facts, and the Secretary of State does not deny the facts alleged in the plaint then he would be held to have waived his objection to the proof of those facts. When, for instance, a plaintiff states in his plaint that the notice has been served on a certain date which beyond two months of the date of the institution of the suit and the Secretary of State does not raise any objection, the latter would be debarred from challenging these facts at the trial. So also when it has been alleged in the plaint that notice was sent with all the requisites beyond two months and the Secretary of State does not deny that the notice was received by him, he cannot during the trial be heard to say that he has not received the notice. But where the facts are admitted by the plaintiff himself and he fails under the express provisions of the statute no question of waiver can arise at all. The Secretary of State cannot be held to have waived the objection where the provisions of section 80 have not been complied with on the admitted facts. 20 Pat. 394. Section 80 is express, explicit, mandatory and admits of no implications or exceptions. Where there are two plaintiffs, notice by one is not sufficient notice within the meaning of section 80; it is not sufficient compliance with its provisions and the suit as a whole is bad. (1935 B. 229 and 1935 M. 389, Foll.) 159 I.C. 33=1935 S. 206; 14 L. 330=1933 L. 203. See also 37 Bom.L.R. 341=1935 B. 229; 41 L.W. 591=1935 M. 389. Section 80, applies to all forms of suit and whatever the relief sought. The section is express, explicit and mandatory and admits of no implications or exceptions. Where a suit is filed for sale in enforcement of a mort-



(a) in the case of a suit against the Central Government, a Secretary to that Government ;

(b) in the case of a suit against the Crown Representative, the Political Secretary ;

#### NOTES.

gage to which the Secretary of State for India in Council is a party as being a mortgagee of some of the properties under the Land Improvement Loans Act, notice under section 80, C.P. Code, is necessary; and in the absence of such notice the suit must be dismissed as against him. 1938 M.W.N. 280=A.I.R. 1938 Mad. 583. See also 20 Pat. 394.

CONSTRUCTION — ENGLISH DECISIONS.—VALUE OF.—In interpreting section 80 cases in the English Courts decided under statutes passed in England for the protection of public authorities (*e.g.*, the Public Authorities Protection Act, 1893) are not, as a rule, a safe guide, inasmuch as the English Statutes are not *in pari materia* with section 80 of the Indian Code. 61 I.A. 171=61 C. 470=1934 P.C. 96=66 M.L.J. 506 (P.C.). A notice served under the old section 80, prior to Part III of the present Government of India Act and with it the Government of India (Adaptation of Indian Laws) Order, 1937, coming into force, is valid although the suit is lodged subsequently. The suit is saved by paragraphs 9 and 11 of the Preamble to the Government of India (Adaptation of Indian Laws), Order, 42 P.L.R. 596=A.I.R. 1940 Lah. 455.

SCOPE OF SECTION.—A Public Officer who is sued in respect of an act of bad faith is not entitled to notice under section 80. 16 C.W.N. 145; 26 A. 220; 32 C. 1130; 8 B. 421. A Public Officer is entitled to notice under section 80 before suit, though he acts *mala fide* in the discharge of his duties. 41 M. 792=34 M.L.J. 494 (F.B.); 35 B. 421. Section applies also to acts purporting to be done in public capacity though not strictly according to law. Seizure of goods by Official Assignee—Suit to recover damages—Notice is necessary. 1930 M. 458. See also 1937 Lah. 386. The section is not limited to cases of what might be called torts or wrongs. 34 C. 257 (282). A Public Officer against whom a suit is filed, in respect of an act done by him in his official capacity is entitled to notice under section 80, even though he has acted *mala fide*. 1934 P. 14. Defendants' interest devolving on Government during suit—No notice necessary. 24 A.L.J. 726=96 I.C. 351 (1)=1926 A. 585. Notice under section 80, is necessary in every case instituted against the Secretary of State including one arising on a contract. 37 M. 113; 27 I.C. 232=18 C.W.N. 1340. But see 20 B. 697; 27 B. 450, as also a suit for an injunction. 105 I.C. 756 (2)=29 Bom.L.R. 1427. See also 105 I.C. 729; 51 B. 725 (P.C.). Suit against a State Railway must be brought against the

Secretary of State—Notice under section 80 essential—Notice under section 77 and section 140 of the Railways Act not enough. 52 B. 548. See also 156 I.C. 541=1935 A. 900. For a suit even for temporary injunction against the Agent, N.W.Ry., notice under section 80 is necessary as section 80 is express, explicit and mandatory and it admits of no implications or exceptions. 14 L. 330=1933 L. 203. Section applies to declaratory suits against Government. 1930 L. 708. Application under para. 17 of the Second Schedule is not a suit for purposes of this section. 13 L. 672. A suit brought pursuant to an undertaking given under section 14, Bombay Land Revenue Act, within 30 days from the Collector's decision is not a suit which falls within section 80; it is a suit on account of land revenue brought under the special provisions of the special Act, and the general provisions of section 80 do not apply to such a suit. 36 Bom.L.R. 297=1934 B. 162.

ANY ACT PURPORTING TO BE DONE IN HIS OFFICIAL CAPACITY.—The notice contemplated is notice for an act which has been done, and does not relate to some act which is only threatened and which may or may not be done in the future. 28 A. 603; 51 M. L.J. 671. When in a suit to set aside a sale under Bengal Act I of 1895, on the ground of fraud, the Secretary of State is made a party, and no relief is claimed against him, no notice is needed. 32 C. 1130. There must be a distinct act of the "Public Officer" which is complained of to entitle him to notice. 13 B. 347; 30 C. 36. Where the plaintiffs instituted a suit for declaration that the sale carried out by the Official Receiver was invalid and ineffective as against them impleaded him as a defendant. Held, that the Official Receiver was a necessary party to a suit of that nature and that the suit was not maintainable against him without notice under section 80. A. I. R. 1937 Lah. 386. Where plaintiff does not allege any act or omission by Official Receiver but he is made a party because he is in possession of property, no notice is necessary. 48 A. 821. See also 50 M. 239; 31 Bom.L.R. 1199. No notice under section 80, is necessary for the institution of a suit against a receiver for recovery of arrears of rent. The omission of the Receiver to pay rent is not an Act purporting to have been done by him in his official capacity. 65 C.L.J. 561. Section 80 applies to all forms of action and to all kinds of relief as against a public officer, and a suit against an Official Receiver is, therefore, liable to be dismissed if no notice was serv-



(c) in the case of a suit against a Provincial Government, a Secretary to that Government or the Collector of the District, and

#### NOTES.

ed on him under the section. 44 C.W.N. 586=71 C.L.J. 594=A.I.R. 1940 Cal. 578. Where on the refusal of a District Registrar to register a document executed by a receiver in insolvency acting under the orders of the District Court and a suit is filed against him under section 77 of Registration Act, the receiver cannot plead that he is entitled to notice under section 80. The cause of action is no doubt the action of a public officer in refusing to register the document, but the public officer is the District registrar and the suit is not brought against him but against the receiver and as such no notice under section 80, is necessary. Further the Registration Act is a 'special law' and section 80, will not apply in view of the provision of 30 days limitation under section 77 of the Registration Act, as the period of 30 days is less than the 2 months provided by section 80. 1939 A.L.J. 1151=A.I.R. 1940 All. 108. Notice given by two out of three joint plaintiffs is enough. 24 M. 279. When a person who has given notice dies before suit, his representative must give a fresh notice before suing. 25 A. 187. In case of an amendment necessitated by the alleged discovery of facts previously unknown to the plaintiff, no further notice need be given. 30 C. 36. But when one notice has been given specifying a particular cause of action, no amendment should be allowed so as to introduce a new cause of action not specified in the notice given. 34 C. 257 (281); 38 C. 797. There is nothing to prevent defendant from waiving notice or from being estopped by his conduct from pleading want of notice at the trial. 130 I.C. 894=1934 C. 175 (34 C. 257 and 40 C. 503, Ref.); 34 C. 257 (282). A notice though invalid may be waived by the Secretary of State and would be deemed to have been waived if no issue is joined at the time of settlement of issues. 40 C. 503. No other defendant than the Government and persons mentioned in this section can raise the question of validity of notice under section 80. 40 C. 503; 136 I.C. 445. Notice—When dispensed with. 15 I.C. 539=14 Bom.L.R. 353. Plea as to want of notice can be raised at the final hearing. 47 A. 291. The person who gives the notice and he who brings the suit must be identical. 59 M.L.J. 923.

**NOTICE—ADEQUACY OF.**—A notice which says that the cause of action and reliefs are described in the annexed copy of plaint which forms part of the notice, though defective in form, is substantial compliance of S. 80. 151 I.C. 1076=38 C.W.N. 409=1934 C. 187.

**NOTICE—REQUIREMENTS OF.**—S. 80 is imperative and imposes a statutory and unqualified obligation upon the Court to see

that its terms are strictly complied with. The object of the section is to give the Secretary of State an opportunity of settling the claim without litigation, or to enable him to have an opportunity to investigate the alleged cause of complaint and to make amends, if he thought fit, before he was impleaded in the suit. A notice which gives only the names, descriptions and places of residence of some only of the plaintiffs is not a sufficient notice under the section. 156 I.C. 591=37 Bom.L.R. 341=1935 B. 229. See also 1938 Pat. 556. But see also 41 C.W.N. 92. S. 80, which extends the period of limitation by two months applies whether an officer acts in good faith or bad faith. A.I.R. 1937 Sind 281. An alternative and a lesser claim which is not mentioned in the notice under S. 80 cannot derogate from the plaintiff's right to have the suit tried on the issue which is claimed in the notice. A.I.R. 1938 Nag. 415. All that a notice under S. 80, C. P. Code, should contain is a statement of the cause of action, meaning thereby the bundle of facts on which the claim of the plaintiff or plaintiffs is founded. Where a claim is made in the notice for a larger amount of money as due from the defendant, the fact that in the suit the claim is reduced to a smaller amount does not change the cause of action for the suit or render the notice invalid, especially when the notice recites the circumstances under which the claim is made and when the reduction does not operate to the prejudice of the defendant but operates to his benefit. Though the notice should in every case state with precision the cause of action, the mere reduction of the claim does not make the notice defective. 41 C.W.N. 92. What S. 80 requires is that the notice should contain the cause of action, etc., and the relief claimed. The notice need not be practically a copy of the plaint. The notice should be such as to give substantial information to the Government of the basis of the claim and the relief which the plaintiffs seek. Where it is obvious from the notice taken as a whole that the assessment of cess on their zemindari on the income of the *hat* was *ultra vires* and that the relief which they wanted to seek was that they should be relieved of that assessment it is not incumbent upon the plaintiffs to give in detail all the forms in which they would seek the relief. 1934 P. 701. The words 'cause of action' in S. 80, should not be construed in a narrow sense as the object of the section is merely to inform the defendant substantially of the ground of complaint. A notice of suit to recover amounts realized from plaintiff is not bad merely on the ground that on the date of the notice the amounts had not been paid by the plaintiff but they were paid only later on. It is enough if the cause of action is stated with precision. 1941 O.W.N. 63. To state a cause of action it may



(d) in the case of a suit against the Secretary of State, a Secretary to the Central Government, the Political Secretary and a Secretary to the Provincial Government of the Province where the suit is instituted,] and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and

## NOTES.

be sufficient to give a legal description by which a particular cause of action is known, such as, damages for breach of contract, and damages for negligence. 17 Pat. 345=1938 Pat. 556.

**JOINT NOTICE FOR SEVERAL SUITS.**—A joint notice given by all the plaintiffs of the different suits mentioning the total amount payable by the Secretary of State is proper when the sum-total demanded in the separate suit does not exceed the amount mentioned in the notice. There is no particular form of notice prescribed anywhere and so long as the notice served satisfies the condition provided in S. 80, the mere splitting up of the notified claim into different suits, does not render the suits non-maintainable for want of notice. (27 B. 189; 1926 M. 408 and 54 C. 969, Rel. on.) 150 I.C. 1131=1934 P. 346. A suit brought after the expiry of two months from the date of service of the first notice but before the expiry of two months from the date of service of the second notice would not be premature, if the second notice does not cancel or annul the first one, but merely amplifies it. 70 C.L.J. 126=A.I.R. 1939 Cal. 758.

**SUIT BY TWO PLAINTIFFS—NOTICE BY ONE ONLY NOT SUFFICIENT.**—A suit brought by two plaintiffs is not maintainable when the notice required by S. 80, C. P. Code, is given only by one of them. Such a notice is not a sufficient compliance with the section. The whole suit is bad and even the plaintiff who has given the notice cannot proceed with it. 156 I.C. 333=41 L. W. 591=1935 M. 389; 159 I.C. 33=1935 S. 206.

**WANT OF NOTICE—PLEA OF—WAIVER OF.**—The plea of want of notice under S. 80 taken by the defendant was a plea which had never been raised before in the history of the case and further having regard to the fact that at the time of the hearing before the Judge more than two years had elapsed since the arising of the cause of action, it was impossible for the plaintiff to bring another suit; further no issue had been raised at any time in the case as to whether or not notice had been served and the defendant had not at any time taken any point on the subject of notice to him. Held, that the want of notice had been waived. (1931 C. 175, Rel. on and 1927 P.C. 176, Dist.) 150 I.C. 590=1934 P. 354. See also 1933 M. 917.

**INCLUSION OF ADDITIONAL RELIEF IN PLAINT.**—The addition in the plaint of a relief which was not covered by the notice does not entail the dismissal of entire suit of the plaintiffs. It is open to the plaintiffs to amend their plaint at any stage and proceed with the suit without that relief. 1934 P.

701.

**SUIT BEFORE EXPIRY OF NOTICE—WITHDRAWAL—FRESH NOTICE—FRESH SUIT.**—A plaintiff who gives a notice of suit under S. 80, and institutes a suit against the Secretary of State for India before the expiry of two months prescribed in the section, but withdraws the same with liberty to institute a fresh suit, is entitled to so institute a fresh suit without a fresh notice. When a suit is withdrawn, the legal position is the same as if no suit had been instituted, and the original notice is sufficient for the fresh suit under S. 80. 36 Bom.L.R. 1106.

**SUITS FOR INJUNCTION.**—Notice is necessary in all suits against the Secretary of State including suits for injunction. 37 M. 113=23 M.L.J. 181 (25 C. 239 R.); 25 A. 187; 35 B. 362; 14 Bom.L.R. 353; 39 M. L.J. 151; 105 I.C. 756=29 Bom.L.R. 1427. Injunction suits against public officers also require previous notice. 58 C. 1288; 12 L. 260; 1933 L. 203=14 Lah. 330. But see 59 C. 961. Also 51 B. 725=53 M. L. J. 81 (P.C.). Bombay rulings expressing *contra* opinion disapproved. 40 B. 392; 34 I. C. 535; 37 B. 243; 35 B. 362 are not now good law.

**SUIT FOR DECLARATION OF TITLE.**—Where plaintiff sues for a declaration of title to land which he claims as part of permanently settled estate from defendant on ground of dispossession, but the defendant claims settlement under Secretary of State, there is a cause of action for the plaintiff against the Secretary of State for impleading him in the suit. 38 C.W.N. 409=59 C.L.J. 295=1934 C. 187.

**ON WHOM NOTICE IS TO BE SERVED.**—The term "District" in S. 80 means the district in which the suit is instituted and the notice must be served on the Collector or one of the Collectors of that district and not on the Collector of another district where the cause of action partly arises. 27 I.C. 232=18 C.W. N. 1340. Service on son of public officer not compliance with section. 58 C. 850.

**WHO IS A PUBLIC OFFICER.**—A Collector when acting as the agent of the Court of Wards is a "Public Officer". 3 A. 20. See also 1928 S. 762=22 S.L.R. 63=105 I.C. 729. But see 11 M. 317; 13 B. 343. As to the position of a person appointed by District Judge to collect rents of wakf property in a dispute among mutwallis, see 1936 A.L.J. 1112. An Official Receiver is a public officer and notice under S. 80 is necessary before filing a suit against him. 46 A. 16; 47 A. 291; 51 M.L.J. 671; 1930 L. 708; 139 I.C. 701=1932 A. 575; also in the case of a Receiver appointed by Court. 34 C.W.N. 673; 58 C. 856; 36 L.W. 694.



the relief which he claims ; and the plaint shall contain a statement that such notice has been so delivered or left.

#### NOTES.

*Costello, J.*, doubting in 130 I.C. 894=1934 C. 175. Where a certain amount due under a promissory note is claimed by the Official Receiver and by certain assignees of the note, and the debtor filed an inter-pleader suit and where the Official Receiver raised a plea that he ought to have been given notice under S. 80, it was held that the mere setting up of a claim to property on behalf of the estate which a Receiver represents could not be considered to be an act purporting to be done by a public officer in his official capacity so as to attract the application of S. 80. 1938 N.L.J. 264=A.I.R. 1938 Nag. 449. In a suit against an Official Receiver of an estate for recovery of arrears of rent notice under S. 80 is not necessary as omission of receiver to pay rent is not an act purporting to have been done by him in his official capacity. 174 I.C. 576=A.I.R. 1938 Cal. 191. See also 65 C.L.J. 561; 44 C.W.N. 586; 1937 Lah. 386. Suit against Official Assignee—Notice not necessary. 25 Bom.L.R. 378=1923 B. 392. See also 47 L.W. 46=1938 Mad. 221=(1938) 1 M.L.J. 92. Although a receiver is a public officer, in the case of a suit against him it is only where the plaintiff complains of some act purporting to have been done by him in his official capacity that notice to him under S. 80, C.P. Code, is enjoined. Where the plaintiff makes no such complaint but simply impleads him in the suit in his capacity as a receiver in possession of some of the properties in suit, no notice need be given to him under S. 80. 41 C.W.N. 322=I.L.R. (1937) 2 Cal. 322. *Chatterji, J.*—Though a receiver appointed in a suit is a public officer within the meaning of S. 80, non-payment of royalty by the receiver in respect of the lands in his possession is not an official act done by him. S. 80, therefore does not apply to a suit against the receiver for royalty arising out of an individual or a private contract between him and the plaintiff. 19 Pat. 433=A.I.R. 1940 Pat. 516. It is the duty of a receiver to take charge of the properties in suit on behalf of the Court. He exercises his functions under the supervision and control of the Court and is remunerated under its orders. He can thus be deemed to be an officer of a Court of justice whose duty it is to take charge or dispose of any property within the meaning of S. 2 (17) (d). Even if he is not an "officer" he is clearly a person especially authorised by a Court of Justice to perform such duties and therefore a public officer. 44 C.W.N. 74=A.I.R. 1940 Cal. 1. No estate vests in the receiver by virtue of his appointment. He collects rents or profits, income or capital on the title of the persons who are parties to the suit and he defends the suit because of the powers given to him by the Court under O. 40, R. 1

(d). In cases when no relief is claimed against the receiver personally and the suit is really against the estate which does not vest in the receiver, but which is held by him under orders of the Court who made the appointment, the suit cannot be said to be one against the receiver within the meaning of S. 80. In other words, S. 80 contemplates a suit against the receiver which seeks to make him personally liable for acts, done or purporting to be done by him in his official capacity and it does not contemplate a case where a suit for possession is brought against the owners of the estate in respect of which he has been appointed a receiver and which suit he has got to defend under powers conferred on him by the Court. In such cases it is undoubtedly necessary to take the leave of the Court which appointed the receiver before the latter can be made a party to the proceedings and that is on the principle that interference with the possession of the receiver without leave would amount to a contempt of the Court whose officer the receiver is. But there is no necessity to serve upon him a notice under S. 80. 186 I.C. 584=44 C.W.N. 74=A.I.R. 1940 Cal. 1. No notice to the Official Trustee is necessary, when the question to be decided relates to the rights of the *cestui que trust* in the trust fund. 7 C. 499. The Official Liquidator, like the Official Receiver appointed in insolvency cases, is an official of the Court and has got definite powers conferred upon him under Act VII of 1913 and as such he is a public servant within the meaning of the term and to such a public officer notice under S. 80 is necessary. 148 I.C. 448=11 O.W.N. 398=1934 O. 158 (2). A liquidator is a public officer within the meaning of S. 2 (17) and S. 80 would apply to him. Where, however, the liquidator has acted through the Deputy Commissioner, notice to the Deputy Commissioner would be sufficient and no separate notice to the liquidator is necessary. 30 N.L.R. 240=17 N.L.J. 47=1934 N. 201. So also notice is necessary before a suit is instituted against Registrar of co-operative society. 177 I.C. 709. S. 80, bars the institution of a suit unless notice has been given, only when the suit is against a public officer and is in respect of any act done or purporting to be done by the public officer in his official capacity. The mere fact that the public officer concerned is a defendant in the suit is not sufficient to determine whether a notice is required under the section. Where, therefore, a Liquidator appointed under the Bihar and Orissa Co-operative Societies Act attaches a house belonging to a member of the Cooperative Society in liquidation in execution of an award issued by the Registrar and the member institutes a suit against the Liquidator to obtain a decision as to whether his house is liable to be attached, he being an



## NOTES.

agriculturist, the suit does not require the service of notice under the section assuming that the Liquidator is a public servant within the meaning of the section. 193 I.C. 142. A liquidator who is appointed by the Registrar of Co-operative Societies to liquidate a private Co-operative Society is not an officer in the service of the Government and is not a "public officer" within the meaning of S. 3 (17) and S. 80, and a suit against him cannot be defeated on the plea that no notice was given as required by S. 80. I.L.R. (1940) Mad. 929=A.I.R. 1940 Mad. 831=(1940) 2 M.L.J. 241. The liquidator appointed under S. 42 (1) of the Co-operative Societies Act is appointed by Government and performs public duties and hence he is an officer in the service of Government, when acting as liquidator and is therefore a "public officer" as defined in S. 2 (17) (h), C.P. Code. In a suit under O. 21, R. 63 against such liquidator, notice should be given as required by S. 80, C.P. Code. 1939 N.L.J. 215=A.I.R. 1939 Nag. 232. A Deputy Magistrate who has been appointed as the returning officer by the District Magistrate for the purposes of an election and who is doing the election work of the municipality at the time cannot be said to be a public officer who is acting in that connection in his official capacity as such public officer, and therefore S. 80, C.P. Code, is inapplicable to him. 152 I.C. 817=1935 A.L.J. 139=1935 A. 106. Village sanitation board—Not a public officer. 1929 N. 70; nor a municipal council. 1930 M.W.N. 821; 61 M.L.J. 642. Notice is necessary when a Government servant's services are lent to a Municipal Committee and he retains a lien on his original service. 104 I.C. 762. Where the Municipal Committee has been superseded under the Municipal Act, the service of the notice under S. 80, on the Deputy Commissioner who is the Collector of the District as well as the administrator of the Municipal Committee is valid and proper. 42 P.L.R. 550=A.I.R. 1940 Lah. 451. Assessment by Municipality—Supersession of Municipality and public officer appointed to perform duties—Suit for declaring assessment illegal and *ultra vires*—Notice not necessary. 159 I.C. 542=1935 C. 726. A Sub-Inspector of Police who is sued for the recovery of account-books seized at a search, is entitled to notice. 29 A. 567. A notice is necessary, before suing a police officer for damages when he acts under the powers conferred by Cr.P. Code and S. 42 of the Police Act will not apply. 30 I.C. 173=13 A.L.J. 788. See also 1930 A. 742. No action for damages can lie against a village headman for an act done in his official capacity unless the requirements of S. 80 are fulfilled. A report to the Sub-Divisional Officer or Deputy Commissioner is not notice. 2 Bur.L.J. 29=1923 R. 250. See also 142 I.C. 501=1933 S. 1 (Manager of encumbered

estates taking charge of estate). No suit can be brought against a Bench Clerk for damages resulting from the loss of a record in Court through his negligence without giving notice. 40 I.C. 677=11 Bur.L.T. 95. A manager of an estate appointed under the provisions of the Court of Wards Act, is not a public officer within the meaning of S. 2 (17) (g), C.P. Code, but is a public officer within the meaning of S. 2 (17) (h), being an officer in the service of the Government. He is, therefore, entitled to the benefit of a notice under S. 80. 43 C.W.N. 1212=A.I.R. 1939 Cal. 720=I.L.R. (1940) 1 Cal. 73. A suit against the Deputy Commissioner as the person appointed by the District Judge to perform the duties of *mutwalli* under a waqf deed, is not a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity and as such no notice under S. 80, is necessary for such a suit. 1941 O.W.N. 906=1941 O.A. 621. The notice contemplated by S. 80, for a suit against a "public officer" is unnecessary in the case of a suit against a person who *on the date of the suit has ceased to be such officer*. The section cannot be read as including a suit against a person who is not a public officer but was a public officer at the time of the cause of action. To do so would be to extend the section beyond its apparent purport. 54 L.W. 172=(1941) 2 M.L.J. 242. Notice under S. 80 of the Code is necessary for suits under S. 104-H of the Bengal Tenancy Act. 22 I.C. 36=18 C.L.J. 566. See also 46 I.C. 899.

PUBLIC OFFICER—IF SHOULD HAVE ACTED *BOA FIDE*—MOTIVE OF OFFICER IN DOING ACT.—S. 80, cannot be read as being limited in its application to cases in which an officer has acted *bona fide* in the exercise of his powers; the duty of the Court is to give effect to the natural meaning of the language used in the section. The question of good faith or bad faith of the public officer either as regards his belief in the legality or propriety of his act or the limit of his powers or the existence of facts justifying the exercise of such powers is irrelevant in the consideration of the question whether the officer is entitled to notice under S. 80. The section does not require that the act should have been done in good faith; it merely requires that it should purport to be done by the officer in his official capacity. The motives with which the act was done do not enter into the question at all. The Court has simply to see what act was done by the defendant and whether it purported to be an official act. Where a police officer arrested the plaintiff and led him to the police station as a person accused of theft, that is an act which every police officer has a statutory power to do under S. 54, Cr.P. Code, and it is as a police officer that he must have taken the plaintiff to the police-station.



81. In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity—  
Exemption from arrest and in respect of any act purporting to be done by him in personal appearance.

(a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and

(b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

82. (1) Where the decree is against the <sup>1</sup>[Crown] or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; Execution of decree. and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Provincial Government.

#### LEG. REF.

<sup>1</sup> Substituted by A.O., 1937 for "the Secretary of State for India in Council".

#### NOTES.

Where it is known to all parties concerned that he was a police officer and it is clear that he purported to act as such, whether in good faith or bad faith, S. 80 applies and notice of suit has to be served under the section. 194 I.C. 263=22 Pat.L.T. 392. See also 1937 Sind 281. The requirements of S. 80, cannot be evaded or explained away and a suit instituted in contravention of the section is unsustainable *in limine*. Where one or some of the defendants are public officers to whom notice of suit is necessary, the bar of S. 80 applies to the suit as a whole and not merely to the claim for relief against these particular defendants. If no notice is served on those defendants, the consequence of instituting the suit in face of the statutory prohibition is that under O. 7, R. 11, C.P. Code, the plaint should be rejected. The proper course is to reject the plaint. 194 I.C. 263=22 Pat.L.T. 392. See also 1937 P.W.N. 694.

COMMON MANAGER UNDER BENGAL TENANCY ACT—Under S. 80, in the case of a suit against a public officer, it is only where the plaintiff complains of some act purporting to have been done by such public officer in his official capacity that notice is enjoined. A claim based upon a breach of a contract by a public officer, may, in appropriate cases, entitle him to notice of suit under S. 80, but the mere omission by the common manager of an estate (appointed under the Bengal Tenancy Act) to pay off a mortgage debt is not such a breach. His failure to pay either interest or principal is not an "act" purporting to be done by him in his official capacity. *Held*, accordingly (assuming that the common manager is a public "officer" within the meaning of S. 80), that notice under the section is not required when, in a suit to enforce a mortgage by sale of the property mortgaged, the manager is impleaded as a co-defendant merely as representing the estate of which the sale is sought and no personal relief is sought against him. 61 I.A. 171=61 C. 470=1934 P.C. 96=66 M.L.J. 506

(P.C.). See also 73 C.L.J. 356.

CONTENTS AND CONSTRUCTION OF NOTICES.—The notice should state the relief which the plaintiff claims; it should be absolute in terms and not conditional. 6 Bom.L.R. 132. The notice must mention the name and place of abode of the intending plaintiff. 14 M. 386. See also 27 P. 206; 57 C. 1127. A notice which does not contain all the names, descriptions and places of residence of the plaintiffs in a suit is an invalid notice. 40 C. 503. A notice under section 80 is not a proper notice if the case set up in the plaint is different from the case stated in the notice. A suit instituted upon such a notice cannot be maintained. 32 I.C. 235. Notice by a plaintiff under the section cannot constitute a cause of action. The right to sue can accrue when the order of the Collector interfering with the plaintiff's right is passed. 19 I.C. 565. The term "cause of action" in the section should not be too narrowly construed, the object of the section being merely to inform the defendant of the grounds of the complaint. 8 C.W.N. 913. See also 24 M. 279; 54 C. 969 (1023). Where plots mentioned in the notice comprised all the plots mentioned in the plaint, the variance between the notice and the plaint does not justify dismissal of the suit. 32 I.C. 752=20 C.W.N. 636. It is quite true that if two or more causes of action are united in one suit and with regard to one of them the suit fails for want of notice under section 80 there is no reason why the entire suit should be dismissed. But where in a suit against a person for declaration of title to certain property the receiver of that property is added as party and there are definite allegations against him of collusion with that person in granting rent receipts and setting up a claim to possession in the disputed property and the defence of both the defendants in answer to the plaintiff's claim is identically the same, it is not possible to sever one part of the case from the other. 44 C. W.N. 74=A.I.R. 1940 Cal. 1.

LIMITATION.—Where notice to Government is necessary under section 80, the period of two months is excluded from the prescribed limitation. 52 P.R. 1917=38 I.C. 600=42 P.W.R. 1917. Where a special law of limi-



(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report.

SUITS BY ALIENS AND BY OR AGAINST <sup>1</sup>[FOREIGN RULERS AND RULERS OF INDIAN STATES].

83. (1) Alien enemies residing in British India with the permission of the Central Government, and alien friends, may sue in the Courts of British India, as if they were subjects of His Majesty.

When aliens may sue.

(2) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts.

*Explanation.*—Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a licence in that behalf under the hand of one of His Majesty's Secretaries of State or of a Secretary to the Central Government shall, for the purpose of sub-section (2), be deemed to be an alien enemy residing in a foreign country.

When foreign States may sue.

84. (1) A foreign State may sue in any Court of British India :

Provided that such State has been recognised by His Majesty or by the Central Government.

Provided, also, that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity.

(2) Every Court shall take judicial notice of the fact that a foreign State has or has not been recognised by His Majesty or by the Central Government.

85. (1) Persons specially appointed by order of the Government at the

LEG. REF.

<sup>1</sup> Substituted for "Foreign and Native Rulers," by A.O., 1937.

<sup>2</sup> The Explanation was added by A.O., 1937.

NOTES.

tation applies, a party is not entitled to deduct the period of two months for service of notice under section 80. 66 I.C. 287=34 C. L.J. 205. The dismissal of a suit filed within two months from the date of notice under section 80, on the ground of the insufficiency of the notice is no bar to the maintainability of a fresh suit brought after the expiry of two months from the date of the notice. The second suit would be maintainable on the same notice. 41 C.W.N. 92. Where a suit for damages is brought against joint tortfeasors and one of them requires a notice under section 80, which extends the period of limitation by two months as against him, time must be calculated in the same manner as against both even though notice under section 80 is not necessary to the other tortfeasor. A.I.R. 1937 Sind 281.

**NON-COMPLIANCE—PROCEDURE.**—On a non-compliance with the section regarding notice the Court ought to reject the plaint and not dismiss the suit. 58 C. 850.

**WAIVER.**—The notice required under section 80 of the C.P. Code can be waived. (34 C. 257 and 40 C. 503, Foll.) 146 I.C. 699=38 L.W. 891=1933 M. 917. See also 150 I.C. 590=1934 P. 354.

**SEC. 83.**—Whether the cause of action arose before or after war, an alien enemy

can be sued in British Indian Courts and would have every right to prosecute his case before the Courts in accordance with the law of procedure, and it makes no difference that he was interned at the time. 40 C. 1140. A British subject voluntarily residing or carrying on business in enemy country will be treated as an alien enemy and cannot sue in British India. 1 L. 276. Alien enemy who has been licenced to trade in British India has a right to sue in Indian Courts. 31 I.C. 888=9 Bur.L.T. 51.

**SEC. 84.**—See 11 C. 17 (24). Foreign State—Attributes of sovereignty. 59 M.L.J. 548.

**SECS. 84 to 87.**—When the Ruler of the State has severed his connexion with the State, the Government can appoint a person to prosecute or institute suit in British Indian Courts and such person has *locus standi* to continue or file suits, and the fact that such an appointment is made after a plaint has been put into Court will not render it ineffective provided that it is put into Court within the period of limitation. (25 A. 635, Ref.) 143 I.C. 348=34 P.L.R. 470=1933 L. 456.

**SEC. 85.**—[See also Notes under section 84, *supra*.] This section does not prevent institution by an independent Prince of a suit in a Court in British India, in his own name, and through a recognized agent other than one appointed under the section. 10 C. 136; 19 A. 510. The Desai of Patadi is a Ruling Chief. 8 B. 415. Also the Raja of Hill Tipperah. 9 C. 535. The section applies to



Persons specially appointed by Government to prosecute or defend for Princes or Chiefs.

request of any Sovereign Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, or at the request of any person competent in the opinion of the Government, to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognised agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief.

<sup>1</sup>[*Explanation*.—For the purposes of this sub-section the expression “the Government” means—

- (a) in the case of any Indian State, the Crown Representative; and
- (b) in any other case, the Central Government.]

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief.

(3) A person appointed under this section may authorize or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto.

86. (1) Any such Prince or Chief, and any ambassador or envoy of a foreign State, may <sup>2</sup>[in the case of the Ruling Chief of an Indian State with the consent of the Crown Representative certified by the signature of the Political Secretary, and in any other case with the consent of the Central

Suits against Princes, Chiefs, ambassadors and envoys.

#### LEG. REF.

<sup>1</sup> Substituted by A.O., 1937.

<sup>2</sup> Substituted by A.O., 1937.

#### NOTES.

suits filed in a Revenue Court. 25 A. 635. The provisions of section 85, are specially enacted for a privileged class of persons, such as a Sovereign Prince or a Ruling Chief, who are parties to suits or legal proceedings, and are subject to the rule of strict construction and must be rigidly followed. A suit instituted on behalf of a Ruling Prince or an Indian State by a person who is not an authorised agent under O. 3, R. 2, C.P. Code, and without the authority required by section 85, C.P. Code, is a defective suit and has to be dismissed. A subsequent authority obtained under section 85 for the first time after the presentation of an appeal upon the dismissal of the suit cannot cure the defect so as to make the suit a properly instituted suit. I.L.R. (1940) Bom. 225=42 Bom.L.R. 262=A.I.R. 1940 Bom. 172. An order dated 20th June, 1935 and signed by the Chief Secretary of the Punjab Government appointing a person to prosecute or defend all suits on behalf of or against the Jammu and Kashmir State unless it is revoked is valid even after the Government of India (Adaptation of Indian Laws) Order, 1937. 42 P.L.R. 228=A.I.R. 1939 Lah. 279.

SEC. 86:SCOPE OF SECTION.—Section 86 is exhaustive and lays down the cases where a prince or chief can be brought on record whether he is suing or sued as such or in any other capacity. 38 M. 635=25 M.L.J. 621. See also 39 M. 661=29 M.L.J. 667.

A suit against a foreign prince or chief without the sanction of the Governor-General is not maintainable as it contravenes section 86, when permission has been applied for and refused by the Governor-General, it is not open to the Court to question the propriety of the order refusing consent. Once the plaintiff fails to obtain the requisite consent, the Court has no authority to proceed with the suit. 11 O.W.N. 1426=153 I.C. 856=1935 O. 1426. Section 86, in terms applies only to suits, and cannot be made applicable to insolvency proceedings initiated by a petitioning debtor merely by reason of the fact that a Sovereign Prince or Ruling Chief is one of the creditors. An insolvency petition filed by a debtor of a Sovereign Prince or Ruling Chief is, therefore, maintainable without the certificate mentioned in that section. I.L.R. (1940) 1 Cal. 344=44 C.W.N. 333=A.I.R. 1940 Cal. 244.

APPLICABILITY—SUIT AGAINST BUSINESS CONCERN RUN BY STATE OF RULING PRINCE.—The provisions of section 86 do not apply to a suit instituted not against the Prince himself, but against a business concern run by the State of a Ruling Prince. 1934 A.L.J. 1093=1934 A. 740. Applicability of section —Proceedings under sections 184, 186 and 187 of Companies Act. Section 86, C. P. Code, does not apply to the proceedings under section 184 but applies to all the proceedings under sections 186 and 187 of the Companies Act. If the Court makes an order under section 184 of the Companies Act and places the name of a Native Prince or a Regent of an independent State upon the list of contributories, it does not thereby enforce a



Government, certified by the signature of a Secretary to that Government,] but not without such consent, be sued in any competent Court.

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued; but it shall not be given unless it appears to<sup>1</sup>[the consenting authority] that the Prince, Chief, ambassador or envoy—

(a) has instituted a suit in the Court against the person desiring to sue him, or

(b) by himself or another trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

#### LEG. REF.

<sup>1</sup> Substituted by A.O., 1937.

#### NOTES.

jurisdiction against that Native Prince or against the Regent or President of the independent State. The proceedings under sections 186 and 187, however, stand on a different footing. An order under section 186 for payment of money due from a person can be made by the Court only in cases where a suit to recover the amount would be maintainable and the Court cannot override the provisions of section 86, by making an order under section 186 of the Companies Act. No order under section 187 can be made against the Sovereign Prince or the Ruling Chief at all, and no question of any consent of the Governor-General in Council can arise, because such a case does not fall in any of the three classes mentioned in subsection (2) of section 86. 1936 A. L. J. 1134=1936 A. 826 (F.B.).

**PRIVILEGE UNDER—IF CAN BE WAIVED.**—It is open to a Ruling Prince to plead want of jurisdiction because of the provisions of section 86, or to waive the privilege by defending the suit on merits and producing evidence and taking the chance of getting a judgment in his favour. 1934 A.L.J. 1093=1934 A. 740.

**SUIT AGAINST RULING PRINCE—EXTENT OF PRIVILEGE.**—In India a Ruling Prince can be sued in British Court. The rule of international Law which is based on the principle of "absolute independence of the Sovereign to recognise any superior authority" cannot be applied to Princes in India for the simple reason that they are subordinate to the authority of the British Crown. The rule of International Law has been modified by the provisions of section 86, under which alone the Princes can claim exemption and not on the ground of their absolute sovereignty. Under section 86, a Ruling Prince cannot be sued without the sanction of the Governor-General in Council and no execution can be issued against him without such sanction. Beyond these two points, no other privilege can be claimed by him under C.P. Code. There is nothing in the Code which prevents a plaintiff from making an indirect attempt

to reach the property of a Ruling Prince. 1934 A.L.J. 1093=1934 A. 740.

**SECS. 86 AND 87.**—A suit will not lie against a sovereign Prince without the consent of the Governor-General in Council. A State cannot be sued apart from its Ruling Chief. 23 M.L.J. 605. (9 C. 535, Foll.) Time spent in getting Government of India's consent cannot be deducted in computing limitation. 53 B. 12.

**APPLICATION OF SECTION.**—The section does not apply to a defence put forth (as set-off). Such a defence can be put forward in answer to a claim by a Ruling Chief without the consent of the Governor-General. 62 I.C. 778.

**RULING CHIEFS.**—The Khurndward Jagirdars are Ruling Chiefs who cannot be sued without the consent of the Governor-General under section 86 of the C.P. Code. 51 I.C. 228=21 Bom.L.R. 376.

**CONSENT OF GOVERNOR-GENERAL.**—A suit against a Ruling Chief cannot be maintained without the consent of the Governor-General in Council. 25 I.C. 271. The consent must be given before the commencement of the suit. 21 B. 351. Even when leave is granted by the Governor-General in Council, the Court in which the suit is filed can question the leave in case the conditions mentioned in the section are not fulfilled. 29 A. 379.

**SUBMISSION TO JURISDICTION.**—Where a Ruling Prince having sovereign powers submits to the jurisdiction of a British Court, no objection can be raised by him, in the Appellate Court on the ground that the consent of the Governor-General had not been obtained prior to the institution of the suit. 46 I.C. 558. No suit can be maintained against a Ruling Chief without the consent of a Governor-General in Council. The mere fact that the defendant after claiming the privilege pleaded also on the merits, does not amount to a waiver of privilege and submission to jurisdiction. 39 M. 661=29 M.L.J. 667. The recognition of cases of waiver as excepted from the ordinary provision of International Law as understood in England cannot be imported into the clear language of the C.P. Code. 39 M. 661=



(3) No such Prince, Chief, ambassador or envoy shall be arrested under this Code, and, except with <sup>1</sup>[such consent as is mentioned in sub-section (1)] certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy.

<sup>2</sup>[(4) The Central Government or the Crown Representative, as the case may be, may by notification in the Gazette of India authorise a Provincial Government and any Secretary to that Government to exercise with respect to any Prince, Chief, ambassador or envoy named in the notification the functions assigned by the foregoing sub-sections to the consenting authority and a certifying officer, respectively.]

(5) A person may, as a tenant of immovable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property.

Style of Princes and Chiefs  
as parties to suits.

87. A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State :

Provided that in giving the consent referred to in the foregoing section <sup>3</sup>[the Central Government, the Crown Representative or the Provincial Government], as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name.

#### INTERPLEADER.

88. Where two or more persons claim adversely to one another the same

#### LEG. REF.

<sup>1</sup> Substituted for "the consent of the Governor-General in Council" by A.O., 1937.

<sup>2</sup> Substituted by A.O., 1937.

<sup>3</sup> Substituted for "the Governor-General in Council, or the Local Government" by A.O., 1937.

#### NOTES.

29 M.L.J. 667. Acquiescence by defendant bars him from questioning validity of decree. 2 Pat.L.T. 180=6 P.L.J. 185. See also 58 I.C. 912.

SEC. 86 (3) AND (5) : RELATIVE SCOPE OF.—Sub-section (5), section 86, is entirely distinct from sub-section (3). The two sub-sections are really dealing with two quite distinct matters. 159 I.C. 637=39 C.W.N. 1206=1935 C. 664.

SECS. 86 AND 87.—Sections 86 and 87 relate to an important matter of public policy in India and the express provisions contained therein are imperative and must be observed. Where a suit was brought against the Gaekwar Baroda State Railway through the Manager and Engineer in Chief—and the plaintiff admitted that it was owned and managed by His Highness the Gaekwar and where no certificate under section 86, C.P. Code, was obtained and the suit was decreed on the ground that the Railway was a corporation capable of being sued, it was held that there was no evidence on record to support the contention that the Railway was a corporation and that it was directly contrary to the admission of the plaintiff. It was further held that the suit was in reality though not in form, a suit against His Highness the Gaekwar and if the judgment of the High Court was allowed to stand it might have far reaching results and might have the effect

of nullifying the provisions of sections 86 and 87. The fact that the Railway was allowed to defend the suit on the merits could not amount to a waiver of privilege as the provisions of sections 86 and 87, are imperative, and having regard to the purpose which they serve, they could not be waived in such a manner. 65 I.A. 182=I. L. R. (1938) All. 601=A.I.R. 1938 P.C. 165= (1938) 2 M.L.J. 11 (P.C.).

SEC. 87.—See notes under sections 84 and 86.

SEC. 88.—The law of interpleaders as set out in C.P. Code is the same as that of England. The applicant should satisfy the Court that he has no interest in the subject-matter of the suit except for charges and costs, otherwise he is disentitled to sue. 4 R. 465. An interpleader suit is not improperly constituted merely because one of the defendants does not claim the whole of the subject-matter. 1 M.H.C.R. 361. See also 14 B. 489. In an interpleader suit all contesting defendants are in the position of plaintiffs. 48 M. 1. Where the defendants do not claim adversely to one another, nor is the plaintiff admitting the title of one of the defendants or is willing to pay or deliver the property to him, the suit is not an interpleader suit. 1922 C. 138. When in a suit for rent the defendant pays the money into Court with the request that it be paid over to the party entitled to it, such suit may be treated as in the nature of an interpleader proceeding. 17 M. 85. In an interpleader suit the matter in dispute is the title to the property which is claimed by two or more persons, and its valuation is the value of that property. 1940 A.L.J. 578=A.I.R. 1940 All. 452.



Where interpleader-suit may be instituted.

debt, sum of money or other property, movable or immovable, from another person who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself:

Provided that where any suit is pending in which the rights of all parties can properly be decided no such suit of interpleader shall be instituted.

## PART V.

### SPECIAL PROCEEDINGS.

#### Arbitration.

89. *Arbitration.* (Repealed by the Arbitration Act X of 1940).

#### NOTES.

SEC. 89.—Section 89 excepts the procedure of the Code from being applicable to arbitrations under the Arbitration Act and section 4 does the same generally. 5 Bur.L.T. 155=17 I.C. 902. Section 89 covers all references to arbitration whether the reference is or is not made without the intervention of the Court, and whether an award does or does not follow. 160 I.C. 287=38 P.L.R. 102=1936 L. 374. The object of the section is to give effect to the provisions of Sch. II as if they had been enacted in the body of the Code. 47 A. 637. Arbitration without Court's order. 40 B. 386. Award without intervention during pendency of suit cannot be recorded as adjustment. 67 I.C. 123; 55 C. 533; *contra* 51 M. 800 (F.B.); where "any other law" is held to include the provisions of C.P. Code. 131 I.C. 443=1931 O. 127; 9 R. 39. *Per Courtney-Terrell, C.J.*—S. 89 is clear and specific. The words "any other law for the time being in force", in that section must clearly be read *ejusdem generis* with reference to a specific enactment, the Arbitration Act of 1899; the section contemplated that further legislation may take place or that there may be already in existence a specific piece of legislation dealing with arbitration. The legislature did not intend to override either the Arbitration Act or any other specific enactments; the intention was that all references to arbitration of whatsoever kind, if they are to have a binding effect, must be instituted and conducted according to the provisions of Sch. II of the Code. S. 89 does not also take into contemplation O. 23, R. 3, at all as being one of the proceedings by way of arbitration to which the section and the schedule are not to apply. The proceeding under O. 23, R. 3 for the recording of a compromise is not an exception to S. 89. *Per Agarwala, J.*—S. 89, is mandatory, and when a suit is pending, the matter in dispute may be referred to arbitration only in accordance with Sch. II. The words "any other law" in S. 89 do not include O. 23, R. 3. To take "other laws" as referring to the Code itself would be contrary to all canons of construction of

statutes. It is not open to the Court to substitute for the words "any other law" in S. 89, the words "except as provided in this Act or by any other law." 14 P. 799=156 I. C. 1050=16 Pat.L.T. 280=1935 P. 243. *See also* 1939 Rang.L.R. 280=1939 Rang. 300 (F.B.). The words "by any other law for the time being in force" in S. 89, refer to some law extraneous to the Code and cannot be legitimately held to cover O. 23, R. 3. In other words, once S. 89 is held to apply, no reliance can be placed for any purpose on O. 23, r. 3. The only remedy left is either to proceed with the arbitration, or if the Court supersedes the arbitration, to proceed with the hearing of the suit or the appeal, as the case may be, on the merits, as required by para. 8 of the Second Schedule read with para. 19. 160 I.C. 287=38 P.L.R. 102=1936 L. 374. *See also* I. L.R. (1939) Nag. 250=1939 N.L.J. 228=1939 Nag. 186 (F.B.). A Court is competent on an application under Sch. II, C. P. Code, to pass a decree on an award as modified by a lawful compromise filed by the parties. 25 O.C. 213=1922 O. 189. The words 'save in ...in force' in S. 89 do not let in O. 23, r. 3 of the Code and the words "any other law for the time being in force" refer to amendments of, or substitutions for, the Arbitration Act or other pieces of legislation on that subject-matter. 47 C. 6. Whether an award in a pending suit without intervention of Court is an adjustment under O. 23, r. 3, C.P. Code. 53 M.L.J. 444.

AGREEMENT TO ABIDE BY STATEMENT OF WITNESS—LEGALITY OF.—The parties to a suit can validly agree, even apart from the Indian Oaths Act, that they will abide by the statement of a witness, including one who is a party to the suit; and they can leave the decision of all points including costs arising in the case to be made according to the statement. Such an agreement does not amount to a reference to an arbitrator and does not contravene the provisions of the Arbitration Act or the C.P. Code relating to arbitration. 146 I.C. 84=1933 A.L.J. 1127=1933 A. 861 (F.B.).

SEC. 89 AND SCH. II, PARA. 22.—S. 89 (1), C.P. Code, read with Sch. II, para.



*Special Case.*

Power to state case for opinion of Court.

90. Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed.

*Suits relating to Public Matters.*

91. (1) In the case of a public nuisance the Advocate-General, or two or more persons having obtained the consent in writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

## NOTES.

22, makes the concluding provision of S. 21 of the Specific Relief Act inapplicable to all arbitration agreements and awards governed by Sch. II. 46 C. 1041.

SEC. 90: SCOPE.—Not applicable where more efficacious remedy is open under special Act. 1930 B. 232.

SEC. 91: SCOPE OF SECTION.—S. 91 (1), C.P. Code, authorises two or more persons to sue with the previous consent of the Advocate-General in respect of a public nuisance, but it does not compel them to do so nor is there anything in S. 91, which confers a new right. If right exists independently of that section, that right is not taken away. Therefore, a representative suit brought not on behalf of the public of a place but of one particular community forming part of it, for a declaration of its right to take out their processions, along a particular route and for removal of certain obstructions, is not defective because a previous consent of the Advocate-General had not been taken. 151 I.C. 263=1934 A. 941. See also 1938 Mad. 338. S. 91, though it provides a remedy by getting the sanction of the Advocate-General—a remedy which in many of these cases will be financially out of reach of the parties expressly safeguards any other remedies which may exist. The English rule requiring proof of special damage in cases in which a member of the public prays for the removal of an obstruction to a public way does not apply to India. I.L.R. (1939) Mad. 870=49 L.W. 334=A.I.R. 1939 Mad. 691=(1939) 1 M.L.J. 392. But see 1940 Pat. 449. S. 91 deals with the case of a public nuisance. Therefore, a suit relating to an encroachment on a private easement is not barred by that section. 153 I.C. 704=1935 A.W.R. 92=1935 A. 789. Relief not claimed in respect of public nuisance cannot be granted. 73 I.C. 616=1923 L. 546. See also 85 I.C. 304=1924 A. 599. Village pathway—Obstruction not public nuisance. 46 I.C. 970. See also 85 I.C. 304=1925 A. 399; 1929 A. 790. In view of S. 3, Cl. (44) of the General Clauses Act, the definition of "public nuisance" given in S. 268, I.P. Code, must be held to apply to the Code of Civil Procedure. 157 I.C. 638=1935 O.W.N.

899. In the case of a public highway sanction under the section is necessary for establishing the right of the public. 53 B. 187. S. 33 of Calcutta Municipal Act, if controls S. 91, see 40 I.C. 74=21 C.W.N. 595. See also 1938 Mad. 338=1938 M.W.N. 262; 19 Pat. 208=1940 Pat. 449. A suit for establishing a public right of way and removal of obstruction which constitutes a public nuisance can be maintained by a plaintiff without the sanction of the Advocate-General under S. 91, and without proof of special damage. (1939) 1 M.L.J. 392. S. 91 does not control the provisions of O. 1, R. 8. 88 I.C. 505=1925 C. 1233. Nuisance—Public and private—Difference between—Right of suit—Obstruction to procession of Hindu idol by Mahomedans—Individual's right of suit. 36 I.C. 634=12 N.L.R. 130. See also 27 Bom.L.R. 421=1925 Bom. 367; 1935 Pesh. 190; 157 I.C. 638=1935 O.W.N. 899.

PROOF OF SPECIAL DAMAGE.—While it is necessary to prove special damage in cases where the plaintiff sues merely as a member of the public in respect of a public right in the full sense, it is not necessary to prove it in the case of quasi public rights, where the plaintiff sues as a member of the limited class whose special rights have been infringed. The doctrine of special damage is based upon the principle of English Common law that there can be no private action for a public wrong. To give a right of suit the wrong must be in some way special or peculiar to the person who sues, and it is based on the sound rule that no man should be harassed by a multiplicity of suits in respect of a single wrong. The principle has been adopted by the Courts in India as a matter of equity and good conscience. The wording of S. 91, C.P. Code, also makes it clear that the Legislature contemplated that this doctrine of special damage should apply in India. The doctrine has, however, two very definite limitations: firstly, it applies only to cases regarding public rights in the full sense; secondly an invasion of special rights will provide a cause of action without special proof of damage, for in such a case the law will presume damage. It is by reason of these limitations that it has been



92. (1) In the case of any alleged breach of any express or constructive trust

#### NOTES.

held not to apply to cases of quasi public rights, such as village roads. 19 Pat. 208 = 1940 P.W.N. 829 = 1940 Pat. 449. *But see also* 1939 Mad. 691 = (1939) 1 M.L.J. 392. Obstruction of way without any special damage can afford no cause of action to a member of the public. 23 M.L.J. 539. *See also* 27 Bom.L.R. 421 = 1925 B. 367. In a suit by a private person for the removal of a public nuisance he must prove special damage to himself. Special degree of inconvenience suffered by him cannot be said to cause him damages. 48 I.C. 88 (Nag.). *See also* 91 I.C. 728 = 1926 C. 549. Per *Sundara Aiyar, J.*—Special damage need not always be only pecuniary. 23 M.L.J. 539. Special damage should be something substantial and not pecuniary damage to the extent of four annas or eight annas. 23 M.L.J. 539. *See also* 1940 Pat. 449 = 186 I.C. 208; (1939) 1 M.L.J. 392 = 1939 Mad. 691. When objection on the score of want of sanction is not taken in the trial Court or in the first appellate Court and a decree has been passed in favour of the plaintiffs, it would not be equitable to allow the defendants to raise the objection in second appeal. A mere failure to obtain permission under S. 91, would not render the suit not maintainable if no objection is taken by the other side. 1938 M.W.N. 262 = 177 I.C. 633 = A.I.R. 1938 Mad. 338. Under S. 91, the consent of the Advocate-General is necessary for a suit with regard to a public right, but an action brought by a particular section or class of the public, claiming a right of way over certain land alleged to be a village pathway, is an exception to that general rule. Such an action is maintainable without proof of special damages. 20 Pat.L.T. 414 = 1940 Pat. 160. Where a particular passage or way is not a public highway and where certain persons bring a suit in their personal right to the use of the passage or way, it is not barred by S. 91, for the plaintiffs have a personal cause of action to bring the suit. 1939 A.L.J. 821 = I.L.R. (1939) All. 754 = A.I.R. 1939 All. 586.

SEC. 91 AND O. 1, R. 8.—A village pathway, or lane is of the class of a public highway and has its origin in dedication. It is not a private way or way of a class over which only certain classes of persons or certain portions of the public have rights which have their origin in custom. An *osara* built on such a village path or lane is a public nuisance within the meaning of S. 91. A suit in respect of such an *osara* can only be brought by observing the conditions laid down in the section—consent in some form as required by the section is necessary. Even if the pathway or lane be treated as a private pathway or one over which only limited persons have a right, notice and leave of Court under O. 1, r. 8, is necessary. A suit by a private person without sanction under

S. 91, or without leave under O. 1, r. 8, or without allegation or proof of special damage is not maintainable. 166 I.C. 538 = 17 Pat.L.T. 842 = 1937 P. 54. Obstruction to a village pathway is a public nuisance under S. 91, C.P. Code, though it may not be a public highway in the full sense. S. 91, however, does not take away any independent right of suit which may exist and it does not override the provisions of O. 1, r. 8, and it does not take away any right of suit under O. 1, R. 8, even when it is a case of public nuisance. The special restrictions of S. 91 can be overcome by proof of special damage and by proof of the invasion of the special rights of a limited class which will give an independent right of action. This latter right of suit is independent of both S. 91 and O. 1, r. 8. Therefore, in the case of suits relating to obstructions to village ways, if the plaintiff does not utilise the special provisions of S. 91, or prove special damage, but purports to sue under O. 1, r. 8, he must plead and show, (1) that he sues not on behalf of the public generally, but on behalf of a limited and clearly defined class with which he has a common interest and a common right, and (2) that the pathway in question is not a public highway in the full sense in which all the members of the public who happen to go to the place have equal interest; he must show that it is a way or path of a quasi public type, in which the class he represents has got special rights as distinct from those of the public generally. 19 Pat. 208 = 1940 P.W.N. 829 = 22 Pat.L.T. 46 = A.I.R. 1940 Pat. 449. *See also* (1939) 1 M.L.J. 392.

SEC. 92: SCOPE OF SECTION.—S. 92 is intended to be an exhaustive statement of the law applicable to suits based upon any alleged breach of any express or constructive trust, created for public purposes of a charitable or religious nature. 44 A. 622; 135 I.C. 806 = 1932 B. 65 = 33 Bom.L.R. 1575. *See also* 30 S.L.R. 104 = 165 I.C. 158 = 1936 S. 179. The argument that in the absence of an allegation of breach of trust in the plaint the suit is not maintainable, is untenable. A suit under that section lies not only in the case of any alleged breach of trust, but also where the direction of the Court is deemed necessary for the administration of a trust, if it be a trust for public purposes of a charitable or religious nature. 1938 Rang.L.R. 276 = 1938 Rang. 339. The requirement of the section as to sanction cannot be evaded by asking for a bare declaration under the Specific Relief Act. 24 L.W. 286 = 97 I.C. 630 = 1926 M. 1029. Section not confined to what may be called in the English law sense of "express or constructive trust"—at all events as regards "constructive trust." 60 M. 567 = 52 M.L.J. 415. The provisions of S. 92 are imperative, and the consent in writing of the Advocate-General, on



Public charities.

created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two

#### NOTES.

the Legal Remembrancer as the case may be, has to be secured as a pre-requisite and *sine qua non* before the plaintiff can file a suit under the section. 152 I.C. 861=11 O. W.N. 1435=1935 O. 96. Section 92 is mandatory and a suit claiming any of the reliefs therein mentioned must be brought in conformity with its provisions or not at all. 41 A. 1; 49 I.C. 530. The question whether section 92 of the C.P. Code has to be applied to suit must depend upon the prayers in the plaint at the date when the suit is instituted, and the section cannot be evaded by an amendment of the plaint at a later date. A suit which, as originally instituted, is obnoxious to section 92 cannot, by amendments in the plaint, be altered and rendered not obnoxious to the section. 165 I.C. 1001=38 Bom.L.R. 808=1936 B. 412. A suit to which a claim is made to property as the plaintiff's private property is not a suit to which section 92, applies. The nature of a suit is determined by the plaint and not by the written statement. A suit for declaration, injunction and possession of certain property as the plaintiff's own property is not a suit under section 92. The fact that the defendant in his written statement pleads that the property is a public charitable and religious trust cannot make the suit one under the section. 30 S.L.R. 478=A.I.R. 1937 Sind 174. Though the section has to be construed strictly, it should not be construed in such a way that a fraud is perpetrated on the section itself. 30 S.L.R. 104=1936 Sind 179. A suit for removal of a trustee and for settling a scheme is governed by section 92, C.P. Code, and not by the Religious Endowments Act. 24 M.L.J. 658. The plaintiffs are entitled to proceed either under section 18, Religious Endowments Act or under section 92, C.P. Code. *See also* 37 I.C. 688=4 L. W. 444=1934 P. 443. Court has very wide powers under section 92 and the circumstances under which those powers should be exercised are clearly stated by the Privy Council in 43 C. 1085 (1101) (P.C.). A Court should not frame a scheme when there is no mismanagement or misappropriation. 106 I.C. 375 (M.). Section 92 deals with completed trusts and is inapplicable where that stage has not yet been reached. 70 I.C. 903=16 L.W. 922. A suit for the administration of the trusts of a will which contained disposition for charitable purposes is maintainable though it is not brought under section 92. 70 I.C. 903=16 L.W. 922. A suit by an idol in his juristic capacity against persons who are interfering unlawfully with his property or with his income is not governed by section 92. 45 A. 215. A dispute between rival claimants to the office of trustee does not fall within the section. 44 A. 721. *See also*

134 I.C. 857=1931 N. 198. In order to bring a case within section 92 the suit must be a representative one, brought for the benefit of the public and to enforce a public right in respect of an express or constructive trust, (*Ibid.*) The section does not bar a suit for declaration that the plaintiff is a duly constituted mohant. 34 I.C. 502; 62 C.L.J. 153. A suit for declaration that defendants are not properly appointed trustees of a temple and for an injunction appropriate to that declaration does not fall within the purview of section 92. 46 B. 101; 9 R. 459. A suit to establish a personal right as hereditary trustee does not fall within this section. 61 M.L.J. 815. [45 M. 113 (F.B.), Rel.] *See also* 1937 Sind 174; 46 L.W. 426. A suit by co-trustee to declare joint right of management needs no sanction. 39 M.L.T. 214=105 I.C. 194=1927 M. 948. *See also* 103 I.C. 134=1927 M. 820; 1927 M. 338; 97 I.C. 480; 35 I.C. 806=1932 B. 65=33 Bom.L.R. 1575 [55 C. 519 (P.C.), Ref.] But if it is for a declaration of individual rights and also prays for a scheme for management by rotation, it is not maintainable without previous sanction required by this section so far as such relief is concerned. 63 M.L.J. 703. *See also* 1938 Lah. 869. A suit is not taken out of the scope of section 92 because the defendant denies the trust and claims to be the owner of the property. 9 I.C. 358=13 Bom.L.R. 49. *See also* 53 M.L.J. 183; 11 P. 288; 30 S.L.R. 104=165 I.C. 158=1936 Sind 179. But a decree cannot be passed against him to deliver possession of the properties in his possession. Section 92 need not be resorted to where a suit for a declaration of public right of way is filed with the permission of Court obtained under O. 1, R. 8. 69 I.C. 910=26 C. W.N. 587. Suit for declaration that certain property is wakf and not the private property of the defendant does not fall under the section. 8 L. 111; 160 I.C. 289=1936 L. 283. In a suit under section 92, when the defendants deny that the property is a public trust and claim it as their private property, it is open to the Court to decide the question whether the trust in respect of which the suit is brought is a public charitable trust or not so as to attract the application of section 92. A separate suit for declaration that the property is trust property is not necessary. An issue may be raised in the suit as to whether the trust is a public trust contemplated by section 92. 39 C.W.N. 1103=1935 C. 805; 152 I.C. 50=36 Bom.L.R. 526=1934 B. 257. The real intention and meaning of section 92, is that by virtue of the specific categories of relief mentioned in paras. (a) to (g) and the general relief mentioned in para. (h), it intends and is effective to catch all those cases in which any declaration, order or other relief is asked for



or more persons having an interest in the trust and having obtained the consent

## NOTES.

by way of carrying into execution and administering a trust for public purposes of a charitable or religious nature as opposed to relief claimed adversely to the trust altogether, as for example, a claim that no valid wakf exists or that certain property does not form part of the trust property. 14 R. 575. A scheme, particularly one relating to a Muslim wakf, can be modified by an application under section 151. 1940 O.W.N. 639=15 Luck. 730 A.I.R. 1940 Oudh 421. Where the defendant denies the trust, he cannot be held to be a trustee and must therefore be a trespasser or third party. Against such a trespasser or third party a suit can be brought without sanction. Under section 92 it is presupposed that an express or constructive trust created for public purposes of a charitable or religious nature exist, but where the nature or existence of such trust is in dispute, section 92 will not apply and a suit for a declaration without a further relief for possession with regard to the trust may be brought and that too without any sanction. 1934 N. 277. Nor suit by worshippers for declaration as to prior compromise decree in scheme suit being invalid and for declaring property to belong to wakf. 55 I.A. 96=55 C. 519 (P.C.). Nor for declaration that plaintiff has got right to appoint trustees. 49 A. 435; nor a suit to establish the existence of a trust; 5 P. 539; 1929 L. 740; nor a suit to establish right to office of mutawalli. 7 Pat.L.T. 4=1925 P. 554. Section 92 (2) saves the special jurisdiction of the District Court under Religious Endowments Act. 37 I.C. 688=4 L.W. 444 (27 M.L.J. 266; 28 M.L.J. 326, Foll.). Suit to enforce rights of worshippers is not one under section 92. 35 I.C. 88=3 L.W. 512. Suit filed in private capacity to recover possession from alleged trespasser is not one under section 92. 31 Bom.L.R. 349=1929 Bom. 193; nor suit for recovery of arrears from holder of a fund for charity. 31 Bom.L.R. 192=1929 B. 153. A suit under section 92 is a representative suit. 40 M. 110=31 M.L.J. 279. Section 92, C.P. Code, and section 14, Religious Endowments Act (XX of 1863) in so far as the forms of relief to which they relate are the same appear to offer a choice of proceeding under either of the sections, but they are not bound to proceed under both. 37 M. 184=24 M.L.J. 697. A suit under section 92 does not concern the private rights of the parties thereto and cannot be referred to arbitration. 72 I.C. 1016. Section 92 debars persons from unrestricted access to Courts and hence must be strictly construed. A suit to restrain interference with plaintiff's right to exclusion is not within section 92. 50 I.C. 509; nor a suit for damages for misconduct of trustee. 92 I.C. 526=1926 M. 509. Construction of scheme decree and its execution. See 1937

Mad. 326; 1937 Bom. 124=38 Bom.L.R. 1137; 1937 Lah. 490; 46 L.W. 701=(1937) 2 M.L.J. 887; 1939 M.W.N. 1009=1939 Mad. 605.

SCOPE OF SCHEME BY COURT.—Scheme can be made only under this section. 7 Pat.L.T. 4=1925 P. 544. In settling a scheme of management the Court has a wide discretion. The wishes of the founder with regard to management, if conformable to the changed conditions and circumstances of the present day, as well as the past might be taken into consideration; but the primary duty of the Court is to consider the general interests of the body of the public for whose benefit the trust is created and the Court might vary any rule of management which it finds to be impracticable or unsuited to the best interests of the institution. 43 C. 1085=31 M.L.J. 290 (P.C.). See also 38 C.W.N. 452=1934 P.C. 53=66 M.L.J. 333 (P.C.); 51 M.L.J. 454. In settling a scheme due consideration should be paid to the established practice of the institution and to the position of the persons connected with it. 8 Bom.L.R. 756. As also the interest of the beneficiaries. 114 I.C. 10=1929 P.C. 27 (P.C.). The Court can uphold a scheme settled by the co-trustees of an institution under which each of them was to manage the trust in rotation. 13 M.L.J. 341. The High Court has a large discretion in the matter of sanctioning a scheme for the management of a temple and of its funds. 24 M.L.J. 199 (P.C.). Even when a will directs that members of the testator's family are to be appointed members of the committee if suitable persons are not available, the Court has power to appoint strangers. 58 I.C. 566=17 A.L.J. 957. Where a Court has sanctioned a scheme for the administration of a religious or charitable trust the Court can vary the scheme from time to time according to the exigencies of the case. 43 C. 467. Successive scheme suits—Maintainability of. See 1922 M.W.N. 477=70 I.C. 579. Trustee appointed under a tentative scheme can only be removed by regular suit. 94 I.C. 610=1926 M. 799; 58 A. 538. Whether Courts have inherent powers to alter schemes without a fresh suit being brought for the purpose when there is no provision for alteration in the scheme, see 1922 M. 413=70 I.C. 579; 91 I.C. 794=1926 M. 659; 36 M. 464; 37 C. 871; 59 M. 751. Outside the scheme decree, the Court has no general power to deal with matters arising under it, e.g., trustee's failure to comply with the scheme. 1929 M. 300. Provision in scheme for filling up vacancies in office of trustees by application to Court valid. 1930 M. 918. Reservation of permission to apply to Court, for the proper management of an institution is bad in a scheme decree. See 95 I.C. 5=1926 M. 655; 50 M.L.J. 409. See also 51 M. 31=54 M.L.J. 792 (F.B.). Provision



in writing of the Advocate-General, may institute a suit, whether contentious or

### NOTES.

for enforcing scheme so as to disqualify particular person holding office as trustee is *ultra vires*—Independent suit the remedy. 1929 M.W.N. 744. A scheme decree may be in general declaratory but in particular circumstances provision may be made for execution of parts of the scheme. 107 I.C. 136=1928 M. 61. A provision in a scheme decree to the effect that "the trustees of the respective kattalais shall hand over all the cash proceeds of their property to the treasurer", is inexecutable. Neither section 51 nor O. 21, R. 32, C.P. Code, can be applied to such a clause in the decree. No receiver can be appointed to execute it by way of equitable execution. Per *Cornish, J.*—There is no short cut of a remedy by application to the Court where a trustee refuses to carry out his duties under the scheme. The only remedy available is a suit to remove him or to have the scheme modified. 59 M. 751=1936 M. 581=71 M.L.J. 87. See also 157 I.C. 486=41 L.W. 597=1935 M. 474. But see 38 Bom.L.R. 1137. Provision in the decree for its alteration in execution is *ultra vires*; changes can be made only in a fresh suit. 49 M. 580. But see 58 A. 538. where it was held that such a provision is within the power of Court to frame a scheme and apart from such a provision, a scheme may be modified under the inherent power of Court where it is necessary to prevent abuse of the process of the Court or where the ends of justice demand it. A provision in a scheme giving the Court authority to appoint a successor in place of a deceased trustee, is not a provision which can be regarded as constituting a modification of the original scheme and is not, therefore, *ultra vires*. 166 I.C. 215=1937 O.W.N. 39. Rules framed by temple committee under scheme decree can be altered by Court. 28 Bom.L.R. 309=94 I.C. 47; 1926 B. 179. Where a suit is brought by plaintiffs not in assertion of their individual rights but on behalf of the general public who are interested in the institution for the settlement of a proper scheme of management of the charities and for other relief there is no bar of limitation. 43 M. L.J. 448. Scheme giving liberty to Board of Trustees to apply to Court for directions—Individual member of the board cannot apply. 1929 M. 625. See also 1929 M. W. N. 744. Application for direction is maintainable only as regards matters left open by the Court for future determination—Consideration of the powers of a Temple Committee after the passing of Act II of 1927 is not one of them. 1929 M. 625.

SUIT UNDER SEC. 92—FRAME AND RELIEFS OF,—Suit primarily for settlement of scheme and appointing trustees—Prayer for possession of properties from strangers—Not proper—Order striking off such strangers is proper. 1937 Rang. 483.

REVISION OF SCHEME.—District Judge has jurisdiction to revise scheme once framed under proper circumstances. 153 I.C. 294=1935 P. 88. See also 1940 Oudh 421=1940 O.W.N. 639. 58 A. 538. *Tyabji, J.*—It is open to the Court to include in schemes for the administration of charitable institutions clauses providing that the schemes may, from time to time and as occasion arises, be altered by the Court according to the practice of the Bombay High Court. Such a clause is a valid provision. Where a decree includes a scheme for the administration of a charitable institution, the decree is in its substance very different from the generality of decrees. Whereas ordinary decrees require a particular act to be done by the defendant for the benefit of the plaintiff, a scheme, on the other hand, provides for continued action in regard to the administration of the charity, it being intended to lay down a plan of lasting character for the working of the institution. It contemplates a series of acts extending over many years during which its terms are to be put into operation. 38 Bom.L.R. 1137=A.I.R. 1937 Bom. 124.

SELECTION OF TRUSTEES.—Appointment from plaintiff's community on the ground that the trust had largely benefited by its endowment. 54 I.C. 263=10 L.W. 494. It is competent to the Court in framing a scheme for a Hindu religious or charitable endowment to sanction a cypres application of the funds of the endowment if the objects of the trust are not suited to modern conditions and if there is a general charitable intention in the terms of the endowment. The trustee himself cannot apply the income cypres without the sanction of the Court. 37 M.L.J. 489. Court's jurisdiction to frame a scheme under section 92 is not excluded by the fact that the temple is one subject to a Temple Committee, but in framing the scheme the Court should not unduly interfere with the power entrusted by the statute to the Committee, *e.g.*, by appointing a Board of Control between the trustees and the Temple Committee. 39 Mad. 700=30 M.L.J. 29. When a decree directs a trustee of a Hindu temple to perform festival, a Court has no jurisdiction to give certain directions for the same, 30 I.C. 771=2 L.W. 607. Hereditary trustee—Appointment of treasurer—Necessity for, 28 I.C. 479. A Court in framing a scheme regarding a temple is bound to have regard to the existing rights of individuals to the trusteeship of the temple. 23 M.L.J. 134; 28 M. 319; 21 M.L.J. 784. When deciding a case under section 92, if it is decided to appoint a committee, it is best to state so clearly in the judgment and to add that the personnel of the committee will be decided later on an application by the parties. The personnel can then be determined. 1940



not, in the principal Civil Court of original jurisdiction or in any other Court

#### NOTES.

A.M.L.J. 112. Where it is decided to appoint a committee, it is, most inadvisable that parties' counsel should be appointed as members. It is not right to ask counsel to act on behalf of their clients as committee members in a trust for which they appeared on opposite sides in a Court. 1940 A.M.L.J. 112. Where a trustee is removed, it is desirable that the Judge should issue notice to the parties interested and also give public notice in such a way as to enable claimants to the office to come forward and put in their respective claims. But when this procedure is not observed and a new trustee is appointed by consent of parties without any enquiry, the order will not operate as *res judicata* barring the claim of any claimant in future. 41 C.W.N. 298. Indian Courts have the same powers as the Courts of Chancery in England to appoint additional trustees even where there are hereditary trustees. 23 M. L. J. 134. See also 51 M. L. J. 457. Scheme—Effect of—Private rights lost—Alteration of scheme. 36 Mad. 364=21 M. L.J. 952. Even apart from any question of mismanagement and misappropriation, a Court can settle a scheme if it can conduce to the better management of the trust property. 45 I.C. 213. Appointment of trustee—Founder not providing for—Officer reverts to heirs—Court's duty. 1929 B. 193=31 Bom.L.R. 349. In making an appointment of a trustee in a suit under section 92, C.P. Code, although regard must be had to the line of devolution that may have been prescribed in the deed of endowment, it is permissible to the Court, in peculiar circumstances having regard to the exigency of the case, to make an appointment which may involve a departure from the arrangement contemplated by the deed of trust itself. 41 C.W.N. 298.

OBJECT OF SECTION.—The object of section 92 is to make it clear that the provisions of section are mandatory and object of the saving clause is to make it clear that Rel. End. Act is still in force. 24 M.L.J. 658. The object of section is not to encourage abuse of the process of the Court by vexatious or improper suits. 37 I.C. 897.

APPLICABILITY OF SECTION.—Test of applicability. 97 I.C. 480. The question whether a suit falls within section 92, C.P. Code, depends not upon the character in which the plaintiff sues but upon the nature of the reliefs sought. A suit by an idol of a temple represented by its manager against the trustee of a fund established for meeting the expenses of a public worship and other duties including repairs connected with that temple alleging breach of trust and claiming an account from the defendant trustee is a suit falling under section 92 (1), C.P. Code, and is not maintainable without the previous sanction of the Advocate-General. 58 M. 988=

C.C.M.—73

1935 M. 825=69 M.L.J. 291 (F.B.). See also 72 C.L.J. 362. The section does not apply to the case of an endowment for purposes religious as well as charitable. 5 M. 383; 11 A. 18 (22) (F.B.); 25 A. 631. In the case of a trust for public purposes of a charitable and religious nature, the Court is not fettered by the wishes of the founder. The primary duty of the Civil Court is to consider the interest of the public, or that part of the public, for whose benefit the trust is created and the Court is justified having regard to the previous management, in deciding, in the exercise of its discretion, that the defendant mutawallis should be removed on account of their insolvency and mismanagement and keeping the charity in a deplorable condition. 43 C. 1085 (P.C.), Rel. on. 147 I.C. 882=1934 P.C. 53=66 M.L.J. 333 (P.C.). The allegation that a person is entitled to the office of a trustee of a fund brings the reliefs to that declaration sought within the purview of section 92 (1) and the proper remedy is a suit properly instituted under that section and not an application under section 34 or section 74. Trusts Act. 150 I.C. 193=11 O.W.N. 323=1934 O. 118. The mere fact that the plaintiffs in a suit are in a sense trustees will not necessarily preclude the application of section 92, if the reliefs sought relate not to the vindication of the personal rights of the trustees, but to the advancement of the interests of the institution itself by securing more efficient management. A suit whose avowed object is the furtherance of the interests of the institution itself is a suit falling under section 92 and its provisions must therefore be complied with. 42 L.W. 264=1935 M. 855=69 M.L.J. 300. The section does not apply to a case where the suit is by the whole body of persons who are legally authorised to administer the trust to which it relates. 29 A. 27. Section 92 applies to an action for removal of a person appointed a trustee under a trust deed. Section 92 applies as much to the removal of a trustee *de son tort* as to the removal of an ordinary trustee. 151 I.C. 138=1934 P. 321. A suit for the recovery of trust property improperly alienated by a trustee does not lie under this section. 8 B. 365; 28 A. 112; 55 M. 549=62 M.L.J. 180. But see 24 C. 418. Nor a suit by a trustee to recover possession of property from a trespasser. 25 A.L.J. 902; 129 I.C. 741=1931 B. 170=32 Bom.L.R. 1687. A suit to compel trustees to make good the loss sustained by the charity in consequence of their default falls, within the scope of the section. 21 B. 48. The section was intended to apply to persons who, before its enactment, had or were believed to have no right to take proceedings for purposes mentioned in it. 21 M. 406. The section does not apply to application for modification provided for in a scheme. 133



empowered in that behalf by the Provincial Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

#### NOTES.

I.C. 823=1931 Bom. 388=33 Bom.L.R. 546. *See also* 55 B. 414. Where a society wants immovable properties bequeathed to it to be converted into money and invested in G.P. notes the proper procedure is by way of suit under this section. 53 A. 422. A relief asked in a suit for declaration that a certain property is public property to which the entire Hindu community is entitled to go and worship does not come under section 92. 145 I.C. 294=14 P.L.T. 768=1933 P. 246. Where certain persons apply for being appointed as trustees of a certain wakf without specifically praying for the removal of the trustees actually working there, the purpose of the application is virtually the removal of such persons therefrom and the relief sought for falls within the purview of S. 92 (1); the Court has no jurisdiction to entertain such application; the remedy is by way of suit under S. 92. 1937 O.W.N. 730=1937 Oudh 381.

**RELIEFS UNDER THE SECTION.**—A court has inherent power to pass a decree in a suit relating to trust, under section 92 (h) appointing new trustees and directing old ones to deliver the properties to them. 58 I.C. 566=17 A.L.J. 957. The discretion which is conferred upon a Court by the terms of section 92, is very wide and the law does not make it obligatory upon a Court in a suit under that section to make all the orders that are contemplated by the different clauses of that sub-section. It is quite open to the Court not to frame a detailed scheme, if it thinks that certain directions given by it to the newly appointed trustee for the proper carrying out of the endowment would be quite enough. 41 C.W.N. 298. In framing schemes the superintendence over temples should not be vested in Courts but in temple Committees. 1927 M.W.N. 759=26 L.W. 581=1927 M. 1033. In section 92 the words "such further relief as the nature of the case may require" cover every subsidiary order or direction on any matter of detail necessary for carrying out the main purposes of the section. 40 I.C. 182; 24 C. 418; 11 P. 288. The expression must be taken to mean relief of the same nature as clauses (a) to (g) and so the section does not apply to a suit by certain worshippers for a declaration that a prior scheme suit had been fraudulently compromised and for a declaration that the properties belonged to a wakf and no sanction is necessary. 55 C. 519=55 I.A. 96=54 M.L.J. 669 (P.C.). It would be of no avail to pass a decree removing the trustee and appointing a new trustee if the old trustee is allowed to remain in possession of the property. To render the decree operative, possession must be delivered to the newly appointed trustee. A relief for the delivery

of possession would fall under Cl. (h) of section 92 and be within the competence of the Court to grant. But no order can be made for such amounts as may be due from the old trustees after accounts are taken. 144 I.C. 506=1934 N. 48. A prayer asking that the trustees be restrained from alienating the trust property is one which may well be included under section 92 (h). 30 S.L.R. 104=165 I.C. 158=1936 Sind 179. A decree cannot be passed against the defendant who sets up title adverse to a trust, to deliver possession of properties in his possession, in a suit under this section. 53 M.L.J. 183. There is much which is common between section 14 of the Religious Endowments Act and section 92 but the latter is substantially the wider and provides for settling a scheme which is a jurisdiction of a very wide and beneficial nature. 42 B. 742. *See also* 1925 P. 544. Where none of the reliefs specified in section 92 is claimed and the plaintiff does not ask the Court to appoint him a mutawalli, the suit is competent under section 92. 29 I.C. 423=20 C.W.N. 604. A suit for declaration that the property in the suit is a public charitable property and that neither the defendant nor any one else is entitled to alienate the same and for an injunction restraining the defendant from alienating the same or any portion of it to any person, is a suit to which section 92 applies, because the relief prayed for falls within Cl. (h) of the section; consequently sanction under the section is necessary. 30 S.L.R. 104=165 I.C. 158=1936 Sind 179. Mere declarations are outside the scope of section 92. But where reliefs contemplated by the section are claimed and such reliefs cannot be granted without the determination of the question whether a public trust exists or whether a particular property appertains to a public trust the Court in a suit under section 92 can determine the question whether a public trust exists or a particular property appertains to such public trust. A suit for a mere declaration that a trustee has not been validly appointed may be outside the scope of section 92. But in a suit under that section the Court has to determine whether a trustee has been validly appointed or not if determination of such a question is necessary for giving reliefs claimed in the suit which properly come under that section. 72 C.L.J. 362. A.I.R. 1941 C. 68. Though in a suit properly framed under S. 92 a relief amounting ultimately to an injunction may be granted to the plaintiff, the relief for a permanent injunction to restrain the defendant from obstructing general public in going to the place for puja is not contemplated by S. 92 and there is no bar to grant of such relief on account of absence of consent of Advocate-General. 145 I.C. 294=14 Pat.L.T. 768=



## (a) removing any trustee ;

## NOTES.

1933 P. 246. A prayer for ejectment cannot be entertained by the Court in a suit instituted under section 92. 144 I.C. 168=1933 L. 395. It is not beyond the power of the Court which frames a scheme in a suit under section 92, to provide for the modification of the scheme by an application in the very suit itself in which the scheme is framed. 73 C.L.J. 532=A.I.R. 1941 C. 618.

ACCOUNTS, DIRECTION AS TO.—S. 22, C. P. Code, is quite wide enough to entitle the Court to direct an account against a trustee and to order him to pay the amount found due upon taking those accounts. 28 I.C. 886. A decree directing trustee to pay amount due on taking accounts is executable and not merely declaratory. 52 M.L.J. 182; 54 M. 345=60 M.L.J. 173 (178). See also 1928 M. 61=107 I.C. 136. Such an order is appealable as a decree. 54 M. 337=60 M.L.J. 167. It is not obligatory on the Court to pass a decree directing accounts on the removal of trustee in a suit under S. 92, C. P. Code. If upon a consideration of the facts and circumstances of the case, when the income of the endowment is quite small and the expenditure does not leave much in the shape of balance, the Court comes to the conclusion that it would not be profitable to make an order for accounts, it is very difficult for the appellate Court to say that that order is not justifiable or that it would be interfered with. 41 C.W.N. 298. When the Court removes a trustee for mismanagement and breach of trust under S. 92, it will not pass an order against him for rendition of accounts, if it is found that the usufruct of the properties has all along been held by in the hands of the trustee for the time being to be applied at his discretion, and also when such an order would be infructuous in the sense that it would lead merely to an expensive and laborious inquiry leading to no tangible result. 14 P. 379=16 Pat.L.T. 35=1935 P. 111. See also I.L.R. (1937) Cal. 673=1937 Cal. 150. Suits merely to recover money found due by the defendant on the taking of accounts and to recover property belonging to the trust but in the possession of the defendant and to recover damages for a tort committed by the defendant would always be maintainable under the general law and may not fall under S. 92. 1934 M. 126=57 M. 362=66 M.L.J. 98. Directory clauses outside the scheme portion in a decree are executable; but those within it are *prima facie* inexecutable. 1933 M. W.N. 183.

SANCTION.—Sanction obtained from Advocate-General without disclosing rejection by the Collector of a prior application for sanction, is not invalid. But the *bona fides* of the applicant will be taken into consideration. 1928 M. 401. Notice to trustee desirable before sanction. 53 M. 223. Sanction by Collector without notice to de-

fendants is valid. Court can direct suit to stand over for obtaining sanction against other defendants, where sanction had been obtained only as against one defendant. 1930 M.W.N. 456. A sanction granted for a suit under S. 92 means any suit which may be laid under that section and it is not confined to one of the species of suits that could be raised on the application. 48 C. 493 (P.C.); 21 B. 257. The limitation requiring previous sanction is necessary to prevent an abuse of the powers conferred by the section. 21 M. 406. The suit must be limited to matters included in the consent and it is not competent to the Court to enlarge the scope of the suit. 21 B. 257. But see 48 C. 493 (P.C.). Variance between sanction and plaint is not fatal to the suit unless there is any material omission. 107 I.C. 130=1928 M. 205. The duties imposed upon a Collector by Government Resolution under S. 93 of the C. P. Code are of a very special nature, and cannot be discharged by his subordinates. 35 B. 243. But there is no harm in an order being signed by the sheristadar for the Collector. 107 I.C. 130=1928 M. 205. Consent obtained as against persons not real trustees is invalid as against the real trustees. 24 L.W. 419=97 I.C. 462=1926 M. 970. Such an objection cannot be waived by real trustee. (*Ibid.*) The "consent in writing" must be a specific permission given to two or more persons by name. A permission given to one applicant by name "and another" is not sufficient. 26 A. 162. But see 10 M. 185; 9 I.C. 358. Sanction is necessary for a suit, by individual worshippers against trustees for infringement of right common to them and other worshippers. 52 M.L.J. 541. Where sanction under S. 92 is obtained by several persons and one of them dies before the institution of suit, the suit instituted by the rest is valid. A.I.R. 1940 Lah. 356. The use of the word "instituted" in S. 92, makes it incumbent on the Court to see what the prayers were in the plaint at the date the suit was instituted in order to satisfy itself whether S. 92 (2), had been complied with, and for that purpose the Court must pay no regard to what may happen by way of amendment or abandonment at some later stage in the suit. If the suit as instituted falls under S. 92, it cannot lie if brought without the sanction of the Advocate-General or the Collector, the fact that by subsequent amendment the relief or reliefs falling under S. 92 are struck would not make the suit maintainable. *Broomfield, J.*—If a suit claims the reliefs specified in S. 92 and should therefore have been brought under that section, the difficulty cannot be got rid of by amending the plaint or abandoning those reliefs. It would make no difference in principle whether a particular relief is given up after a formal amendment of the plaint or whether it is abandoned without it. 42 Bom.L.R. 443=A.I.R. 1940 Bom. 242.



(b) appointing a new trustee ;

#### NOTES.

**FORM OF SANCTION.**—The plaintiffs who are seeking to obtain the Court's assistance to enforce the management of the trust property are not to be defeated because the Collector elected to name only one of the petitioners and to refer to the others merely as the other applicants. 9 I.C. 358=13 Bom. L.R. 49. But *see* 26 A. 162 (*contra*). Where the consent in writing of the Advocate-General, or Collector has been obtained to a suit by three persons, the suit as instituted must conform to that consent. If after the institution by three persons as plaintiffs, two die, the suit does not become defective or incompetent. There is no provision at all in the Code for recourse being had to the Advocate-General or Collector during the course of a suit or proceedings in appeal. The consent is a condition of the valid institution of a suit and has no reference to any other stage. The persons who filed the suit within the leave of the Advocate-General or Collector are not to be deemed to be one plaintiff and as such there is no reason why one of the plaintiffs in the case should not appeal alone on the same terms and conditions as are applicable to suits in general. 65 I.A. 198=A.I.R. 1938 P.C. 184=(1938) 2 M.L.J. 1 (P.C.). The suit for declaration and injunction as to pathway is one to which O. 1, R. 8 is appropriate if the Court's permission is taken, the recourse to the Advocate-General being unnecessary. 69 I.C. 910=26 C. W. N. 587. Where the object of suit is to secure certain advantages to a trust, any two persons can sue in that behalf with the sanction of the Advocate-General or the Collector of the District concerned. 35 I.C. 88=3 L. W. 512. *See also* 60 I.C. 570. No sanction is required for a plaintiff suing as a trustee for obtaining a decree for an account against his co-trustee. 41 M.L.J. 608=45 M. 113. But *see* 66 I.C. 837=16 L. W. 155; *also* for a suit by a co-trustee for joint right of management. 105 I.C. 194=1927 M. 948. Where a sanction under S. 92 is granted to more than two persons interested in the trust, all must join in the suit, and not any two of them. 29 M.L.J. 231. A suit for appointment of new trustee requires a sanction. 21 M.L.J. 450. No relief can be prayed for, to which no sanction has been obtained. 26 L.W. 581=1927 M. 1033. But *see* 9 O.W.N. 966=1933 O. 22=8 Luck. 266.

**"TWO OR MORE PERSONS."**—The phrase "two or more persons" in S. 92, means two or more individuals who are named or so described in the consent that they can be identified. A.I.R. 1941 Sind 88. When a suit is instituted by one plaintiff only with the consent of the Advocate-General, and the plaint is subsequently amended by the addition of a second plaintiff, and the Advocate-General consents to it, the suit is bad in its inception and should be dismissed. 30 B. 603. But *see* 1929 M. 63. Reservation

by a Court to a person or persons to apply for a relief is *ultra vires*. 51 M. 31=53 M.L.J. 792 (F.B.). The power to file suit granted by the sanction must be exercised by all the grantees joining as plaintiffs. Where some of them were plaintiffs and the others were joined as defendants defect is not cured by transposition of the defendants to plaintiff's side. 53 M. 223. Where consent has been given to two or more persons, some only of those persons, even if they are more than two cannot institute the suit. A condition precedent to the valid institution of the suit is the fulfilment of the conditions of the consent which has been given. The section does not contemplate that some of those persons should institute a suit as plaintiffs while others who, after consent is given, have changed their minds should be joined as defendants. A.I.R. 1941 Sind 88.

**"INTERESTED."**—The interest must be an existing one; and not a mere contingency; the mere possibility of an interest is not sufficient. 20 C. 810 (816)=1930 L. 1. *See also* 1938 Rang. 339. The interest need not be a direct interest. 24 I.C. 712. The interest need not be personal. A *worshipper* has such an interest in the temple management to see not only that he himself is in the voters' list but also to see that the list is properly revised and the election is held as per rules. 50 M. 726=53 M.L.J. 545. Where the evidence shows that the temple is a public temple, the right to worship in the temple gives the plaintiff a right to sue under S. 92. 1933 S. 213. *Residents of the locality* in which a religious institution such as a mosque is situated and for which it was originally founded and the persons authorized by law to use it and the worshippers of the mosque are persons interested under the section. 152 I.C. 323=1934 Pesh. 57. The *descendants of the founder* of a trust have an interest in the trust over and above that which the public generally have or might have in a public trust and any one of them has a *locus standi* to sue the trustees and beneficiaries colluding to misappropriate trust property if according to him provisions of the trust have not been carried out or have been rendered impossible of being carried out. The provisions of S. 92 do not cover a suit of this nature. 47 M. 884 (P.C.), Rel. 1933 L. 670. "Interest" what is, *see* 91 I.C. 924=1926 M. 267; 23 L.W. 240=92 I.C. 950=1926 M. 466; 40 M. 16; 1932 A. 708. *Persons in whom right of control is vested* by founder—Not the only persons competent to bring the suit—*Collaterals of founder* have right of suit as persons interested. 1929 L. 428=116 I.C. 451. *See also* cases cited under the heading "right of suit" *infra*.

**PRIVATE TRUST.**—S. 92 is not applicable to private trust. 43 M.L.J. 116=49 C. 459 (P.C.); 25 I.C. 661; 56 I.C. 707; 101 I. C. 54. The Court should pause before interfering under S. 92 with a matter which is



## (c) vesting any property in a trustee ;

## NOTES.

more a family matter than of a public nature. 28 I.C. 116. The essential ingredient which constitutes a gift of movable or immovable property in the Hindu Law is the *Sankalp* and the *Samarpan* whereby the property is completely given away and the owner completely divests himself of the ownership of the property. The fact that a *dharmshala* was built by a person in pursuance with the will of his predecessor and proof of public user is not sufficient proof of dedication; where on the other hand, the evidence was to the effect that the owner kept the keys of the building and permission to use it was obtained from him, it must be held to be a private institution. 141 I.C. 523=34 P.L.R. 105=1933 L. 189. See also 148 I. C. 882=1934 A. 315. A trust for the benefit of the poor members of a particular testator's family is not a trust "for a public purpose of a charitable nature" within the meaning of S. 92. Accordingly a suit relating to such a trust does not require for its commencement the sanction of the Government Advocate, even though the suit is for relief of one of the kinds mentioned in that section. 14 R. 575. See also 1935 S. 235.

**PUBLIC TRUST.**—A suit to remove a duly appointed muttawalli of a trust created for a public purpose of a religious or charitable nature cannot be instituted save in conformity with S. 92, C. P. Code. 35 A. 98. Public trust—Test of. 38 I.C. 800; 45 I. C. 213; 11 I.C. 166; 1928 M. 879. S. 92 is not limited to trusts in the sense defined by the Trusts Act but must certainly include them. 40 Bom.L.R. 1041=A.I.R. 1938 Bom. 471. Unless a trust is expressly created for a public purpose of a charitable nature, the mere fact that the income of certain property has been for long spent in feeding an idol and in maintaining and taking care of pilgrims will not by itself constitute a trust of such a nature. 11 I.C. 308=8 A.L.J. 1120. A public trust must be proved by strong evidence; the mere fact that the income of certain property has for a long time been spent to support fakirs and visitors is not sufficient evidence of such a public trust. 11 I.C. 166. See also 1937 Cal. 67; *Tope nam* is a public charitable trust. See 1937 M. 862=(1937) 2 M.L.J. 505. A trust created by a private person formulating a scheme to help Anglo-Indian youths of the Madras Presidency in their studies, providing for the grant of loans at a low rate of interest to the youths of that community who wished to qualify for professions or obtain higher education generally is not a private trust, but a public trust governed by the provisions of S. 92. A scheme of loans for educational purposes at low interest must be regarded as a scheme of a charitable nature. The fact that the founder has placed certain restrictions as regards the age and other qualifications of the recipients of the benefit does not make the

trust any the less a public trust. An order of Court permitting a deviation from the trust can only be made in proceedings taken with the sanction of the Advocate-General under S. 92, and not by way of an originating summons under O. 45 of the Original Side Rules of the High Court. 50 L. W. 534=A.I.R. 1939 Mad. 920=(1939) 2 M. L.J. 714. Allotting property for the benefit of poor members of a particular community is a purpose of public or charitable nature within the meaning of S. 92. Where a suit relates to such property sanction of the Advocate-General under S. 92 prior to the institution of the suit is essential, although such property forms a small part and is divisible from the rest of the trust property in respect of which the suit is brought. Sanction under S. 92 is all the more necessary when the suit is not divisible and it is not possible for the plaintiff to omit the relief which he claims relating to charitable part of the trust and in such a case the whole suit is governed by S. 92. I.L.R. (1939) Kar. 325=A. I. R. 1939 Sind 13. Matter pertaining to administration of religious trust—Temple trustee removing namams in temple and on temple articles and putting different namams—Suit in respect of—Suit to compel trustee to take out deity in procession on certain occasions—Sanction is necessary. 1939 M.W. N. 418=1939 Mad. 757. See also 141 I.C. 523=1933 L. 189; 1934 A. 315. There must also be clear proof of dedication. 141 I.C. 523=1933 L. 189. It is for the plaintiff to prove that there is an endowment or trust for public or charitable or religious nature. But the question of onus is immaterial when evidence on both sides is adduced. 64 C.L. J. 341=1937 C. 67. The section should be applied to Mutts and the public, the Advocate-General and the Courts of Justice should have the power to stop the wholesale misuse of the income of a charitable and religious institution like a matam. 38 M. 256=25 M.L.J. 393. The head of mutt, how far trustee of mutt property. He will be trustee of temple property vested in him as head of Mutt—In respect of such property, suit lies for his removal under S. 92, C. P. Code. 32 M.L.J. 271, affirmed on appeal in 39 M.L.J. 98 (P.C.). But see also 37 M.L.J. 231=40 M. 745; 43 C. 707; 43 M. 253; 40 Bom.L.R. 1041=1938 Bom. 471. Though a caste or a section thereof can own a temple, a temple which is merely managed by certain caste is the subject of a charitable trust and a scheme can be framed for it. 34 I.C. 551=4 L. W. 228. Public includes a section of the public. 11 P. 288. A District Court cannot, even with the consent of parties, delegate the decision whether a trust is or is not a public trust to a Subordinate Court. 130 I.C. 299 (1)=1931 A. 332.

**PUBLIC AND PRIVATE TRUST.**—Where the bulk of the income from the wakf properties is to be spent for the family or family



## NOTES.

purposes, some portion for religious purposes which cannot be regarded as wholly public in Mahomedan Law like *Mohurram* and *Ramzan* expenses, and the surplus, if any, is to go to *haj* expenses of the *mutawalli*, the wakf is not a trust created for public purposes within the meaning of S. 92, C. P. Code. 44 C.W.N. 969. There is no hard and fast rule that, merely because there are certain provisions in favour of private individuals and certain others in favour of the public, therefore, the case falls within or without the class of public trusts to which S. 92, C. P. Code applies. The Court must look to the real substance of the trust and the primary intention of the creator of the trust in every case. 42 C.W.N. 345=A.I.R. 1938 Cal. 278. S. 92—Applicability—Wakf partly private and partly public—Suit for removal of trustee alleging breach of private trust—Consent of Advocate-General not necessary—'Breach of trust'—Meaning of. 1939 Rang.L.R. 140=1939 Rang. 254. S. 92—Applicability—Hindu leaving widow and large properties—Wills left by deceased giving considerable properties to trusts and charities and maintenance to widow—Suit by latter claiming higher maintenance according to Hindu Law and challenging wills—No sanction—Necessary. 41 Bom.L.R. 787=1939 Bom. 354.

RELIGIOUS TRUST.—The head of a mutt may be answerable as a trustee for maladministration. 50 M. 297=52 M. L. J. 405. Where a person was put in charge as pujari of an idol in a Dharmasala, he is a servant and not a trustee and a suit under S. 92 is not maintainable against him. 21 A.L.J. 310=1923 A. 247. Although a District Judge has the powers of a Khazi under the Mahomedan Law to deal with an application for appointment of a mutwalli, he may relegate the petitioner to a suit under S. 92. 49 I.C. 799=23 C.W.N. 138. A suit by a temple trustee to recover the amount due by a defendant under the terms of the trust cannot be maintained without leave as the suit is not exempt from S. 92 or S. 18, Religious Endowments Act. 62 I.C. 911=14 L.W. 238. Public user for a long period without objection can be relied upon as strong evidence of a public trust. Where properties have been acquired by a Sadhu, *mahant* of a temple and have descended from chela to chela there is a presumption that they have been dedicated to religious uses. 40 Bom.L.R. 1041=A. I. R. 1938 Bom. 471. Where the origin and founder of a temple are unknown, the facts that members of public are freely admitted, festivals are celebrated in a certain manner, and the like lead to the inference that the temple is a public one, and the inference is not rebutted by the fact that a particular mode of worship is followed, that management follows a particular line of descent in the pujari family. 40 M.L.J. 289. See also 1938 Bom. 471. S. 92, C. P. Code, is not confined to cases where there is definite evi-

dence as to the creation of the trust and of dedication to purposes of charitable and religious nature. The section will apply even in the absence of such evidence. The matter has to be decided not merely on the terms of the grants in respect of the particular institution but also on the usage and custom of the institution. The fact that the income of the properties has all along been applied to religious and charitable purposes is strong reason for holding that those purposes are the purposes for which the institution exists. 14 P. 379=16 Pat.L.T. 35=1935 P. 111.

CHARITABLE TRUST—WHAT CONSTITUTES.—Where the words used in a trust are "charitable and benevolent" purposes, any object to be benefited must possess both characteristics. Accordingly these words will constitute a good charitable trust, that is to say a charitable trust of a public character. But where the words are "public, benevolent or charitable purposes" the gift is expressed in another form admitting non-charitable objects, for example objects of private benevolence only, or public non-charitable purposes and the trust will fail. A bequest to charitable purposes may by its very terms show that those purposes are of a private nature. In such a case the bequest would not fall under S. 92. Where a gift is to purposes which are charitable, whatever else they may be in addition, then unless the charitable purposes expressed are clearly stated to be of a private nature, the Courts will administer the trust as one for public purposes of the charitable nature. Where the testator's intention is to benefit only the members of his own family who are poor, this is not "a public purpose of a charitable nature" within the meaning of S. 92. But, where charity, *prima facie* for public purposes, is the expressed object of the settlor, these purposes are not in any way defeated by the reminder that members of his own family are eligible to benefit with other members of the public at large. 1939 Rang.L.R. 520=A.I.R. 1939 Rang. 203.

CO-TRUSTEES.—S. 92 has no application to a suit for a declaration that the plaintiff and the defendant are co-mutwallis of wakf property and are entitled to manage it jointly. 52 I.C. 628 (A.). See also 97 I.C. 480. A trustee of a public charity can sue his co-trustee for an account without the sanction of the Advocate-General or the Collector. 41 M.L.J. 608=45 M. 113. See also 25 Bom.L.R. 747=1924 B. 198. S. 92 does not cover suits relating to disputes between parties as to who is to be a mutawalli on the ground of family relationship. 37 A. 86. See also 40 B. 439. Where a suit is instituted by a person claiming to be a trustee of property dedicated for religious purposes, for a declaration that he is a trustee and is entitled to manage the institution as such but the relief he claimed is in his individual capacity and not in a representative capacity and the suit is against a rival trustee or one who claims to be a



## (d) directing accounts and inquiries ;

## NOTES.

trustee, such a suit does not fall under S. 92 (1). No injury to public right or interest is involved; whoever happens to succeed will hold the property as trustee and not in his own right. The dispute between the rival trustees *inter se* is neither a suit for removal of any trustee nor one for appointing a new trustee nor for vesting any property in a trustee and does not fall under any heads from (d) to (g) or under head (h) of S. 92. A suit in respect of properties forming the subject-matter of a public charitable trust, seeking relief on the ground of a breach of trust by the defendant trustee falls under S. 92, and is not maintainable unless instituted in conformity with the provisions of S. 92. The fact that the trustee-defendant is a woman and that the plaintiff is a reversioner who has a chance of becoming a trustee in the future makes no difference. There is no difference between a male holder and female holder of the office as regards trusteeship in respect of the status of or the remedies open to the next successor to the office. 48 L.W. 543=A.I.R. 1939 M. 65=(1938) 2 M.L.J. 1013. Trust funds deposited with banker by trustee—Misapplication to private account of trustee—Suit by co-trustee against banker and trustee—Sanction of Advocate-General not necessary. See 1938 M.W.N. 1017=48 L.W. 577=A.I.R. 1938 Mad. 999.

CO-SHARER.—Suit by co-sharer pujari for declaration of his right to share of income and for injunction from obstruction—Section applicable. 148 I.C. 1153=35 Bom.L.R. 1119=1934 B. 26.

DE FACTO TRUSTEE.—A *de facto* trustee or a trustee *de son tort* is subject to the same liabilities as a *de jure* trustee and suit under S. 92 is maintainable against the former. 27 I.C. 389. See also 33 C. 789; 22 B. 759; 15 C. 329; 26 M. 450; 1931 M.W.N. 898.

TRUSTEE DE SON TORT.—In order to invoke the application of S. 92, C. P. Code, four conditions are necessary: (1) the trust in suit must be for public purposes of a charitable or religious nature, (2) the plaint must allege a breach of trust or that the direction of the Court is necessary for the administration of the trust; (3) the suit must be not only in the interest of the plaintiff individually, but in the interest of the public, or in the interest of the trust itself (for where the trust is a public one the interest of the trust will be the interest of the public); and (4) the relief claimed in the suit must be one of the reliefs mentioned in the section. A prayer for removal of a trustee is a relief contemplated by the section and falls under it. The fact that the defendant sought to be removed on the ground of misconduct and misappropriation is a self-constituted trustee, that is to say, a trustee *de son tort* is immaterial, because if the defendant is a person who is not a trustee and purports to act as a trustee, he is a

trustee *de son tort*, and a suit to remove such a person, is a suit for the removal of a trustee within the meaning of S. 92, C. P. Code. 1940 P.W.N. 123=21 Pat. L. T. 155=A.I.R. 1940 Pat. 425. A sanyasi appointed by the people to look after a temple died and after his death his son took possession of the property as chela of his father. He was however appointed neither by the bhik nor by the representatives of the people: Held, that the person who had succeeded to the temple as son and chela of father could not be described as trustee *de son tort*. A.I.R. 1940 Lah. 356. The consent of the Advocate-General under S. 92, C. P. Code, is not necessary in order that a trustee may recover trust property in the hands of a stranger to the trust. 45 C.W.N. 385=I.L.R. 1941 M. 175=A. I. R. 1941 P.C. 1=(1941) 1 M.L.J. 393 (P.C.).

CONSTRUCTIVE TRUSTEES.—Different from the English Law sense. See 50 M. 567=52 M.L.J. 415. A constructive trustee within the meaning of S. 92 would include a person who holds a particular fiduciary position and whose obligation as such can be enforced in a Court of law. 25 Bom.L.R. 747 (22 Bom.L.R. 457; 11 M.I.A. 405; 20 Bom.L.R. 1088; 54 Bom.L.R. 629, Rel.) (Archaka of temple). A stranger to a trust who receives money or property from the trustee, which he knows to be part of the trust estate, and to be paid or handed to him in breach of the trust is a constructive trustee; and the cases of a constructive trustee, or *de jure* trustee, or trustee *de son tort* are covered by S. 92. They are not strangers to the trust and a suit against them is maintainable under S. 92. In such a suit it is not necessary for the plaintiff to pay *ad valorem* Court-fee on a prayer for declaration of trust. 39 C. W. N. 1103=1935 C. 805=63 C. 74.

NEW TRUSTEES.—A suit lies for the appointment of new trustees on the ground that the defendants are not the lawful trustees and that the trusteeships are therefore vacant. The new trustees so appointed can demand possession from the defendants. 26 M. 450 (453). A fresh suit under the section is necessary to appoint additional trustees. 1927 S. 1=97 I.C. 398. A provision in a scheme settled under S. 92, C. P. Code, giving the Court authority to appoint a successor in place of a deceased trustee, is not a provision which can be regarded as constituting a modification of the original scheme and is not, therefore, *ultra vires*. 1937 O.W.N. 39=A.I.R. 1937 Oudh 193.

REMOVAL OF TRUSTEE.—See 67 I.A. 32=(1940) 1 M.L.J. 371 (P.C.) (Removal of trustee *de son tort*). No general rule can be laid down befitting the different kinds of religious heads of varying sanctity and eminence. It must depend upon the facts of each case. It may be that mere mismanagement or incapacity is, in the case of certain



(e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust ;

### NOTES

high dignitaries, not ordinarily sufficient for their removal from the performance of their religious duties, as distinct from their duties as managers of the properties of the institution. It may also be that a Court, in certain cases, exercises a wise discretion in not directing their total exclusion from their religious office, where (*e.g.*) the lapses are due to causes like a misconception of their position or obligations. The Court may sometimes not order their total removal, but may associate with them a committee of management. But these are all matters for the consideration of the Civil Court, which must necessarily enjoy a wide discretion to decide what form of punitive or ameliorative order will suit the requirements of the case. The true rule in such matters can be stated to be that if it be found by the Court that the functionary, in the exercise of his duties, has put himself in a position in which the Court thinks that the obligations of his office in connection with the endowment can no longer be faithfully discharged without danger to the endowment, that is a sufficient ground for his removal, if need be, from both his offices. 67 I.A. 32=44 C.W.N. 177=A.I.R. 1940 P.C. 24=(1940) 1 M.L.J. 371 (P.C.). In a suit under S. 92, for the removal of a mahant from his office, the Court can consider the moral character of the mahant as directly relevant to the issues arising in the suit, (*e.g.*) his fitness to remain in office and his liability to be removed therefrom. 67 I.A. 32=1940 P.C. 24=(1940) 1 M.L.J. 371 (P.C.). Mere assertion in a suit under S. 92, C.P. Code, by a trustee that trust properties are private properties is not by itself a sufficient ground for his removal. If he committed any breach of trust before the suit, his conduct in the course of the suit is an important element to be taken into consideration in deciding whether the breach should be condoned and he should be allowed to retain the office. 72 C.L.J. 362. The Dharmakarta holds the position of trustee and as such on assertion of private ownership in trust property and falsification of accounts, he is liable to be removed. 45 M. 565=43 M.L.J. 536; 47 I.C. 850; 47 C. 866. Where a mutawalli had shown by his conduct to be entirely unfit to administer wakf he should be removed. The discretion of lower Court not being influenced by sound reasoning or exercised judicially, could be interfered with by the High Court. 177 I.C. 234=A.I.R. 1938 Rang. 166. It is a serious delinquency on the part of the person for the time being administering the trust to set up a case that it was his private property, generally in such cases, Court should not continue such a person in the post of chief trustee. 1940 A.M.L.J. 112. S. 92—"Two or more persons"—Meaning of. Proof of breach of

trust or mismanagement is not essential for the removal of a trustee from management. The Court has a wide discretion under S. 92, C.P. Code, to take such action as it thinks necessary or desirable for the good of the charity. The fact that a trustee puts forth an unwarranted claim to the right of exclusive management does not necessarily call for the penalty of exclusion from management. 43 Bom.L.R. 706. A suit to dismiss a Pujari for misconduct is not one coming within the provisions of S. 92. He is not a trustee in any sense of the term. He is only responsible for the services in the temple. 1940 A.M.L.J. 66. Where the secular and religious duties of a mahant of a public endowment are inter-dependent and inseparably blended, as it must be the case in any well-organised institution, a Civil Court has jurisdiction under S. 92, C.P. Code, in fit cases to remove the mahant not only from the trusteeship and management of the temporal affairs of the endowment but also from his spiritual duties. But even if the two capacities of the office can be separated, and the mahantship on its spiritual side regarded as purely an office or dignity, there is no doubt that the office is of such a nature that a suit relating to it must fall within the purview of the explanation to S. 9, C.P. Code—the spiritual portion of the office being intimately connected with the exercise of rights to property. There may, however, be cases where the duties of an office are purely spiritual and moral, entirely unconnected with any particular temple or place. The office may be such that no pecuniary benefit is attached to it or its emoluments are purely voluntary contributions, or the duties attendant to it are the exercise of spiritual and moral supervision over the voluntary actions of the worshippers. In such cases, it may be futile for a Civil Court to interfere with the exercise of the duties of the office. No rights of property are connected with it and there is no machinery by which the Court can control the voluntary action of the worshippers or the mahant. 67 I.A. 32=I.L.R. (1940) 1 Cal. 266=A.I.R. 1940 P.C. 24=(1940) 1 M.L.J. 371 (P.C.). S. 92, C.P. Code, does not say that a trustee guilty of a breach of trust can be removed only by a suit. A suit may be brought to remove him in the manner prescribed by the section. But if a suit has once been brought under the section, and a scheme has been framed, which provides for the removal of trustees for unfitness, the exercise of that power in the course of proceedings arising out of the scheme, is not contrary to S. 92, even though the trustee be found unfit by reason of a breach of trust. 38 Bom.L.R. 147=1937 Bom. 124. If any relief is to be granted in a suit under S. 92, ordering the removal or interfering with the rights of the shebais and trustees as founders, something



(f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged ;

(g) settling a scheme ; or

(h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

#### NOTES.

substantial must be shown justifying their removal or interference. 64 C.L.J. 341=1937 C. 67. Where a clear case is made out for the Court's interference under S. 92, by proving that the mahant or trustee has frustrated the whole purpose of the trust, has alienated the properties of the trust unlawfully, and has been guilty of wasteful and extravagant management, the final order of the Court should be governed by what appears to be in the interest of the institution. It is necessary in such cases that the Court should remove the mahant or trustee and appoint a new trustee and make arrangements which will prevent mismanagement in future and provide for future succession. 14 P. 379=156 I.C. 1099=16 Pat.L.T. 35=1935 P. 111. See also 1938 Rang. 166. In framing a scheme the Court need not remove trustees already holding office when no misconduct is proved against them. 34 I.C. 551=4 L.W. 228. Under S. 92 a person in charge of a mosque who claims its property, as his own is removable from office. 152 I.C. 323=1934 Pesh. 57. See also 148 I.C. 882=1934 A.L.J. 531=1934 A. 315. In a suit to remove the Sajjadanashin and for settlement of scheme, the death of the Sajjadanashin renders his removal unnecessary but the cause of action which necessitated the settlement of a scheme survives. 1934 P. 443. There is nothing in S. 92 to prevent the inclusion in a scheme framed under that section of a provision empowering the Court in specified contingencies to reduce the powers of the "managing trustee or Sajjadanashin mutwalli," temporarily or otherwise or even to remove him altogether. 1934 P. 443. See also 37 P.L.R. 85. In a suit under S. 92 the Court has power to appoint a receiver and take the management of the Temple out of the hands of the trustees appointed by the Temple Committee pending the disposal of the suit even though there is no prayer for his removal and though he cannot be removed except on a proper enquiry. 41 M.L.J. 545. Removal of trustee—Hereditary trustee—Trustee spending money not required by terms of endowment—Right to reimbursement. 48 I.C. 897=1918 M.W.N. 555. See also 42 M. 668; 1929 A. 433. A person without instituting a suit under S. 92 cannot seek to oust from possession persons who claim to hold as trustees. A Court can appoint a mutwalli to fill up a vacancy in the office. 29 I.C. 849=18 M.L.T. 48; 25 M.L.J. 273.

C. C. M.—74

The Court cannot remove a trustee from his office for alleged misconduct on a mere application made to it for his removal, when it is impossible for it to entertain the application conformably with the provisions of the scheme. The remedy of the persons interested in the trust is to institute a suit under S. 92, with the permission of the Legal Remembrancer, for his removal. No action can be taken by the Court on a miscellaneous application for tracing the funds misappropriated by him, nor can it give any directions in respect of the proper management of the affairs of the trust. 58 A. 538; 157 I.C. 202=1935 A.L.J. 311=1935 A. 273. See also 59 M. 751=71 M.L.J. 87=1936 M. 589; 159 I.C. 296=1935 S. 210. It is not competent to the framers of a scheme to provide that where the ordinary law requires a suit to be brought, an application may be substituted for it. Where the allegations amount to charges of breaches of trust such an application would run counter to the terms of S. 92, C.P.Code, and a provision to that effect is therefore *ultra vires*. Merely because the scheme is incorporated in a decree, it does not require any greater validity so far as binding the Court is concerned. 157 I.C. 486=41 L.W. 597=1935 M. 474. But see also 1937 Bom. 124=38 Bom.L.R. 1137 cited below. S. 92 does not say that a trustee guilty of a breach of trust can only be removed only by a suit. A suit may be brought to remove him in the manner prescribed by the section. But if a suit has once been brought under the section and a scheme has been framed, which provides for the removal of trustees for unfitness, the exercise of that power in the course of proceedings arising out of the scheme, is not contrary to S. 92, even though the trustee be found unfit by reason of a breach of trust. 38 Bom.L.R. 1137. A clause in a scheme providing for removal of a trustee on an application is invalid. 131 I.C. 423=1931 N. 82 (1). See also 1935 A. 273=1935 A.L.J. 311; 16 Pat. L.T. 35; 37 P.L.R. 85. Removal of a trustee, grounds for—*De facto* trustee—Long management—No misconduct—Scheme—Additional trustee when appointed. 48 I.C. 833=1918 M.W.N. 786. Suit to remove defendant Pandara Sannidhi and to frame scheme—Death of the defendant—Cause of action in respect of framing of scheme if survives. See 48 M. 688=49 M.L.J. 324.

NOTICE.—There can be no question that ordinarily when a trustee is removed in accordance with the provisions of S. 92, the



## NOTES.

Judge should issue notice to parties interested and also give public notice in such a way as to enable claimants to the office to come forward and put in their respective claims. The law, however, does not make any provision of this nature; and, therefore, it cannot be laid down as a hard and fast rule that in all suits under S. 92 of the Code that is the procedure necessarily to be resorted to. 41 C.W.N. 298.

**ALIENATION OF TRUST PROPERTY.**—A declaration regarding the validity of an alienation by a trustee comes within S. 92 (*h*). 44 A. 622. *See also* 26 L.W. 274=1927 M. 886; 1937 Lah. 660. The transferee of a wakf property who is made a party to a suit under S. 92 is bound by decision in the suit and is barred from going behind it in a subsequent suit. 33 A. 752; 23 C.W.N. 115. Suits against strangers to a trust whether alienees from trustee or trespassers are not governed by S. 92. 40 M. 212=31 M.L.J. 777; 50 M.L.J. 42. The expression "granting further or more relief" must be read along with the specified reliefs and those that should be granted under this clause should be of the character as those expressly mentioned. 40 M. 212=31 M.L.J. 777.

**ABATEMENT OF SCHEME SUIT.**—A suit under this section is prosecuted by individuals not for their own interest but as representing general public and so it does not abate on the death of the original plaintiffs. 48 C. 493 (P.C.). *See also* 16 L. 782; 17 P.L.T. 926. A suit under S. 92 does not abate on the death (or withdrawal) of one of the plaintiffs who obtained sanction for instituting the suit. (47 M.L.J. 745 Foll.) 146 I.C. 628 (2)=1933 M. 854=65 M.L.J. 690. *See also* 1940 Lah. 356; 55 A. 687=1933 A.L.J. 1393. Where in a suit under S. 92 the question is whether the property is private or public and the defendant contends it to be a private one, the cause of action survives on his death against his sons and the suit does not abate. 148 I.C. 882=1934 A.L.J. 531=1934 A. 315. S. 92 is mandatory but is permissive and directory. It is necessary for the continuance of the suit that there should be at least two plaintiffs. 37 A. 296. Scheme suit—Death of defendant if suit abates. 1926 M. 162=48 M. 688=49 M.L.J. 324.

**AMENDMENT OF PLAINT.**—It is incumbent upon the Court to see what were the prayers in the plaint at the date the suit was instituted in order to satisfy itself whether S. 92 has been complied with and for this purpose the Court must pay no regard to what may happen by way of amendment or abandonment at some later stage in the suit. I.L.R. (1939) Kar. 325=A.I.R. 1939 Sind 13. It cannot be held that no amendment of the plaint is ever possible in suits under S. 92, C. P. Code. Amendments may be made with the consent of the Advocate-General or

of the Collector. Although the Code does not provide for recourse to the Advocate-General or the Collector after the suit has been instituted, it does not follow that the Advocate-General or the Collector may not take any further part in the suit. The true position is that it is for the Court to decide in suits under S. 92 whether an amendment is permissible and the consent of the Advocate-General or the Collector as the case may be is really evidence which has to be taken into consideration before deciding whether the amendment should be allowed. There is no reason why amendments which do not substantially change the character of the suit or enlarge the scope of it should not be made by the Court itself without sanction. Amendments which enlarge the scope of the suit, for instance by allowing further reliefs without substantially changing its character, may be made with the sanction of the Advocate-General or the Collector. Amendments substantially changing the character of the suit would not be permissible even with sanction, for in such a case it can hardly be said that the suit in its amended form was ever validly instituted. 43 Bom.L.R. 706. The sanction of the Advocate-General is equally a condition precedent to the amendment of the plaint especially where such amendment relates to a cause of action arising after the institution of the suit and fresh parties are added in consequence, with a claim for fresh reliefs against them. 36 B. 168. It is not the law that an application for amendment of a scheme of management framed in a suit under S. 92, C.P. Code, can only be made by parties to the suit in which the scheme was originally framed. The scheme cannot be regarded as a continuation of the suit, at any rate in the sense that applications under the scheme can only be made by parties to the scheme. Where the scheme provides for modification of the scheme by the Court on the application of parties interested in the institution, any person who may have an interest in the institution from time to time, whether or not he was a party or a representative of a party to the original litigation, is entitled to make an application for amendment or modification of the scheme. 38 Bom.L.R. 1137=A.I.R. 1937 Bom. 124. The phrase "Any other Court empowered in that behalf by the Local Government" in S. 92, probably refers to Courts such as the Subordinate Judge's Courts. 48 C. 53. But *see* 22 I.C. 95=18 C.W.N. 612. A notification by a Local Government empowering a Sub-Judge to try a particular suit pending before the District Judge is not one contemplated by S. 92. 39 C. 146. *See also* 31 I.C. 397. Amendment of suit by adding strangers to the trust as defendants and prayers for reliefs beyond S. 92, takes the case out of the section and compromise therein does not bind the public under S. 11, Expl. VI. 55 C. 519 (P.C.). *See also* 42 Bom.L.R. 443=1940 Bom. 242.



## NOTES.

**PARTIES TO SUIT.**—The alienee of the trust property for the breach of which a mutawalli is sued under S. 92 may be made a party. 42 C. 1135. See also 47 I.C. 111 = 28 C.L.J. 4; 35 B. 470; 164 I.C. 615 = 43 L.W. 409 = 1936 M. 449; 42 C.W.N. 345 = 1938 Cal. 278. But see 38 M. 1064; 28 M.L.J. 326, and also see 27 M.L.J. 266; 11 P. 288. Strangers to the trust are neither necessary nor proper parties. 10 R. 342; 11 P. 288. Beneficiaries can sue trustees for encroachments made by them. 101 I.C. 744 = 1927 A. 518. A relief against strangers for recovery of possession of properties in their hands cannot be granted under S. 92 and hence they must be struck off the record. 27 M.L.J. 266; 39 C.W.N. 1103 = 1935 C. 805. But see 53 M.L.J. 183. In a suit for framing a scheme for a public charity, the persons who *bona fide* allege to be trustee thereto should be made parties, otherwise their right would be lost if a scheme were framed. 50 I.C. 58. (36 M. 364, Ref.)

**ADDITION OF PARTIES.**—In a suit for the protection of a trust under S. 92 the Court has power under O. 1, R. 10 to add parties for the effectual adjudication of questions relating to administration of the trusts. 43 M. 707 = 38 M.L.J. 201. Court can add other worshippers if the suit is not properly prosecuted. 13 I.C. 232. Under S. 92 a suit may be brought by the Advocate-General himself or two worshippers to whom he has given his consent in writing to sue or by the Advocate-General in conjunction with those persons. The right of each to sue in his own name is not inclusive of the right of the other. 43 M. 707 = 38 M.L.J. 201. No consent from Advocate-General is necessary to be added as defendants. Plaintiffs no doubt do. 5 R. 263 = 103 I.C. 261 = 1927 R. 182. Suit by body in charge of endowment—Statute modifying management of institution—New body cannot apply to continue the suit where the application would amount to an evasion of S. 92. 52 C.L.J. 78 = 1931 C. 281. In the case of a representative suit relating to a trust instituted with the consent of the Advocate-General or the Collector under S. 92, C.P. Code, no fresh consent is necessary in the case of each fresh addition of a party. Any member of the public who is interested in the trust may come in and carry on the suit or appeal, as the case may be, without obtaining a fresh sanction. An appeal is only a continuation of the suit. 62 C. 1132 = 61 C.L.J. 469 = 39 C.W.N. 951. Right to sue—Trust for maintenance of choultry for feeding the poor, and building of temple—Suit by two members of public for framing scheme for management of trust. Held, that though the plaintiffs are not directly interested in the choultry for the poor, they are interested in the building of the temple, and in the suit so brought, the trust should be considered as a whole. 165 I.C. 63 = 1936

M. 495.

**RIGHT OF SUIT—"INTEREST."**—Interest in S. 92, C.P. Code, denotes an interest which must be a present and substantial and not a remote and fictitious or purely illusory interest. 1938 Rang.L.R. 276 = A.I.R. 1938 Rang. 339. A decree obtained in a suit under S. 5 of the Religious Endowments Act does not bar a suit under S. 92, of the Code. 63 I.C. 418. A suit relating to a public trust is not maintainable without the Advocate-General's permission unless the plaintiff has special claim or interest. 35 I.C. 846. The fact that the plaintiffs belong to the family of the founder and are entitled to succeed to the properties thereof under certain contingencies would naturally give them an "interest" so as to enable them to bring a suit under S. 92. 41 M.L.J. 20 (42 M. 360, Dist.). Residents of the locality in which a choultry is situated and members of the community for whose benefit the choultry was founded have a sufficient "interest" therein within S. 92 to institute a suit. 35 M.L.J. 661. A member of a church need not sue by virtue of an office. 39 M. 1056 = 30 M.L.J. 423. The section protects the right of the public and does not take away private rights; it should not be used to deprive individuals, whose rights have been infringed, of their remedy. 25 M.L.J. 373. A suit by parties to a scheme suit to establish a private right which may interfere with the scheme settled is not maintainable. 9 N.L.J. 45 = 94 I.C. 326 = 1926 N. 326. A Hindu entitled to worship in a temple has an "interest" in it; the section does not require a "direct" interest. 24 I.C. 712. Right to sue—Bad for want of requisite interest on the part of one of the plaintiffs—Subsequent addition of other persons having requisite interest—Effect of. 43 M. 720 = 38 M.L.J. 504.

**SUIT UNDER—SUIT FOR REMOVAL FOR SHEBAITS OR TRUSTEES AS FOUNDERS—RIGHT TO RELIEF—GROUNDS—PROOF OF BREACH OF TRUST—NECESSITY.**—If any relief is to be granted in a suit under S. 92, C.P. Code, ordering the removal or interfering with the rights of the shebait and trustees as founders, something substantial must be shown justifying their removal or interference. Where therefore members of the old managing committee of an ashram brought a suit against the founders of the institution on their forming a new managing committee on the expiry of the old one without even attributing breach of trust on the part of latter, held, that the founders were justified in taking proper steps for the management of the institution and in forming a new committee and there being no breach of trust attributed to them, the suit was not proper. I.L.R. (1937) 1 Cal. 515 = A.I.R. 1937 Cal. 67. Cl. (h) of sub-S. (1) of S. 92, C.P. Code, does not so widen the provisions of S. 92 as to make S. 92 not otherwise applicable to suits against strangers, applicable to such suits.



## NOTES.

Where the person in possession asserts the property to be his, but admits that he is executing the trust, such person is a trustee either constructive or *de son tort* and in either case he is not a stranger. Therefore a suit under S. 92 can be brought against him. 171 I.C. 344=31 S.L.R. 510=A.I.R. 1937 Sind 230.

APPEAL.—See 1937 O.W.N. 730=1937 Oudh 381. When a suit filed with the consent of Advocate-General at the instance of relators is dismissed, and the Advocate-General does not think fit to appeal, the relators cannot file an appeal on their own account. 9 Bom.L.R. 996. See also 37 P.L.R. 85. When the suit is dismissed all the plaintiffs together must appeal. 100 I.C. 838=1927 L. 382. There is no authority for the proposition that some of the persons who have obtained leave can either institute a suit or can present an appeal, when the remaining persons are alive and have not concurred either in the institution of the suit or in the presentation of the appeal. 16 L. 782=158 I.C. 465=1935 L. 251. Where an appeal was filed by four out of the five persons who had obtained the consent of the Collector and the other who was not impleaded as appellant owing to his absence was impleaded as a respondent applied to be transposed as an appellant and the application was granted; *Held*, that the appeal was competent as it was presented with the concurrence and at the instance of such person. (*Ibid.*) Powers given under scheme—Order in exercise of their powers—Whether appealable. 92 I.C. 556=1926 M. 130; 1930 M. 918=128 I.C. 575. Scheme—Further directions left open—Appeal—Modification in respect of matters left undecided—Not legal. 12 L.L.J. 199. Where a scheme provides for an application for modifying or altering it an order passed on such an application is not appealable. 55 B. 414. See also 133 I.C. 401=1931 A. 765. Where orders are passed merely for carrying out a scheme, they are orders in execution, and appeals lie from such orders under S. 47. 177 I.C. 919=A.I.R. 1938 Rang. 363. Appointment of mutawalli on framing scheme—Appeal by defeated candidate does not lie because he was not a party to the original action and because it was not a judicial order. 14 P. 236=157 I.C. 477=1935 P. 261.

PARTIES TO APPEAL.—Where a person interested in a proceeding under S. 9 prefers an appeal against order of the District Judge, the proper respondents will be the parties that started the proceedings and in no case can the District Judge be called upon as respondent to support his own judgment. 144 I.C. 701 (1)=1933 A. 151. The fact that some of the reliefs cannot be granted on account of the absence of the consent in writing of the Advocate-General does not disentitle the plaintiff to the other reliefs. 145 I.C. 294=14 Pat.L.T. 168=1933 P.

246. Where the directions given by a Court in the previous suit for settling a scheme have entirely failed to secure the due administration of the trusts for want of effective machinery, a new scheme must be framed to make the administration effective. 1934 P. 443. Suit under S. 92: District Judge has no power to direct transfer of suit to Subordinate Judge. 37 Bom.L.R. 120. A suit instituted with the sanction in writing of the Legal Remembrancer of the U. P. appointed by the Government to exercise the powers of the Advocate-General, but without the sanction of the Local Government to the specific suit is incompetent. 59 I.A. 121=53 A. 990=62 M.L.J. 249 (P.C.); following 58 I.A. 460=61 M.L.J. 402=53 A. 910 (P.C.). See also 1935 N. 28.

REVIEW.—A Court or a Judge carrying out the provisions of a scheme decree passed under S. 92, C.P. Code, acts as a Court and not as a *persona designata*. The Court or Judge has power in such cases to appoint trustees to vacancies in the office of trustees which have arisen, but there is no power to cancel an order of appointment or to review the same on the ground that some party alleges that he was misled by reason of wrong information given to him that the case was adjourned and therefore was not present at the time the order was made, when it is not proved that either the Court established or the Judge was at fault. The inherent powers of a Court cannot be extended to such a case. 50 L.W. 460=A.I.R. 1939 Mad. 969= (1939) 2 M.L.J. 475.

COMPROMISE OF SUIT.—A suit under S. 92 cannot be compromised if it is proved that the endowment is a public one and where the question whether the endowment is public or not is still in dispute, there cannot be a lawful agreement and it cannot be said to be proved to the satisfaction of the Court that the suit had been adjusted by a lawful agreement so long as such a controversy exists. 26 I.C. 360=18 C.W.N. 1264. A Court should not sanction a compromise of a suit under section 92 under which any portion of the trust properties is given to any of the parties. 37 M.L.J. 489. See also 41 C.W.N. 298. See 22 Pat.L.J. 799. Where a compromise decree is made in a suit under section 92, C.P. Code, and a subsequent suit before the District Judge for a declaration that the terms of the decree and of the compromise petition in the former suit on which the decree was based did not represent the true agreement between the parties and are vitiated by fraud, is transferred for trial to a Munsif, the latter, if he finds the allegation to be true can only declare that the facts are what he finds them to be and that in consequence the decree of the District Judge in the prior suit must be and should stand as vacated. It would then be for the parties to go to the District Judge and to ask him to revive the prior suit and dispose of it according to law giving them the neces-



## NOTES.

sary and proper reliefs. The Munsif has no jurisdiction to make a new decree under section 92 as that is a matter within the exclusive jurisdiction of the District Judge. 22 Pat.L.T. 799. *Quære*.—Whether in a representative suit affecting a public trust under section 92, a compromise can be entered into without leave of Court. 22 Pat.L.T. 799.

ARBITRATION.—Where an arbitrator is required to investigate the nature of the management of various charitable trusts by the parties in management thereof and is also asked to lay down a scheme for the future management of the institutions, that cannot be regarded as a matter arising out of the private rights of any particular individual. The fact that the disputing parties belong to the family or families in which the management of the institutions is vested will not of itself take the case out of the purview of section 92, if the object of the proceeding is to safeguard the interests of the institutions or obtain directions for their proper management. A suit to have such an award made a decree of Court cannot lie when the procedure prescribed by section 92 has not been complied with. 48 L.W. 742=(1938) 2 M.L.J. 972.

JURISDICTION.—See 22 Pat. L. T. 799. A suit under section 92 should be brought in the place where the subject-matter of the trust, i.e., the trust property or trust money, or any part of it is situate. A suit under the section for the usual reliefs against the functioning trustees, in a case where the trust fund is in the hands of the trustees or where the claim against them is in the nature of a debt, must be instituted either in the Court having jurisdiction over the place where the trustees reside or where the debt can be enforced on the ground that a part of the cause of action has arisen. The suit can be properly instituted in the District Court of the place where the trust is situate, though under section 92, both the sub-Court and the District Court to which the former is subordinate have concurrent jurisdiction. 42 L.W. 505=1935 M. 983=69 M.L.J. 274. Where money settled on trust is deposited at Madras with a firm carrying on business at Calcutta a suit relating thereto can be maintained in Calcutta. 59 C. 357. Section 92 must be taken as overriding Cl. (12) of Letters Patent (Calcutta). (*Ibid*). As to legality of transfer of a suit under section 92 by District Judge to sub-Judge, see 1935 B. 172, cited under section 24. Where a Local Government, purporting to act under section 92 (1), C.P. Code, issues a notification which empowers the presiding Judge of a particular Court, specifically meaning the Judge, to hear suits which may be instituted under section 92, it is only reasonable to assume that the Government intends to comply with the section and to confer the necessary powers to the Court over

which the named Judge presided and presides. The Court presided over by that Judge is a Court duly "empowered in that behalf" within the meaning of section 92 (1). The jurisdiction may, however, be limited in time, i.e., only so long as that Court is presided over by the particular named Judge. The notification cannot be taken as merely empowering the particular named Judge as a *persona designata*, so as to make it not in conformity with section 92 (1) and invalid on that account. The fact that the limits of the jurisdiction of the Judge are not mentioned in the notification will not also invalidate the notification. The notification in question would also empower the Court presided over by that Judge to entertain plaints, as the power to entertain plaints is included in the general grant of jurisdiction. I.L.R. (1937) Bom. 655=39 Bom.L.R. 548=A.I.R. 1937 Bom. 275 (F.B.).

RES JUDICATA.—Suit under S. 92—Collector's permission alone obtained—Subsequent Privy Council decision saying sanction from Local Government compulsory—*Held*, that the trial of the suit was not without jurisdiction as admittedly the permission of the Collector to the appeal was obtained before the suit was brought and that procedure was according to the procedure laid down in Civil Circular No. 1-48, and hence the judgment was *res judicata*. 1935 N. 28. Where the Judge appoints a new trustee by consent of the parties to the suit without making any enquiry or resorting to any elaborate proceeding, the appointment is not an appointment which is the result of a judicial proceeding and can only be justified as an appointment made with the consent of the parties and on no other footing. That being the position, there can be no question that the order which the Judge has made in respect of the appointment will not operate as *res judicata* barring the claim of any claimant in future. 41 C.W.N. 298.

COSTS.—In a suit under S. 92, which was instituted *bona fide* and in which the plaintiff's allegation are found to be substantiated, it is only proper that the plaintiff should get all their costs out of the estate. 63 C.L.J. 573.

SEC. 92 (2).—Clause is mandatory. 7 P.L.T. 4=1925 P. 544.

SEC. 92 AND S. 73 OF MADRAS HINDU RELIGIOUS ENDOWMENTS ACT.—The respective spheres of S. 92, C. P. Code, and S. 73 of the Madras Hindu Religious Endowments Act must not be forgotten. The latter Act removes from the ambit of S. 92, C. P. Code, only those religious trusts which amount to "religious endowments" under that Act. Where an endowment or fund is set apart for two purposes, namely, for the renovation of a temple and for the maintenance of a vedapatasala not connected with any temple, the entire amount of the fund being devoted to both purposes together without any apportionment or severance, the endowment is not a "religious endowment"



93. The powers conferred by sections 91 and 92 on the Advocate-General may, outside the Presidency-towns, be, with the previous sanction of the Provincial Government, exercised also by the Collector or by such officer as the Provincial Government may appoint in this behalf.

Exercise of powers of Advocate-General outside Presidency-towns.

## PART VI.

### SUPPLEMENTAL PROCEEDINGS.

- Supplemental proceedings. 94. In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,—

(a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison ;

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property ;

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold ;

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property ;

(e) make such other interlocutory orders as may appear to the Court to be just and convenient.

### NOTES.

falling under the Madras Hindu Religious Endowments Act, because one of the purposes, though religious, is outside the scope of the Act. 42 L.W. 505=1935 M. 983=69 M. L.J. 274.

SEC. 92 AND O. 1, R. 10 (2).—In a suit under S. 92 for settling a scheme for a trust, it is necessary to implead as a defendant a person who is not merely a beneficiary but is a near relation of the founder of the trust and has got the necessary qualification which, under the terms of the trust-deed, entitles him to be made a trustee, in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit. If he is not so impleaded, he will have no right of appeal against the decree of the trial judge affecting the trust properties. 167 I.C. 828=1937 O.W.N. 271=1937 Oudh 229.

SECS. 92 AND 93.—Suit under S. 92—Collector's permission alone obtained—Subsequent by Privy Council deciding sanction from Local Government compulsory—Decision in suit, not without jurisdiction. 157 I.C. 90=1935 N. 28.

SEC. 93.—In a case where the defect of want of previous sanction by the Local Government is cured by the provisions of the Public Suits Validation Act (XI of 1932) it is not necessary for the plaintiffs to obtain any sanction of the Local Government during the pendency of the suit. (1932 P. C. 51 Ref.) 8 Luck. 266; 1933 Oudh 22. See also 63 C.L.J. 70=1936 C. 815. A suit which has been dismissed under S. 93, C. P. Code, on the ground that the consent required by the section is not in order may be restored under S. 3 of the Public Suits

Validation Act of 1932, if an appeal from the decree dismissing the suit is competent and open at the time of the latter Act. Once the order of restoration is made, the suit has to be proceeded with and tried in accordance with law. The suit cannot again be dismissed on the ground that there has been no valid consent given by the Collector. 63 C.L.J. 70=1936 C. 815. The Collector exercising under S. 93, C. P. Code, the powers conferred on the Advocate-General under S. 92, C. P. Code, has no jurisdiction to impose by his order granting sanction for a suit any time limit for the institution of the suit. The only restrictions which can be imposed are in respect of the persons who can institute the suit and in respect of the reliefs which are sought and are obtainable in such suit; any other restrictions either in the matter of the institution or in the conduct of the suit would be *ultra vires*. A condition imposed by the Collector that the suit should be instituted within two months is illegal and may be ignored, although if the suit is filed long after the grant of sanction, the Court has a discretion to refuse to pass a decree in the suit on the ground of unnecessary delay. In any case, assuming that the Collector can impose such time limit the period would not commence to run until the order of sanction is made known to the parties. 1937 M.W.N. 1319.

SEC. 94.—Court has not got wider powers under this section in the matter of granting temporary injunctions than those conferred by O. 39, R. 1. 23 L.W. 85=92 I.C. 615=1926 M. 258. A Civil Court has no jurisdiction to issue an injunction to a party to a proceeding under S. 40 of the B. T. Act restraining him from proceeding further



Compensation for obtaining arrest, attachment or injunction on insufficient grounds.

95. (1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section,—

(a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or

(b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same, the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him :

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction.

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction.

#### NOTES.

with an application made by him under that section to a Revenue Court. 5 Pat.L.J. 76=53 I.C. 37=1919 Pat.H.C.C. 461. An order directing the furnishing of securities and submission of accounts passed on an application for the issue of temporary injunction is one under S. 94 (c). 17 I.C. 361=17 C.W.N. 318. As to jurisdiction of Court to issue injunction to another Court, *see* 1935 Pesh. 182.

SEC. 94 (c) AND O. 39.—When a Court accepts an undertaking given by the defendant in a suit and dismisses an application for attachment before judgment, the order of the Court amounts in substance to an injunction restraining him from acting in breach thereof. The form only implies that the Court is prepared to deal with him honourably in the expectation that he will treat his undertaking as equivalent to an order of Court. It is not open to the defendant to afterwards say that because the Court did not pass an order of its own after accepting his undertaking he is not in the position of a person bound by an order of Court. If the defendant commits a breach of his undertaking, the Court has jurisdiction to commit him to jail for contempt of Court and for violating the undertaking. 165 I.C. 747=44 L.W. 714=1936 M. 651. *See also* (1937) 2 M.L.J. 888=1938 M. 190.

SEC. 95: RIGHT TO APPLY FOR COMPENSATION.—A defendant can apply for compensation whether process is served on him or not. 15 B. 160; 26 I.C. 369. The application can be made only to the Court which disposes of the case. 3 W.R. Mis. 28; and a Court of Small Causes can award compensation. 26 M. 504. The Court cannot of its own motion grant compensation. 26 M. 494. Compensation can be given even when the suit is withdrawn. 15 B. 160. The section applies also to conditional attachments of the class contemplated by O. 38, R. 5 (3). 35 C.W.N. 546. The only ground put forward in an application for attachment before judgment was that unless

the attachment was made the plaintiff in the event of success would have difficulty in realising the decretal amount, the application did not mention any of the grounds which justify an application for attachment before judgment under O. 38, R. 5, and on the face of it the application was made on altogether insufficient grounds and was entirely unjustified. If such application is granted, the case is clearly one in which the defendant is entitled to reasonable compensation against the plaintiff under S. 95. 151 I.C. 283=11 O.W.N. 1135=1934 Oudh 429 (2). The question to be decided under S. 95 is whether there are no sufficient grounds for applying for attachment and not whether there are no reasonable grounds stated in the creditor's application for attachment. Though not stated in the application, if there are really sufficient grounds, the defendant would not be entitled to compensation under S. 95. 1937 N. 126. An application for compensation for wrongful attachment of property cannot be entertained by the Court before the order of attachment is set aside by the Court. 151 I.C. 994=1934 M. 638=67 M.L.J. 448. S. 95 is not inapplicable to cases in which the plaintiff happens to be a minor. 42 L.W. 542=1935 M. 886.

ORDER FOR COMPENSATION.—It is doubtful if an award of compensation can be made in a case where the order of injunction was passed after hearing both the parties and it was found there was sufficient grounds for making it. 17 L.W. 150=1923 M. 352. The fact that an interim order of attachment before judgment is made absolute is no bar to the Court entertaining an application for compensation under this section. 1931 M.W.N. 956 (1923 M. 352, Expl.). The proper stage for making such an application would be only when the suit is heard and until then, it would be premature. (*Ibid.*) An order for compensation is one independent of decree, although it sets off the compensation as against the decreed amount. 21 I.C. 756. A compensation may be given for improperly obtaining tem-



## NOTES.

porary attachment though the same is set aside on notice. 49 I.C. 86=9 L.W. 69. Compensation will be granted only where damages has resulted. Where only an order of attachment before judgment has been passed but the property has not been actually attached in pursuance of the order, it cannot be said that the mere order of attachment has resulted in damages and hence the person whose property has been ordered to be so attached cannot claim compensation under S. 95. 183 I.C. 174=A.I.R. 1939 Rang. 260. The setting aside of an order of attachment is not an essential preliminary to the grant of compensation for wrongful attachment under S. 95, C. P. Code. Nor would the passing of an absolute order of attachment be a bar to an application under S. 95 for compensation for wrongful attachment. No such preliminary step has been prescribed in S. 95 which alone governs the procedure in a summary application for compensation for wrongful attachment and a Court would not be justified in hedging this remedy round with restrictions which the section itself does not import. 1940 Mad. 77=(1940) 1 M.L.J. 782=50 L.W. 640. The word plaintiff in S. 95, C. P. Code, cannot be read as including the next friend of a minor plaintiff. The Court has no jurisdiction to order a next friend to pay compensation under S. 95, C. P. Code. The injured party is not, however, prevented from instituting a suit to recover from the next friend compensation, should he wish to do so. 53 L.W. 675=(1941) 1 M.L.J. 765.

**PRESUMPTION.**—It must be presumed that the Court granted the application for arrest or attachment upon sufficient grounds, unless the contrary is proved. 18 W.R. 450.

**PROOF.**—Damages can be awarded only when it appears to the Court deciding the suit that there was no probable ground for instituting it. 13 M.L.J. 70. Plaintiff must prove want of reasonable and probable cause in a suit for damages for attachment before judgment and malice. Malice is any improper or indirect motive, i.e., no hatred or enmity is necessary. 35 M. 598=21 M.L.J. 1052. See also 9 I.C. 60=13 O. C. 357. It is incumbent on an applicant under S. 95, C. P. Code, for compensation for wrongful attachment, to prove affirmatively that the attachment was applied for on insufficient grounds. It is not sufficient for this purpose to show that he has properties which are greater in value than the amount at stake in the suit. He must show that the plaintiff was unjustified in suggesting to the Court that he the defendant was about to defeat the object of the suit by making alienations. (1940) 1 M.L.J. 782=50 L.W. 640. The decree-holder who wrongfully moves the court, is a trespasser responsible for all damages though he may have acted innocently and mistakenly. 12 I.C. 26=4 Bur.L.T. 220. To justify an

attachment before judgment it is not enough that the defendant is in straightened circumstances but it must be proved that he was actually about to dispose of his property. 49 I.C. 86=9 L.W. 69. In an application for compensation for wrongful attachment under S. 95, C. P. Code, it is not necessary to prove special damage. The words "expense or injury" indicate that either the particular damage upon which a monetary value can obviously be placed or the more general damage which the Court endeavours to assess in terms of money, is contemplated by the section. It is not necessary to prove more than general damage, *e.g.*, mental pain, general loss of reputation, etc. 1940 Mad. 77=(1940) 1 M.L.J. 782=50 L.W. 640.

**DAMAGES, EXTENT OF.**—The litigation and delay, and also every depreciation of the goods, by any immediate fall in the market, are the natural and necessary consequences of the creditor's unlawful act. 17 C. 436. For wrongful attachment the decree-holder moving the Court is responsible for any loss suffered by a person whose goods are wrongfully attached. 12 I.C. 26=4 Bur. L. T. 220. Expense or injury in S. 95 for wrongful arrest includes also general damages such as damages for injury to reputation or humiliation. No special procedure is necessary for wrongful arrest. 3 I.W. 30=32 I.C. 592. See also 1940 Mad. 77=(1940) 1 M.L.J. 782. A Court is not justified in awarding compensation to a defendant in a suit under S. 95, on the basis that his prestige suffered or that he felt humiliated by reason of an attachment before judgment obtained by the plaintiff. *Damage to prestige and humiliation do not amount to "injury"* for which compensation can be awarded under S. 95. The claim to damages must be in respect of some damage caused to the defendant as the proximate result of the attachment which had been applied for on insufficient grounds. 39 C. W. N. 915.

**RIGHT OF SUIT.**—A claim for compensation for wrongful attachment of property before judgment made in a counter-affidavit disputing the propriety of the interim order, is no bar to a suit for damages. 38 M.L.J. 324. Suit for damages, if can be maintained against a defendant for obtaining maliciously and without reasonable cause a perpetual injunction which was dissolved on appeal. 42 C. 550. (13 W.R. 305, doubted.) See *contra* 30 C.W.N. 465=94 I.C. 444=1926 C. 757. The suit barred under S. 95 (2) and the application under section 95 must be *ejusdem generis* with the same cause of action. An application under S. 95 does not bar a subsequent suit for damages caused by reaping and removal of the crop on land which the plaintiff was, by the Court's injunction, forbidden to enter. 1932 M.W.N. 536. Maintainability of suit for damages for malicious attachment apart from S. 95. 59 C. 1073=1932 C. 821.



## PART VII.

## APPEALS.

*Appeals from Original Decrees.*

96. (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed *ex parte*.

## NOTES.

APPEAL.—An appeal will now lie from an order granting compensation. 28 A. 81; 24 M. 62, or refusing compensation. 25 M. L.J. 46. An order of a Divisional Court under S. 95, refusing an order of the Court of first instance is an appellate order under S. 104 (9) and is not appealable. 11 I.C. 917=4 Bur.L.T. 204. An order under S. 95, C. P. Code, passed by a Small Cause Court dismissing an interim attachment issued by itself is valid and such an order cannot be questioned on appeal. 26 I. C. 359.

REVISION.—The grant of compensation under S. 95 is no doubt a matter of discretion, but the discretion has to be exercised in a judicial manner. Where the Court has given no reasons for refusing the application for compensation, the order clearly ignores the terms of S. 95 and is not one according to law. 151 I.C. 283=11 O.W.N. 1135=1934 Oudh 429. *Court-fee* in appeal against order under S. 95. See 1940 A. M. L. J. 70.

SEC. 96: APPEAL, WHAT IS.—An application by a party to an appellate Court asking it to set aside or revise a decision of a subordinate Court is an appeal within the ordinary acceptation of the term. An irregular or incompetent appeal is none the less an appeal for purposes of limitation. 63 M.L.J. 329=59 I.A. 283=60 C. 1 (P.C.). S. 96, C. P. Code, does not apply to appeals from decrees passed by a High Court in exercise of its original jurisdiction, but provides for appeals from other Courts exercising original jurisdiction. The original side of a High Court is just as much the High Court as the appellate side, and rights of appeal are given not by the Code but by the Letters Patent. 1937 Rang.L.R. 97=A.I.R. 1937 Rang. 268. Under S. 96, an appeal can lie only against a decree and not against any findings or observations made in the body of the judgment, if the final decree is not against the party concerned. 1940 R.D. 355=1940 A.W.R. (B.R.) 170.

RIGHT OF APPEAL.—There is no right of appeal unless it is conferred by statute. 11 M. 26=14 I.A. 160 (P.C.); 40 C. 21=39 I.A. 197, 203 (P.C.); 28 A. 549; in express words 20 B. 803; 43 C. 857; 1929 R. 198; 1929 A. 577; 39 C.W.N. 567. It cannot be assumed that there is a right of appeal in every case decided by a Court.

C. C. M.—75

Such a right must be given by statute or some authority equivalent to a statute. [11 M. 26 (P.C.), Ref.]. 57 M. 271=66 M.L.J. 438; 57 M. 670=66 M.L.J. 532. An agreement not to appeal if for consideration and is otherwise good is valid and enforceable. 14 M.I.A. 204; 8 C. 455; 1 A. 267 (F.B.); 134 I.C. 262=1931 N. 126. Application under section 34, Trust Act, order on, if open to appeal. See 11 O.W.N. 1533=1935 O. 72. See also 40 Bom.L.R. 1198 (Appeal from order under O. 41, R. 5 refusing stay of execution).

RIGHT OF APPEAL—EXTENT OF.—Section 96 gives right of appeal from every decree passed by a Court of original jurisdiction. The right of appeal vests in every party adversely affected by the decree and against only that part of the decree which adversely affects him. 151 I.C. 25=1934 A. 677. See also A.I.R. 1937 Sind 94; I.L.R. 1937 Nag. 519=1937 Nag. 268.

SEC. 96 (2).—Scope—Defendant not filing written statement on date fixed and failing to appear—Pleader's request to make oral statement refused—*Ex parte* decree—If justified—Appeal after dismissal of application to set aside *ex parte* decree—Appellate Court can set aside *ex parte* decree and remand suit—C.P.Code, O. 10, R. 2—Right of pleader to make oral statement. Where a decree in favour of the plaintiff allows his claim in its entirety provided a certain condition is fulfilled and dismisses it in its entirety if that condition is not carried out within a specified time, in either event the rights of the parties are conclusively determined by the decree. The plaintiff is entitled to appeal from the order imposing the condition of which he complains. A party in whose favour a decree has been passed may nevertheless have a right to appeal against a finding adverse to him—the test to be applied in each particular case being whether the finding sought to be appealed against is one to which the rule of *res judicata* may be held to be applicable so as to dissentitle the aggrieved party to agitate the question covered by the finding in any other proceeding. 42 C.W.N. 492.

FORUM OF APPEAL.—A brought a suit against B for redemption of a house on the payment of Rs. 1,000. B pleaded *inter*



(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

#### NOTES.

*alia* that A had admitted B as owner of the house and that as such he had rebuilt the house incurring a cost of Rs. 15,000, which A must pay in addition to mortgage-money. The Subordinate Judge passed a preliminary decree for possession by redemption of the mortgage on payment of Rs. 9,050. B filed an appeal for enhancement of the amount. *Held* that the appeal lay to the High Court and not to the District Court as the value of the subject-matter in a redemption suit was the amount adjudicated by the trial Court, Rs. 9,050, and not the valuation given by the plaintiff, Rs. 1,000. [1926 L. 376 (F.B.), Foll.; 106 P.R. 1895, (F.B.), held overruled.] 148 I.C. 234=1933 L. 155.

SEC. 96 (3).—*Consent decrees* are not appealable. 43 C. 85. But they can be set aside for proper grounds by a separate suit, 15 B. 594. No appeal lies against a decree passed upon a compromise even if the compromise be disputed. For a consent decree to come within the prohibition of section 96 (3) it is not necessary that the consent should continue till the passing of the decree. 12 P. 359=14 P.L.T. (Supp.) 1=1933 Pat. 306. Where a compromise has been recorded and it has not been challenged in any way in the lower Court the recording of the compromise must be held to have been done by consent and section 96 (3) read with section 108 would bar an appeal against the order. 57 B. 206=35 Bom.L.R. 127=1933 B. 205. *See also* 156 I.C. 1035. *Consent decree*—Parties inviting Court to adopt special procedure—Court adopting and deciding suit—Appeal from decision—Maintainability. 71 M.L.J. 281. *See also* 172 I.C. 421 (decree passed on oath taken by a party in pursuance of an offer by the other party—Effect of). In construing a particular provision of the Code the Courts should, as far as possible, give to the other provisions of the Code their proper and effective meaning to attain their proper and effective purpose. There is a distinction between a decree passed by consent of parties to which section 96 applies, and a compromise of suit under O. 23, R. 3. Section 96 does not in all cases bar an appeal which involves a consent decree. Where an order recording a compromise is passed under O. 23, R. 3, an appeal lies from it under O. 43, R. 1, Cl. (m) and section 96 (3) is not a bar to such appeal. [1933 B. 205, not foll.] 29 S.L.R. 437=163 I.C. 240=1936 Sind 59. Section 96 (3) is not applicable to mutation proceedings. 35 P.L.R. 395.

AN AGREEMENT TO ACCEPT THE DECISION OF A COURT AS THAT OF AN ARBITRATOR without any objection implies that the

decision was to be accepted as final and there is to be no right of appeal to another forum. 15 L. 726=1934 L. 176 (2). Where the parties to a suit agree and say that the determination of their disputes by a third person is to be final between them, it is to be regarded as an undertaking not to appeal. A decree passed is still a decree passed by consent, when the Court finds there was a compromise, whether the compromise is admitted by both the parties or disputed by one of them; and the parties are estopped from impugning the decree made in accordance with the finding of third person by whose decision they have agreed to be bound. 60 C.L.J. 173. When a party offers to be bound by the statement of a certain person, that statement becomes conclusive evidence under the Indian Oaths Act and it is on the basis of that evidence that the Court decides the case. It cannot therefore be said that the decree in such a case is passed with the consent of the parties. 15 L. 305=149 I.C. 1102=1934 L. 67 (1). Decree in accordance with award not appealable—When objections against award have been heard and decided. 119 I.C. 694. Section 96, Cl. (3) pre-supposes that the party appealing has consented to the decree being passed—Person denying to be party to compromise can appeal. 114 I.C. 101=1929 S. 32.

SCOPE OF SECTION.—The new Code does not deprive the litigant of the right of appeal which he had under the old Code even though such right could not be exercised immediately on the introduction of the new Code. 21 M.L.J. 631. *See also* 151 I.C. 25=1934 A. 677. Finding of fact of Original Side Judges of High Court are generally accepted. 20 S.L.R. 295. *See also* 97 I.C. 505=1926 Sind 216; 1934 A. 531. A decree to be appealable must be a final disposal. 1929 M. 404=122 I.C. 519.

APPLICATION OF SECTION, SUB-CL. (3).—Section 96 (3) applies only to suits and not to proceedings in execution. 4 Pat.L.T. 735=1924 P. 346. An order passed by the judge of the City Civil Court, Madras, under section 7 of the Madras City Tenants' Protection Act fixing a reasonable rent is not appealable. Such an order is not a decree under section 96, C.P.Code, the scheme of the Act is to make such orders not appealable. I.L.R. (1939) Mad. 213=49 L.W. 118=A.I.R. 1939 Mad. 430.=(1939) 1 M.L.J. 80. Where a suit for accounts under section 33 of the United Provinces Agriculturists' Relief Act is tried by a Civil Court of original jurisdiction, a Munsif, the trial Court does not exercise any special Jurisdiction under United Provinces Agriculturists' Relief Act and hence the right of



## NOTES.

appeal will be governed by section 96, C. P. Code. 181 I.C. 282=A.I.R. 1939 All. 233.

**WHO CAN APPEAL.**—A party cannot appeal against a decision in his favour on the ground that one of the findings is against him. 24 I.C. 36. See also 2 L.W. 101=27 I.C. 861; 3 A. 152 (F.B.). If a decree is upon the face of it, entirely in favour of a party to the suit, he cannot appeal. 7 A. 606 (F.B.); 8 P. 617. An adverse finding against any single issue or issues is not appealable unless such finding is incorporated in the decree. 6 M.L.J. 87. See also 44 I.C. 723. An appeal is not maintainable against opinions in a judgment when the decree is in favour of a party. 51 I.C. 622. When a suit is dismissed for want of cause of action there cannot be an appeal by defendant on a finding. 20 C. W.N. 1354. Notwithstanding a suit is dismissed, a defendant has a right of appeal and for that purpose it is open to the parties to go behind the decree and see really what the adjudication is. 25 M.L.J. 379. Also see 36 M.L.J. 641. If a person who ought not to have been made a defendant is impleaded as such, he cannot appeal. An order directing the removal of a party's name from the array of parties is in substance though not in form a decree and an appeal lies therefrom. 53 A. 466. No person has a right of appeal from a decision unless his interest is prejudicially affected by it. 41 I.C. 468. A defendant has a right of appeal even if the suit has been dismissed against him, if he is aggrieved by the decree. 30 M. 447; 9 C.W.N. 584. Any plaintiff or a defendant has a right to appeal without the concurrence of the other parties to the suit. 22 B. 718. The representative of a deceased person can appeal from the decree although he may not have been brought on the record. 12 M.L.J. 435.

**WHO CAN APPEAL—THIRD PARTY CLAIMING UNDER PARTY TO SUIT—RIGHT TO PREFER APPEAL.**—The right of appeal is a creature of statute and it can be exercised only by those in whom the power is vested expressly or impliedly by the statute. In a suit under O. 21, R. 103, against the Official Receiver representing the estate of an insolvent, a decree was passed in favour of the plaintiff. The Official Receiver did not prefer an appeal. The appellant, who was one of the creditors of the insolvent represented by the Official Receiver in the trial Court, presented an appeal against the decree in so far as it related to the Official Receiver and an application for leave to appeal against that decree on behalf of itself and the general body of creditors of the insolvent. Held, that the appellant, not having been a party to the suit, was incompetent to prefer the appeal. Held, further, that even if leave to

appeal may be granted to a person not a party to the suit, this was not a proper case in which leave should be granted. 57 M. 670=1934 M. 360=66 M.L.J. 532. Order on application under section 34, Trust Act—Appeal. See 11 O.W.N. 1533=1935 O. 72.

**“EX PARTE” DECREE.**—A defendant against whom a decree has been passed *ex parte*, and who has not adopted the procedure provided by O. 9, R. 13 can appeal from such decree under the general provisions of this section. 9 M. 445. Appealability of order under O. 17, R. 3. 5 R. 838=1927 R. 148. See also 1937 Nag. 268.

**RES JUDICATA.**—A finding upon a point necessarily arising in the case operates as *res judicata* between the parties, and the aggrieved party can prefer an appeal against the finding although the decree is in his favour. 7 A. 606; 11 C. 301 (P.C.); 40 I.C. 771.

**CONSENT DECREE.**—Serious and substantial injustice to the party must be shown to result from letting the order stand which was made by the consent of the pleader under a mistake of fact. 46 M.L.J. 160=1923 P.C. 184 (P.C.). Decree on basis of compromise—Person verifying compromise having no authority—Party can appeal. 1929 Oudh 385 (F.B.). No appeal lies from an order made by consent of parties especially if the appellant has derived some benefit under it. 57 I.C. 70=30 C.L.J. 231; 34 I.C. 186=20 C.W.N. 752. See also 91 I.C. 294=1926 B. 39; 172 I.C. 421 (decree passed on taking of oath). What is a consent decree—Right of appeal in case decided by Court on procedure not warranted by C.P. Code. See 18 Pat. 261=1939 P.W. N. 151=1939 Pat. 514. No appeal lies against an order of dismissal of a suit under O. 23, R. 3 of the C.P. Code. 34 I.C. 186=20 C.W.N. 752. A decree under O. 23, R. 3 can be passed only after there has been an order that the compromise be recorded. 43 C. 85. An order recording a compromise which has not been challenged in the lower Court must be held to have been done by consent and no appeal lies against the order. 35 Bom.L.R. 127. A person who is not a party to the compromise though a party to suit can appeal against the compromise decree which binds only those who are parties to the compromise. 22 C.L.J. 333=20 C.W.N. 178. But see 91 I.C. 620=1926 C. 512. A consent decree in a partition suit as between some of the parties is not binding on any of the parties. 27 I. C. 242. An appeal lies against a decree passed on compromise entered into by a vakil without reference to his client. 41 M. 233 (23 M.L.J. 381, Dist.; 21 M. 274, Foll.) An order directing the appointment of a Commissioner with the consent of parties does not come under Cl. (3) of the section. 29 M.L.J. 219; 27 M.L.J. 173. The fact that defendant does not raise any



97. Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.
- Appeal from final decree where no appeal from preliminary decree.

## NOTES.

objection to a particular relief cannot make the decree a consent decree when the relief is eventually decreed. 49 I.C. 840=15 N. L.R. 39.

**WAIVER.**—Where the plea of limitation is waived though the suit is time-barred, the decree following is a consent decree and thus not appealable. 39 M.L.J. 68=24 C.W.N. 1055 (P.C.). Agreement to abide by decision of Court—Appeal, if lies. 1926 A. 90=89 I.C. 586.

**DECREE ON APPEAL.**—A appeal being a continuation of the original proceeding, the Appellate Court's decree is the decree in the suit. 30 M.L.J. 379.

**PRELIMINARY DECREE.**—Where in a suit for contribution the lower Court decided that the defendants were liable to contribute and also the extent of the liability and it only remained to work out the amount of the decree, *held*, that the findings amounted to a preliminary decree from which an appeal was competent. 9 Luck. 701=11 O.W.N. 606=1934 O. 307. *See also* 50 L. W. 541=1939 M. 897. No appeal lies from an order passed in a partition suit after the preliminary decree and before the passing of the final decree. Such an order cannot amount to a decree so as to be appealable. In a suit for partition there are only two decrees, *viz.*, the preliminary decree and the final decree and no third or further decree can be passed by the Court between these two. 1937 A.L.J. 809=A.I.R. 1937 All. 694.

**SEC. 97: PRELIMINARY AND FINAL DECREES.**—Where a final decree is passed no appeal will lie against a preliminary decree. But the Court may allow the appeal to be amended so as to convert it into one against the final decree. 48 C. 1036; *see also* 1928 L. 73=107 I.C. 610. An appeal filed from a preliminary decree is competent, although during its pendency a final decree is passed but it is not appealed against. 40 P.L. R. 123. Where the preliminary decree for sale on a mortgage provides that if the net proceeds of the sale are insufficient to pay the amount of the decree, etc., the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance, such a provision constitutes an adjudication adverse to the defendant and an award to the plaintiff of a personal decree; and if the defendant does not appeal from it, he is precluded under section 97, C.P. Code, from afterwards disputing its correctness. It is not therefore open to the defendant in such a case to object to the plaintiffs' application for a personal decree after the mort-

gaged properties are exhausted. 151 I.C. 1055=11 O.W.N. 1196=10 Luck. 233.

**PRACTICE AND PROCEDURE.**—It is a salutary rule that where the issue is simple and straightforward and the only question is which set of witnesses is to be believed the findings of fact of the trial judge should not be lightly disregarded. 40 C. 132. If the competency of an appeal is in question the appellant must establish that he has a right of appeal, for a right of appeal is not a natural right but must be given by express rules of statute. 43 C. 857. Small cause suit tried on the original side—Appeal from decree. 51 I.C. 967. An appeal lies from a decree in a suit transferred from the Small Cause Court to the Original Side under section 23 of the Provincial Small Cause Courts Act and the Appellate Court can remand the suit. 45 I.C. 645.

**FORUM OF APPEAL.**—Transfer of venue. 37 M. 477. Where on withdrawal of a claim against some defendants a decree is passed which makes the defendants liable for their own costs, an appeal does lie. 18 M.L.T. 460=31 I.C. 312. The value of the subject-matter in a redemption suit is the amount adjudicated by the trial Court and not the valuation given by the plaintiff. It is the former that determines the appellate forum. 1933 L. 155.

**PRELIMINARY DECREE, WHAT IS.**—The C. P. Code makes no provision for something which is neither a decree nor an order, nor anything which is both; nor does it provide that one adjudication by the Court can be resolved into diverse elements, some of which are decrees and some orders. The question is one of substance, whether an adjudication is a decree or an order. 42 C. 914 (P.C.). *See also* 9 Luck. 701=1934 O. 307. Though no appeal against the final decree is preferred it is no reason for not hearing the appeal against the preliminary decree in a suit for partition. 36 A. 532. If an appeal from preliminary decree succeeds, the final decree passed later on falls to the ground. 34 A. 493; 36 A. 532; 35 M.L.J. 361. The passing of a final decree, whether precludes a party from preferring an appeal against the preliminary decree; 37 M. 455=22 M. L.J. 317; 24 M.L.J. 190. The right to appeal lies only from a preliminary decree and not from a preliminary finding in a suit directing accounts to be taken. 38 B. 331; 39 B. 339 (F.B.). Where there is only a preliminary finding and no decree is drawn up, there is no preliminary decree and no appeal under section 97. 37 B. 480; 37 B. 60. The legislature in enacting section



98. (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

Decision where appeal heard by two or more Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed :

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

<sup>1</sup>[(3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the letters patent of any High Court.]

#### LEG. REF.

<sup>1</sup>Sub-section was added by Amending Act XVIII of 1928.

#### NOTES.

97 intended to prevent preliminary questions being raised in the form of an appeal after a case has been decided upon the merits. 36 B. 536. *See also* 1937 Rang. 494. Effect of passing of final decree after filing of appeal from preliminary decree. *See* 92 I. C. 545=1926 B. 43. An appeal filed against a preliminary decree can be heard though final decree made after the appeal was passed and lodged, is not appealed against; a preliminary decree is not maintainable unless there is also an appeal against the final decree passed subsequent to the preliminary decree by the Court below. 71 I.C. 290 (40 C. 1036, referred to); 91 I.C. 358=1926 C. 557. But *see also* 157 I.C. 416=1935 L. 482. An appeal against the preliminary decree after the final decree is passed but before it is signed is not incompetent, as no copy can be got for the final decree until it is signed and drawn up and the only appealable decree is the preliminary decree. 46 I.C. 802=22 C.W.N. 831 (30 I.C. 321, Foll.) The order remanding after settling certain issues is a preliminary decree and must be appealed from. 32 I.C. 866=22 C. W. N. 43. Where, before the filing of an appeal against a preliminary decree, a final decree was passed and no appeal was preferred against the final decree, there is no appeal against the preliminary decree. 27 I.C. 135=20 C. W. N. 231 (18 C.L.J. 321, Foll.); 30 I.C. 321=22 C.L.J. 90; 1928 L. 73; 1937 Rang. 494; *see contra* 34 C. W.N. 66 (F.B.); 1930 Pat. 177=11 P. L.T. 61 (F.B.). Under the old Code, objections to a preliminary decree could be taken in an appeal against the final decree, without appealing from the preliminary decree. 24 I. C. 18=21 C. L. J. 459. A final decree, passed before the appeal from the preliminary decree must be brought to the Appellate Court's notice, otherwise the

Appellate Court's decree supersedes the final decree also. 17 C.W.N. 868=18 C.L.J. 209 (36 C. 672; 6 C.L.J. 547; 32 C. 1023; 32 A. 225, Dist.; 3 C. 20, Foll.). *See also* 20 I.C. 576=18 C.L.J. 214; 21 I.C. 510=18 C.L.J. 223; 21 I.C. 516=18 C.L.J. 321. Appeal from preliminary decree cannot be treated as one against the final decree also. 74 I.C. 485=11 O.L.J. 248.

SEC. 98: SCOPE AND APPLICATION OF SECTION.—With the addition of sub-section (3), section 98, C.P.Code, made by the Repealing and Amending Act, XVIII of 1928, that section has no application to cases heard by Division Bench of a Chartered High Court, whether on appeals from decrees of Subordinate Courts or from decrees passed by a Judge of the High Court on the Original Side. All cases of difference of opinion among the Judges composing the Division Bench are governed by Cl. 26, Letters Patent, and the Division Bench should state expressly the points of difference.\* 15 L. 425=149 I.C. 575=1934 L. 371 (F.B.). *See also* I.L.R. 1938 A. 972=1938 All. 641 (F.B.). Cl. 20 of the Letters Patent (Lahore) and not section 98 of the C.P.Code applies in case of a difference of opinion between the Judges of a Division Bench even in the case of an appeal from the mofussil. (52 M. 563, Foll.); 142 I. C. 427=34 P.L.R. 584=1933 L. 648 (1). Where a bench of two Judges differ, section 98, regulates the decision of the appeal if it is from a Subordinate Court under the Code or any local or special statute and in all other cases the decision is governed by the Letters Patent. 93 I.C. 344=7 L. 179=1926 L. 65. (N.B.—There is no difference of procedure after the recent amendment of the Letters Patent.) Where two Judges of a Division Bench differ on a point of law and refer the matter to a third Judge, the latter must confine his opinion to the specific point and not dispose of the case *de novo* on the merits. 35 A. 487=40 I.A. 182 (P.C.). Under the old Code when two Judges differed, the whole appeal was referred to a third Judge, but under the new Code it is only the



99. No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.

#### NOTES.

point of law that has to be referred. 39 C. 353=16 C.W.N. 817. Under the proviso to the section reference can be made only when there is a difference on a question of law and not on fact. 17 C. 3 (11)=16 I.A. 137. Letters Patent, Cl. 36 and not section 98, governs the procedure in cases of difference of opinion in revision cases. 32 I.C. 330=17 Cr.L.J. 42. Section 98 applies even to Chartered High Courts subject to Letters Patent, Cl. 36. The result is that Cl. 36 applies to Chartered High Courts and section 98 to Courts other than Chartered High Courts. 52 M. 563=57 M.L.J. 264 (F.B.). The procedure when Judges differ on second appeals from mofussil is governed by section 98, C.P.Code, and not by Cl. 36, Letters Patent. 43 B. 433 (F.B.); 3 B. 204; 10 C. 814; 25 M. 555; 22 M. 68; 11 A. 176 (F.B.), Rel. *See also* 91 I.C. 897=1926 C. 121; 30 C.W.N. 1011=97 I.C. 236=1926 C. 1211. Reference to a third Judge—Third Judge deciding case on another point—Procedure. 26 C. W.N. 985=1922 C. 544. If the appellate Court Judges agree that a part of the lower Court's judgment is erroneous, that part must be reversed, and if as to rest the Judges are equally divided, it is deemed as confirmed. 31 I.C. 965=22 C.L.J. 525 (11 A. 176; 6 B.L.R. 131, Dist.); 1928 M. 180. But *see* 7 L. 179. Judges differing on a question of law—Decision to be arrived at with reservation of point of law. 22 I.C. 383=18 C.W.N. 33. Where in an appeal under the Land Acquisition Act the Judges composing a Division Bench differ as to the amount of additional compensation the award of the lower Court should be confirmed under section 98. 41 M. 943=35 M.L.J. 110.

DECREE CONTAINING ADJUDICATIONS REGARDING SEVERAL ITEMS—ONE ITEM CONFIRMED AND ANOTHER VARIED—DECREE—FORM OF.—Where the "decree" contains adjudications regarding several items, each adjudication is a decree as defined in section 2 (2) and the provisions of section 98 should be applied with reference to the adjudication of each item. Where the Judges composing a Bench do not agree in confirming the adjudication made by the lower Court in respect of one item, but they agree in reversing the decree or adjudication by the lower Court as regards another item in dispute, the decree appealed from should be varied so far as the Bench agree that it should be varied and confirmed so far as they agree that it should be confirmed. (31 I.C. 965,

Rel.); 55 A. 672=1933 A.L.J. 1425=1933 A. 473.

DIFFERENCE ON QUESTIONS OF LAW—PROCEDURE—REFERENCE OF WHOLE CASE NOT PROPER.—When a Bench differ in opinion on certain points of law, under section 98, they may state those points and the hearing by the other Judges is confined to the specific points stated and cannot cover the whole case again. Section 98 is confined to points of law only but the newly added sub-section (3) makes it subject to the provisions of the Letters Patent, Cl. 27 of which states that the points of difference may be referred to the other Bench. This clause is wider than section 98 of the C.P.Code, because it covers points of fact as well as points of law. But in both cases, only the points of difference should be stated and not the whole case. 146 I.C. 84=1933 A.L.J. 1127=1933 A. 861 (F.B.).

SEC. 99: SCOPE AND APPLICATION OF SECTION.—The section applies only to errors or defects or irregularities in the suit or proceedings out of which the appeal then being heard arises, and not to previous suits or proceedings which have come to an end. 23 A. 499 (500). *See also* 1938 N.L.J. 392. Applicability to appeal under section 142, Calcutta Municipal Act. 31 C.W.N. 1040. Section 99, C.P.Code, refers only to Courts of appeal and not to a Court of revision. The section also does not condone every irregularity. The presentation of a plaint by a person who is a stranger to the suit is no valid presentation; and the defect cannot be cured under section 99, C.P.Code. 1937 A.M.L.J. 41. Section 99 has no application to proceedings under the United Provinces Land Revenue Act. 1940 A.W.R. (B.R.) 168=1940 R.D. 445=1940 O.A. 1000. The best test to ascertain whether an erroneous interlocutory order has affected the ultimate decision on the merits is to see whether the Court would have come to the same decision had the erroneous order not been passed. 2 C.L.R. 257. Where the appellate Court did not apply its mind to the case fully and proceeded on an entire misapprehension of the trial Court's decision a remand for a fresh disposal of the appeal would be justified. 130 I.C. 573=1931 C. 164=52 C.L.J. 566. A decree can be varied on appeal on grounds which have come into existence since it was passed. 133 I.C. 244=1931 B. 280=33 Bom.L.R. 266. The successor of a deceased or resigned mutawalli has no *locus standi* in a pending litigation until his name is actually brought on the record in place of the former muta-



## NOTES.

walli. No order or decree in his favour could be passed till then. But if a decree were to be passed prior to such bringing on record, the irregularity affects the merits of the case fundamentally and is not covered by section 99. 1940 R.D. 402=1940 A.W. R. (B.R.) 214.

**JURISDICTION.**—The term “jurisdiction” is used in the sense of pecuniary or local jurisdiction or jurisdictions relating to the subject-matter of the suit. 28 C. 324; 5 C.L.J. 71; 5 C.L.J. 329. The word “jurisdiction” in section 99, judged from the point of view of locality, pecuniary value or the subject-matter of a suit, means competency to try. 10 I.C. 731=7 N.L.R. 33. See also 158 I.C. 971=1935 Pesh. 151. Whether non-compliance with section 147-A of the Bengal Tenancy Act amounts to want of jurisdiction, see 45 C.L.J. 24. Jurisdiction is that of the trial Court. 93 I.C. 938=1926 L. 402. When there is a want of jurisdiction appellate Court will interfere even if there is no miscarriage of justice. 95 I.C. 406=1926 A. 650. See also 1937 P. 147.

**MISJOINDER.**—See 43 Bom.L.R. 293. The words “any misjoinder of parties or causes of action” have been inserted to supersede the rulings in 27 M. 80; 24 C. 540; 15 A. 380. See also 43 Bom.L.R. 293; 22 Pat. L.T. 196. Misjoinder—Joinder of different tenants in suit for enhancement of rent. 23 C.W.N. 945=30 C.L.J. 140. An objection as to misjoinder cannot be taken for the first time on appeal, especially when the suit is decided on the merits in the first Court. 17 I.C. 97. Even though the High Court has erred in overruling an objection to the amendment of plaint on the ground of misjoinder of causes of action, their Lordships of the Privy Council would not, on that ground, reverse the decree granted by the High Court, when the alleged misjoinder has affected neither the merits of the case nor the jurisdiction of the Court. The provisions contained in Civil Procedure Code, do not regulate the procedure of their Lordships in hearing appeals from India but there can be no doubt that the rule embodied in section 99 proceeds upon a sound principle and is calculated to promote justice, and their Lordships would not be prepared to adopt a course which would merely prolong litigation. I.L.R. (1937) All. 655=1937 P.C. 233=(1937) 2 M.L.J. 151 (P.C.). Suit by Hindu sons impeaching a large number of alienations by their father in favour of various persons—Allegation of vice, extravagance and immorality—Impleading all alienees 78 in number as defendants—Plea of misjoinder raised in written statement but not pressed or proceeded with further—Court dealing with all transactions and coming to correct conclusion—Decree confirmed by High Court—

Objection in appeal to Privy Council not competent. 166 I.C. 649=16 P. 149=41 C.W.N. 418=1937 P.C. 42 (P.C.). Misjoinder of causes of action when interference by High Court proper. See 22 M.L.J. 225. Whether misjoinder in section 99, C.P. Code, includes non-joinder. 44 M.L.J. 249. Objections as to non-joinder—Procedure—Lawfully stated. 42 M.L.J. 133. See also 43 Bom.L.R. 293 (Non-joinder).

**ORDER OF HONORARY ASSISTANT COLLECTOR ON A PUBLIC HOLIDAY—ULTRA VIRES.**—There are standing orders of the Government of India that no work of a civil nature can be done on a public holiday and if it is done, then it amounts to a nullity. Accordingly an order passed by an Honorary Assistant Collector on a public holiday dismissing an application for execution of a decree is clearly *ultra vires*, and is liable to be set aside in revision. 167 I.C. 280=1937 O.W.N. 247=1937 O. 272.

**ILLUSTRATIVE CASES.**—Decree passed cannot be reversed simply because it was passed without hearing arguments. 93 I.C. 291. An order adding parties to a case is not one affecting the merits. 3 B.L.R. (O.C.) 113. As to decree passed without hearing arguments, see 13 O.L.J. 473. The joinder of an unnecessary party in a mortgage suit does not involve its dismissal but is a mere irregularity. 52 I.C. 105. But where a person who is a necessary party is not impleaded as defendant in spite of such objection being taken at the very start, the suit should be dismissed. 146 I.C. 72=1933 M. 664=65 M.L.J. 290. Striking out names from the plaint and amending issues are not errors affecting the merits of the case. 4 Beng.L.R. (O.C.) 97. See 9 A. 508 and 14 C. 159. Suit wrongly brought in firm's name—Amendment of plaint—Power of appellate Court. 1935 R. 240. See also 19 Pat. 838 (Court to which decree is transferred ordering substitution of heirs of judgment-debtor, deceased). The defendant could not object to the frame of the plaint in appeal, where it stated all the facts fully and did not in fact mislead the defendant. 34 I.C. 704=12 N.L.R. 90. Absence of Court's permission under O. 1, R. 8, C.P. Code, cannot be raised for the first time in appeal. 1931 O. 375. An objection that there cannot be a decision in a partition suit of rights subordinate to that of the co-sharers cannot be gone into for the first time in appeal. 63 I.C. 161=33 C.L.J. 317. An error in the valuation of the claim is not one which affects the merits of the case. 1 B.H.C.R. 163. Set-off—Court-fee not paid—Objection in appeal—Interference. 19 I.C. 918=17 C.L.J. 305 (F.B.). Form of an issue throwing onus on the wrong party, is not a ground in appeal for setting aside the decree provided the parties were not misled and the evidence fully gone into. 17 C.L.J. 38=17 C.W.



## NOTES.

N. 280. Where the plaintiff in disregard of the provisions of the Code has united in the same suit not merely several causes of action, but several suits against separate defendants with the result that litigation was conducted as though the defendants were a community with common interests, the procedure though highly irregular, nevertheless prevents the landlord from objecting to the use of evidence given in the case of some tenants as evidence in favour of all the parties. 43 M. 567=47 I.A. 76=38 M.L.J. 476 (P.C.) (on appeal from 24 M.L.J. 571). The deposition of a handwriting expert signed by him and admitted in evidence does not vitiate the trial though it is not signed by the Judge. 68 I.C. 664=1923 N. 7 (1). The exclusion of evidence in the lower Court is not sufficient ground for reversing that Court's decision, unless the appellate Court comes to the conclusion that the evidence referred, if it had been received, ought to have varied the decision. 8 B. 408. Error in rejecting documents already admitted by the predecessor of the Judge is not one affecting the merits. 13 B. 449. The second appellate Court cannot set aside the decree of the first appellate Court on the ground of improper admission of additional evidence unless it is satisfied that the decision on the merits is wrong, and that the additional evidence might have resulted in the wrong decision. 26 I.C. 50=1914 M.W.N. 864 (36 M. 477, Foll.). When an unstamped promissory note is treated as a bond and received in evidence on payment of stamp duty and penalty, the receipt of such document is not an irregularity affecting the merits of the case. 1 A. 725. Appeal from decree—Court allowing unreasonable extension of time for payment of court-fee—Wrong exercise of discretion not ground of attack in appeal—Proper remedy is by way of revision to High Court. See 18 Pat.L.T. 665=A.I.R. 1937 Pat. 550 (S.B.). The omission to explain the non-production of a document before tendering secondary evidence is only a mere irregularity. 59 I.C. 461. Omission to record reasons for admission of additional evidence by the appellate Officer is an irregularity not affecting the merits of the case and is curable under section 99. 14 L.R. 366 (Rev.)=17 R.D. 507. See also 1938 N. L.J. 392. Recording evidence in a language which is not the language of the Court is a mere irregularity which can be cured by this section. 34 C. 396. Also the disposal of a suit on a Sunday. 29 A. 562. If the power-of-attorney, on the strength of which a suit is instituted is defective as when it is a special and not a general power, there is merely an irregularity in proceedings not affecting merits of the case.

47 B. 227. Where the plaintiff filed the plaint through an agent and did not even sign the plaint, and there was no power-of-attorney on the record and no explanation was apparently obtained for her failure to sign the plaint and no objection however appeared to have been taken. *Held*, section 99 of the C.P. Code applies to the case. 1 R. 42; 134 I.C. 36=1931 A. 507. See also 1938 R.D. 745=1938 A.W.R. (B.R.) 372 (Both parties absent—Appeal allowed on the statement of a person not duly authorised—Defect cannot be condoned under this section). A plaint was presented on behalf of a person by an agent who had no valid power-of-attorney and the suit proceeded without the plaint being signed by that person and a decree was passed. *Held*, section 99, C.P. Code, applied and cured the defect of this kind. A.I.R. 1937 Rang. 482. Defect of signature does not justify reversal of the decree. 59 I.C. 282=1 Pat.L.T. 647. Defect in signing of plaint can be remedied in appellate Court. 104 I. C. 747. Irregularity in signing vakalat-nama is only formal. 74 I.C. 1033. Where the mother of a minor refuses to act as guardian the Court ought to appoint one of its officers as guardian *ad litem*. An omission to appoint one is a serious defect not curable by section 99. 62 I.C. 464=25 C.W.N. 525. Absence of a formal order appointing a guardian may sometimes be a mere irregularity. 30 I.A. 182; 1935 O.W.N. 333; but not when the minor's interests had been entirely disregarded. 29 A. 679. See also 1935 O.W.N. 333=1935 O. 287. Decree on compromise—Omission to record the compromise not fatal. 1935 A.W.R. 765=1935 All. 738. Where the order amounts impliedly to a redemption decree, it may be treated as such under section 99 of the Code notwithstanding an irregularity in form. 26 I.C. 701=10 N. L.R. 150. Withdrawal of suit with permission on condition as to costs—No date mentioned for payment—Fresh suit filed before payment—Irregularity. 1935 N. 56. Award—Order filing award and judgment combined into one—No separate judgment and order as required by Sch. II, para. 21—If illegal—Irregularity—If cured. 1936 N. 246. A remand under O. 41, R. 23, when the first Court decided the suit on the merits, is an irregularity within section 99 not affecting the merits of the case. 41 C. 108 (28 C. 324, Foll.). Where order passed under O. 39, Rr. 5 and 6 should have been passed under O. 21, R. 42, the High Court refused to set aside as in substance the order was right. 41 I.C. 89. See also 1941 A.W.R. (Rev.) 5 (Petition filed under one section instead of another correct section of an Act). Execution sale—Want of attachment in execution does not interfere with power of Court to sell proper-



*Appeals from Appellate Decrees.*

100. (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds namely :—

## NOTES.

ty. 37 I.C. 964=1917 M.W.N. 89 following 21 A. 311. Refusal of summons under O. 16, r. 1—Party producing copy of document sought to be produced in Court but neither proving that it was original nor that it was true copy—There was no miscarriage of justice due to refusal. 49 C.L.J. 546=1929 C. 459. Subsequent mistakes and irregularities may be condoned under this section, provided the suit has been instituted in such a way as to give the Court authority to try it. 26 B. 259. On an application for grant of a certificate for money said to be due to the wife, a certificate had been granted for collecting the money due to the husband. *Held*, that the defect was purely a formal one; hence the order of grant of certificate could not be interfered with on that ground. 1935 P. 478.

SEC. 100: SECOND APPEAL.—Appeal under section 142, Calcutta Municipal Act is in the nature of first appeal not second appeal. 32 C.W.N. 378=1928 C. 450=109 I.C. 618. Section 100 must be read with O. 41, r. 23. 1940 P.W.N. 566=1940 Pat. 300. Where no appeal lies to the District Judge from the judgment of a sub-judge but one is filed, the appeal is a nullity, for the first appellate Court acts without jurisdiction, and second appeal lies. 1935 L. 319 (1). No second appeal against order under O. 21, r. 90, C. P. Code, even if decree-holder himself was purchaser. 1936 A.L.J. 959=165 I.C. 654=1936 A. 763. Nor against owner under O. 21, r. 92 allowing deposit and setting aside sale. 161 I.C. 26=1936 P. 119. Suit to recover rent of agricultural land in Burma is not of a nature cognizable by Small Cause Court and no second appeal lies even if amount is less than Rs. 500. 1935 R. 386=13 R. 633 (F. B.) (Overruling 3 R. 390).

QUESTION OF FACT—ILLUSTRATIVE CASES.—Interference with findings of fact by the High Court is subject to limits prescribed by section 100. 46 C. 189 (P.C.); 1933 O. 259=145 I.C. 233; 1933 M. 565; 146 I.C. 445=1933 R. 174; 144 I.C. 315=1933 R. 91; 142 I.C. 696=1933 O. 115; 145 I.C. 122=1933 L. 141; 145 I.C. 155=1933 L. 172; 152 I.C. 180=11 O.W.N. 1165=1934 O. 449. See for a full discussion, 3 O.W.N. 645=97 I.C. 853=1926 O. 578. See also 47 C. 107=37 M.L.J. 36=46 I.A. 140 (P.C.). The High Court in second appeal is entitled to come to a finding of fact where the lower appellate Court has omitted to arrive at such a finding. 1940 A.L.J. 366=A.I.R. 1940 All. 349. Conclusions of fact arrived at by the lower appellate Court, however erroneous or unsatisfactory, are conclusive in second appeal and cannot be challenged before the

High Court in second appeal. 22 Pat.L.T. 196; 1937 Sind 263. Extremely strong grounds are necessary for interfering with the finding of the trial Judge who heard the witnesses, that they were unworthy of belief. 116 I.C. 432=1929 N. 117. No second appeal has any chance of success where the only ground is that the lower Appellate Court has omitted to mention this or that piece of evidence. The Legislature rightly or wrongly has decided that the first Appellate Court is to be trusted and it behoves first Appellate Judges to bear in mind the fact that their findings of fact are conclusive and that they therefore have a great responsibility and should be especially careful in such cases. If they are not, it may be a matter for administrative discipline but a second Appellate Court cannot put the matter right in second appeal. I.L.R. (1939) Nag. 510=1939 Nag. 221. On second appeal it is not the concurrent finding of fact which cannot be interfered with; it is the finding of fact of the first appellate Court, and there is no question of its being within the discretion of the second Appellate Court to interfere; the second Appellate Court cannot interfere, however erroneous it may think this finding of fact to be. 1940 Rang.L.R. 180=A.I.R. 1940 Rang. 126. See also 39 P. L. R. 361. A finding of fact is binding on a second appellate Court, if the lower appellate Court committed no error of law in arriving at the finding. 21 I.C. 251; 30 I.C. 503; 57 I.C. 739; 35 I.C. 392; 1926 A. 130; 1926 N. 192; 158 I.C. 51=1935 P. 152; 1935 P. 42 (apportionment of award in land acquisition case between various types of people interested in the land, by lower appellate Court). A finding of fact based upon admissible evidence is binding upon the High Court in second appeal. 148 I.C. 1079=11 O.W.N. 674=1934 O. 97 (2); 1935 L. 641; 1935 A. L.J. 664=155 I.C. 634=1935 A. 662. Per *Lort Williams, J.*—The High Court cannot interfere with the findings of fact unless those findings have been based upon a misconception of the evidence or upon some mistake which has arisen in the consideration of that evidence in the lower Court. Per *Buckland, J.*—The rule regarding the finality of the findings of the lower Court on questions of fact should be strictly enforced. 152 I.C. 597=61 C. 365=1934 C. 633. See also 17 Pat. 430=19 Pat.L.T. 281=1938 Pat. 278; 1937 Sind 263; 1934 O. 261=147 I.C. 871; 147 I.C. 1224=10 O.W.N. 911; 147 I.C. 1175=1934 L. 163 (Fact of compromise being entered into). Where it had been already decided by the lower Court that a certain wall and a door did not encroach on the plot in suit, *held*, that it was not open to the High



## NOTES.

Court in second appeal to direct the lower Court to hold an enquiry as to the same matter. This would be in effect to reopen and try for a second time a claim for a mandatory injunction in respect of the door and the wall. 40 C.W.N. 449=1936 P.C. 83=70 M.L.J. 455 (P.C.). A decision on facts by the lower appellate Court is binding on the High Court, however unsatisfactory the reasoning may be. 1933 P. 708; 152 I.C. 419=11 O.W.N. 1359; 35 P.L.R. 608; 15 L.R. 40 (Rev.)=18 R.D. 12; 13 P. 254=1934 P.C. 5=66 M.L.J. 298 (P.C.); 1935 L. 172. Inconsistent findings by lower Court one before and the other afterwards—The later one prevails—No interference with the later finding in second appeal. 53 M.L.J. 700 (P.C.). But when there is (i) no evidence (12 C. 972), or (ii) no sufficient legal evidence (16 I.C. 887), or (iii) important evidence is ignored (32 P.L.R. 714; 103 P.L.R. 1915; 54 M.L.J. 600), or (iv) only a colourable pretence of considering the evidence is made (38 I.C. 561), or (v) there is no honest and complete consideration, a finding of fact can be contested in second appeal. *See also* 21 Pat.L.T. 873. Otherwise it is final 18 C. 23 (P.C.); 3 L. 389; 1935 L. 389; 35 I.C. 392 (wrong application of law); 1939 Lah. 301 (Misapprehension of real point at issue). A finding of fact based on an obviously erroneous approach to the case cannot be accepted as binding in second appeal. (1937) 2 M.L.J. 511. An assumption of a fact which is not established by evidence is not a finding of fact binding in second appeal. 1937 A. M.L.J. 7. Inferences of fact which are not unreasonable and are justified by evidence cannot be interfered with in second appeal. 62 I.C. 1002; 20 I.C. 523. *See also* 8 L.R. 314 (Rev.); 96 I.C. 14=1926 O. 522; 95 I.C. 463 (1)=13 O.L.J. 146; 39 C.W.N. 303. Where more than one inference is legally open from the evidence, the High Court cannot in second appeal refuse to be bound by that inference drawn in the Court below. 1913 L. 239 (1); 73 I.C. 232; 1939 Pat. 218; 1938 Pat. 386; 1937 Sind 312; 1937 Cal. 8; 1937 Nag. 139; 1938 All. 100; 1938 Lah. 10; 46 I.C. 794; 21 B. 91; 74 I.C. 843. The plaintiffs sued the defendants for a permanent injunction for the closing of a drain from their latrine. The lower appellate Court based its finding on a sweeping statement that water discharged from latrines in Indian homes should as a rule be treated as nuisance and granted the injunction. It was *held*, that the finding of the lower appellate Court about the drain in question constituting a nuisance was given without reference to the evidence bearing on the point and its order for the closing of the drain must be set aside. 161 I.C. 411=1936 O.W.N. 310=1936 O. 211. A finding of fact is not binding in second appeal if it is marked by errors of law as that of ignoring the presumption of correctness attaching to the record-of-rights. 161 I.C. 709=17 Pat.L.T. 405=1936 P. 185. If the first appellate Court has evidence proper for its findings notwithstanding the statutory

presumptions then its findings of fact are final and conclusive. 18 C. 23 (P.C.) and 14 C. 740 (P.C.), Relied on; 34 C.W.N. 1=1929 P.C. 286 (P.C.). The High Court is not entitled to go behind the findings of fact of the District Judge which did not result from the misconstruction of a document or the misapplication of law or procedure but upon the oral evidence in the case. 37 M.L.J. 199 (P.C.); 42 I.C. 68=11 Bur.L.T. 229; 54 C. 586=53 M.L.J. 117 (P.C.). *See also* 1928 M. 377; 10 Pat.L.T. 630. The finding of fact of a lower appellate Court which proceeds on an erroneous view of the law, and which is inconsistent with the facts recited can be interfered with by the High Court. 44 A. 602; 95 I.C. 636=1926 N. 416; 11 L.L.J. 82=1929 L. 314; 21 Pat.L.T. 873; 1941 Pat. 118=191 I.C. 275; 1938 Lah. 180. A finding of fact which has been arrived at in complete disregard of legal propositions involved in the consideration of the question in issue, cannot be regarded as conclusive. 155 I.C. 824=1935 A.L.J. 828=1935 A. 774; or in disregard of the presumption provided by any Statute. 157 I.C. 561=1935 L. 912. Question of fact—Evidence when open to examination. 1 L.L.J. 72. A finding of fact arrived at on a consideration of evidence which is inadmissible and which proceeds partly on such evidence can be assailed in second appeal. 2 L. 271 following 57 I.C. 567; 138 I.C. 399; 39 C.W.N. 277. *See also* 18 N.L.J. 333. But when the finding is based really on other evidence, and the inadmissible evidence is only used for the purpose of further support, that does not vitiate the finding or necessitate a remand. 39 C.W.N. 311; 41 P.L.R. 826=1939 Lah. 548; 1939 Lah. 504=185 I.C. 652. Finding of fact by lower Appellate Court based partly on conjectures and partly on a misunderstanding of the evidence is liable to be set aside in second appeal. A.I.R. 1939 Lah. 510. *See also* 1941 N.L.J. 230. A finding of fact can be reversed in second appeal when it is vitiated by some error of law. A mistake of law is not confined to a decision based on inadmissible evidence. A finding of fact in order to be binding and conclusive on a Court of second appeal must be one based on evidence legally sufficient to support it. The decision of the lower appellate Court on a point of fact must be proper and judicial. 1939 O.W.N. 1114=15 Luck. 191=1940 Oudh 35. Where a decision is based purely on surmises when there is evidence on the record which should have been considered, it entails a question of law. It is a first principle of law that a decision must be based on evidence and not on surmises. 1939 A.M.L.J. 116. There is nothing in the language of sections 100 and 101 which gives countenance to the view that a respondent in appeal under section 100, is debarred from challenging the correctness of the findings of fact of the first appellate Court which in spite of such findings, dismissed the appeal. 179 I.C. 946=A.I.R. 1939 Rang. 59. An erroneous finding of fact is different from an error in procedure. Where



## NOTES.

there is no error or defect in the procedure the finding of fact by the Court of First Appeal is final. 63 I.C. 575; 59 I.C. 885; 40 I.C. 772; 139 I.C. 365=1932 O. 264; 138 I.C. 465=1932 A. 293 (F.B.). Erroneous findings of fact however gross or inexcusable cannot be questioned in second appeal. 98 I.C. 1035; 99 I.C. 199=1927 O. 89; 98 I.C. 1072; 99 I.C. 183; 103 I.C. 215=1927 L. 574; 98 I.C. 869=1927 M. 217; 52 M.L.J. 674; 99 I.C. 769=1927 N. 158; 100 I.C. 792; 52 M. 538=57 M.L.J. 64 (P.C.); 57 M.L.J. 205 (P.C.); 1935 L. 172; 157 I.C. 470=16 Pat. L.T. 666=1935 P. 351; 161 I.C. 516=1936 P. 140. *See also* 92 I.C. 327; 131 I.C. 395=1931 O. 142; 132 I.C. 791; 134 I.C. 1023; 9 O.W.N. 1015, 1063; 136 I.C. 783=1932 M. 173; 1933 O. 115. Vague finding of fact may be subject to question in second appeal. 37 I.C. 27; 40 I.C. 496; 1929 L. 653. A finding of fact arrived at by the lower appellate Court without applying its mind to the facts and circumstances on which the trial Court has based its decision cannot be binding in second appeal. 40 C.W.N. 769. A finding of fact of the lower appellate Court is conclusive in second appeal and the mere fact that the judgment of the lower appellate Court consists only of a few lines does not make the finding of fact any the less binding. There is nothing in the Code of Civil Procedure to take out of this rule a case in which the lower appellate Court records a finding of fact while dismissing an appeal under O. 41, r. 11, C. P. Code. The High Court will not interfere in the absence of any error of law or of defect in procedure. 179 I.C. 803=1939 Pat. 267; 1938 Pat. 608; 1938 Pat. 330. Where the judgment of the lower Court dealing with points of facts is confused and contains mistakes of fact and material evidence bearing on the disputed matters has not been considered, the findings of fact are not conclusive and binding on second appeal and the second appellate Court is justified in re-opening those matters and examining the evidence itself. A.I.R. 1941 Lah. 10. Finding of fact becoming irrelevant by change in law—High Court can consider in second appeal, the altered aspect of the finding on the evidence. 96 I.C. 775=1926 A. 725. Finding of fact—Trial Court's finding reversed in appeal—Cannot be interfered with in second appeal. 6 R. 586. Still more so in the case of concurrent findings by the lower Courts. 57 M. L.J. 594 (P.C.); 115 I.C. 99. Perverse findings though of fact are good grounds for remand in second appeal. 1931 M.W.N. 102. A finding of fact can only be questioned in second appeal if it is without any basis of evidence. It is not enough to show in a second appeal that if the Court were hearing the case either as a Court of first instance of first appeal it might have come to a different conclusion on the evidence on record. To justify interference with a finding of fact, it must be shown that the findings of the lower appellate Court are such that they

have no basis whatsoever in the evidence on record. 1941 A.W.R. (Rev.) 356=1941 O.A. (Supp.) 270. Where a lower appellate Court without giving very cogent reasons differs from the finding of the trial Court which had the best means of judging the weight to be attached to the evidence tendered before it, it can be set aside in second appeal by the Board. 1939 A.W.R. (B.R.) 277.

FOLLOWING ARE QUESTIONS OF FACT.—  
Question as to existence of custom. 141 I. C. 668=1933 A. 306. Where a custom is alleged to exist, the existence or non-existence of such a custom is a question of fact; but it is a question of law whether there is proof to support the custom or whether the evidence is legally sufficient to support such a custom. 158 I.C. 109=1935 A. 720; 157 I.C. 654=1935 O. 459. *See also* 18 N.L. J. 172. (See also under heading 'Custom' *supra*.) Grant by Government of grazing land. 36 A. 256 that land was totally unfit for cultivation. 1939 Pat. 386; 1939 Pat. 161 (Question whether land had been rendered unfit for tenancy); 1940 A.W.R. (B.R.) 89 (Question whether a person has been admitted as a tenant by zamindar); (1941) 2 M.L.J. 529 (Second appeal from decision of District Court on appeal from Collector's decision under S. 74, Madras Estates Land Act. *See also* 39 Bom.L.R. 444; that a gift was an absolute one enuring for the benefit of the donees' descendants. 4 L. L.J. 457. Whether a land was abandoned. 91 I.C. 493=1926 C. 751. Abandonment of holding. 146 I.C. 1022=1934 L. 163. Ancestral character of land. 15 L. 645=149 I.C. 986=1934 L. 719; 35 P.L.R. 378=1934 L. 351. Partibility of property. 151 I.C. 533=11 O.W.N. 259=1934 O. 177. *See also* 144 I.C. 471=1933 L. 350 (Whether land is ancestral or not). *See also* on the same point 145 I.C. 628=1931 L. 765. Question of ownership. 1933 A. 603. Question of title. 162 I.C. 522=40 C.W.N. 758=1936 C. 245. Inference of a lost grant from a certain set of facts. 23 N.L.R. 192=1928 N. 87; 57 I.C. 350. *See also* 1925 P. 748; 31 I.C. 501. Question whether building is movable or immovable property. L.R. 3 A. 128; 1922 A. 45. A finding as to the state of mind of a person when he performed a certain act. 12 I.C. 730=8 A.L.J. 1154. Question of *bona fides*. 92 I.C. 602=1925 L. 505; 94 I.C. 927=1926 O. 501; 131 I.C. 662=1931 N. 67. But *see* 6 R. 643. Question of bad faith. 110 I.C. 868. Care and good faith. 91 I.C. 988; 34 P.L.R. 642=1933 L. 738. Whether certain payments were made in good faith. 148 I.C. 757=1934 P. 121. Reasonable cause in a malicious prosecution. 91 I.C. 112; 28 O. C. 387=1925 O. 359; 1929 A. 429; 49 L. W. 684=1939 Mad. 783=(1939) 2 M.L.J. 296; 20 Pat.L.T. 367=1939 Pat. 13; 15 Luck. 404=1940 O.W.N. 201=1940 Oudh



## NOTES.

320; 1939 A.L.J. 367=1939 All. 554 (Reasonable and probable cause). But see 57 C. 25; 138 I.C. 282=1932 A. 386; 137 I.C. 829=1932 M. 601. Finding as to malice. 1934 L. 907; 1939 Mad. 783= (1939) 2 M.L.J. 296; 1938 P.W.N. 793; 161 I.C. 443=1936 A. 441; 158 I.C. 31=37 Bom.L.R. 468=1935 B. 355. But the High Court is entitled to examine whether the inference drawn from the facts is legitimate, *i.e.*, whether the facts found did, or did not, amount to absence of reasonable and probable cause. 1935 L. 765. Wilful negligence. 24 A.L.J. 825=96 I.C. 1046=1926 A. 394; 1928 A. 166. Whether a transaction, *e.g.*, *heba* was entered into with intent to defeat or delay creditors. 63 I.C. 169. The question whether a particular person did a certain act with a particular intention or not. 45 I.C. 303. Negligence of the guardian *ad litem* of a minor. 52 M.L.J. 709; 107 I.C. 702=1928 A. 166. But see 1926 M.W.N. 350=95 I.C. 707 (1)=1926 M. 905. Contributory negligence by plaintiff. 144 I.C. 1914=1933 A. 214. Negligence generally. 1940 Sind 254; reasonable care and caution under section 41, T. P. Act. 186 I.C. 793=1940 Pat. 480. Reasonable diligence. 142 I.C. 691=1933 A. 158. Question of unsoundness of mind. 144 I.C. 741=34 P. L.R. 297=1933 L. 458. The question whether a statutory presumption is rebutted by the evidence is always a question of fact. 57 I.A. 86=59 M.L.J. 53=1930 P.C. 91 (P.C.). See also 131 I.C. 638=1931 L. 605; 136 I.C. 783=1932 M. 173; 132 I.C. 513=1931 L. 618; 158 I.C. 1134=16 Pat.L.T. 363=1935 P. 415; 165 I.C. 763. Existence of relationship of landlord and tenant—Presumption—Entry in record-of-rights. 64 I.C. 190; 43 Bom. L.R. 1=(1941) 1 M.L.J. 427 (P.C.); 1939 Pat. 202. See also 1934 L. 424 (Finding that certain mohalla is not a separate sub-division). Inference can be drawn from the fact that rent was never paid at the rate mentioned in a kabuliyat but at a lower rate, that the parties never meant to act upon the kabuliyat from the beginning. 39 C.W.N. 888. See also 38 P.L.R. 590. Nature of tenancy—Permanent or precarious. 61 C. 32=38 C.W.N. 65=1934 C. 288; 1941 Pat. 228; 1939 Pat. 350; 1938 Pat. 609. Amount of rent. 146 I.C. 811. In a suit for enhancement of rent, the finding that there was no prevailing rate of rent. 160 I.C. 1102=1936 P. 54; 18 Pat. 204=1939 Pat. 402; 193 I.C. 780; 194 I.C. 300. Question whether a zamindar entered into possession by voluntary transfer or not. 1941 R.D.426; Question as to the binding nature of a tenancy. 45 C.W.N. 57=1940 P.C. 192 (P.C.). So also a finding that the tenancy was one of which the rent was fixed. 1936

C. 582. So also inference from record-of-rights as to nature of holding. 166 I.C. 454 (Pat.). Question of breach of contract. 4 Lah.L.J. 317. Question that an account book was kept in the regular course of business. 1939 Pat. 264. The finding as to the existence of a particular number of trees on a plot is a finding of fact, but the finding that these do not constitute a grove is not a question of pure fact. 1941 A.W.R. (Rev.) 513 (2)=1941 O.A. (Supp.) 473 (2). Question whether the rate of interest was or was not excessive in the circumstances of the case is one of fact. 159 I.C. 205=1935 L. 440. In a contract to sell and to purchase, a finding as to who broke the contract is a finding of fact. 31 N.L.R. 250=155 I.C. 778=1935 N. 111. The question of an implied obligation under section 70 of the Contract Act. 40 B. 646. Finding of undue influence is a finding on the merits. 40 I.C. 215; 18 N.L.J. 67=158 I.C. 973; and misrepresentation. 59 B. 502=159 I.C. 213=37 Bom.L.R. 471=1935 B. 326. Question of consideration in pre-emption suit. 191 I.C. 759=1940 A.L.J. 360=1940 All. 414. Question whether a transferee is a *bona fide* transferee for consideration. 1939 O.W.N. 398=1939 Oudh 230. The question whether time is or is not of the essence of a contract. 67 I.C. 157. Question of good faith under section 14, Limitation Act. 8 L.R. (Rev.) 23. See also 102 I.C. 628; 138 I.C. 646=1932 L. 531. Construing an entry in a document as not constituting a mere acknowledgment but a distinct promise to pay. 159 I.C. 677=1935 L. 877. Question whether there was sufficient cause for non-production of evidence under O. 17, r. 1. 103 I.C. 301 (2). A decision of an appellate Court upon the ordinary meaning of a word. 32 I.C. 240=20 C.W.N. 584. So also as to what is meant by the witnesses by the use of a particular word. 157 I.C. 526=1935 A.L.J. 772=1935 A. 586. "Manufacture", meaning of, is one of fact. 42 C. 888. "Maujudgi" (continuance as wedded wife), meaning of in an agreement is also one of fact. 1935 L. 902. Whether one heir of a tenant represents other heirs. 10 I.C. 116=14 C.L.J. 180. Question of plaintiff's status is a finding of fact. 1923 L. 626. See also 93 I.C. 570. Question of amalgamation of several holdings into one holding. 1939 P.W.N. 217=1939 Pat. 269. Question of ownership of house. 1938 O.W.N. 706=1938 Oudh 186. Finding that plaintiff is not adopted son. 37 P.L.R. 379=157 I.C. 865. Question whether parties follow Mahomedan law is one of fact. 34 I.C. 219. Extent of wakf property. 144 I.C. 467=1933 L. 342. The conclusion that the plaintiff was a full owner and not merely a *dohldar* is a finding of fact. 1923 L. 611. That certain property is not wakf and does not belong to it is a finding of fact. 5 L.L.J. 11; 12 L. 540 (100 I.C. 626, Rel. on); 138 I.C. 215 (1). See also 144 I.C. 467=1933 L. 342. Whether the land in suit form part of a person's inam lands. 163 I.C. 93=1936 M.W.N. 348=43 L.W. 369. Also the



## NOTES.

question as to what lands are included in the permanent settlement. 100 I.C. 507=1927 C. 457. Question whether a wall erected by co-owner on top of joint wall is itself a joint wall or not. 41 P.L.R. 267=1939 Lah. 28; 1940 A.W.R. (B.R.) 120. (Inadequacy of rental). A finding as to legitimacy is one of fact. 153 I.C. 349=1935 O.W.N. 25=1935 O. 80. But it would not be upheld in second appeal, where the lower appellate Court has ignored important pieces of evidence and the strong presumption of law in favour of legitimacy. 60 I.C. 375. A finding as regards the factum of marriage between the parties is a finding of fact. 5 L.L.J. 117. The finding that a woman has taken to a life of immorality is a finding of fact. 31 I.C. 797. See also 1926 L. 461. Question whether certain persons were members of a joint Hindu family is a finding as to status and is one of fact. 67 I.C. 789; 97 I.C. 817 (1)=1926 L. 443. But see 95 I.C. 183=1926 N. 389. A question of what constitutes exclusion from a joint estate may well in many cases be a question of law. 21 C.W.N. 1142=42 I.C. 258. Family arrangement—Binding nature of, is a question of fact. 4 L.L.J. 40. Question whether there has been a family settlement among the members of a joint Hindu family is one of fact. 165 I.C. 217=1936 N. 186; 1941 O.A. 17 (Question whether a deed was executed as guardian of a minor and whether it was for the minor's benefit). (I. L.R. 1940 Lah. 60. Question whether a certain suit was collusive or not. 41 P.L.R. 462); Question whether a document has been tampered with. 5 Cut.L.T. 45; 1940 Pat. 245=190 I.C. 377; 22 Pat.L.T. 666. Finding that a sale is not fictitious. See 42 P.L.R. 246; 43 Bom.L.R. 1=(1941) 1 M.L.J. 427 (P.C.) (Existence of document not appreciated); 1940 P.C. 192=45 C.W.N. 57; 21 Pat.L.T. 165=1940 Pat. 300 (Effect of registration of proprietor's name under section 78, Ben. Ten. Act.) 1939 Pat. 229 (Question of correctness of entry in record of rights). The question of notice is not a pure question of law. 159 I.C. 370=1935 C. 713. A finding that the subsequent purchaser had notice and knew that there was a contract of sale with the plaintiff is one of fact. 3 L.L.J. 447; 1929 O. 316; 130 I.C. 299 (2)=1931 A. 338; 54 A. 557. Whether or not the relation between parties to a suit were sufficiently near to entitle the lower Court to come to the conclusion that the consideration that passed between them was the love and affection of the parties is a question of fact. 154 I.C. 1043=1934 P. 44. Also, whether a certain sum of money was necessary for personal necessities. 8 L. 340. Existence of antecedent debts. 1926 O. 33. Whether there was legal necessity to support alienation in Hindu Law. 14 L. 584=1933 L. 343. See also 146 I.C. 535=1933 M. 836; 156 I.C. 774=1935 P. 175. An alienation by the *mahant*. 17 Pat.L.T. 488=162 I.C. 797=1936 P. 275. Where both the Courts below have found that the suit lands did not form part of an estate so as to oust the jurisdic-

tion of Civil Courts, the decision is binding on the High Court. 18 L.W. 324=75 I.C. 465. Question as to whether oral will was executed is one of fact. 66 I.C. 413. See also 1929 A. 419 (2). So also the question whether a trade-mark was abandoned. 9 L. 487; or whether a copyright has been infringed. 64 M.L.J. 193 (P.C.). Genuineness of a document is a question of fact. 155 I.C. 827=16 Pat.L.T. 377=1935 P. 349; 91 I.C. 1046=1926 O. 257; 61 C. 365=1934 C. 633. (Genuineness of signature.) Effect of attestation is a question of fact. 51 I.C. 621. Waiver is primarily and in most cases an inference from facts. 37 B. 480; 38 I.C. 302; 59 I.C. 607. A finding that the holder of a superior interest acquiring an inferior interest intends to keep the two interests separate and that consequently there is no merger. 39 C.W.N. 694. Question whether transaction is fraudulent preference is also one of fact. 107 I.C. 490. A finding that a certain transaction was intended to defeat and delay the creditors and was collusive. 38 P.L.R. 577. The finding that a mortgagee has never been in actual possession of the land. 67 I.C. 152. See also 130 I.C. 706. Question whether a mortgage is *benami*. 34 P.L.R. 642=1933 L. 738. Also whether certain persons are legal representatives. 97 I.C. 489=1927 C. 81; 19 Pat.L.T. 193=1938 P.W.N. 259=1938 Pat. 372 (Question whether property attached are personal properties of judgment-debtor's legal representative). Whether a place is a town or village. 94 I.C. 127=1926 L. 542. Question whether a grove has lost its character as such. 1938 O.W.N. 1211. The question whether a road is a public road or a private road is rather a question of law than a question of fact and in any case it is partly a question of law, and a finding thereon is not binding upon the Court in second appeal. 157 I.C. 638=1935 O.W.N. 899. Whether a transaction is a mortgage or sale. 92 I.C. 42=26 P.L.R. 799; 134 I.C. 1092=1931 O. 424. Whether a mortgage is proved. 96 I.C. 253=1926 O. 546. Where the finding is arrived at without taking evidence but on a construction of the document and the surrounding circumstances it can be interfered with in second appeal. 134 I.C. 337=1931 B. 371=33 Bom.L.R. 663. See also 138 I.C. 204=1932 B. 230=34 Bom.L.R. 372. Whether a public lane has been so narrowed as to cause damage to the residents is a question of fact. 1929 A. 504. Public right of way. 39 C.W.N. 303; 151 I.C. 263=1934 A. 941. Whether the judgment-debtor has sufficient property to meet the execution of a decree, after he had parted with some other properties. 1929 A. 458=116 I.C. 815. Finding in pre-emption suit that the price stated in the sale-deed is fictitious. 4 Luck. 396. See also 1931 O. 400. Finding as to dissolution of partnership. 1929 L. 154; 144 I.C. 573=37 L.W. 288=1933 M. 353; 35 P. L.R. 557=1934 L. 557. Finding as to particular custom set up. 158 I.C. 796=37 Bom.L.R. 584=1935 B. 371. Whether a right of privacy exists by custom and the nature and



## NOTES.

limits of such a custom, if it does exist, are questions of fact. 155 I.C. 1056=1935 A.L.J. 432=1935 A. 754. Finding that the right of privacy was in no way diminished. 1929 O. 535. Planting of trees—If amounts to an accession under Transfer of Property Act, section 63. 113 I.C. 405=1929 A. 330. Question whether a particular place is town or village is one of fact. 41 P.L.R. 227=1939 Lah. 88. Question in suit to establish right of easement, as to whether enjoyment was peaceable and as of right. 56 C. 927. So also as regards findings as to the length of user. 158 I.C. 361=1935 L. 346. Finding as to the material alteration of instrument. 1929 M. 622. A finding that the inhabitants of a particular locality have or have not in certain circumstances acted in a certain manner. 134 I.C. 21=1931 A. 499. Questions about the adequacy of damages are ordinarily questions of fact which cannot be entertained in second appeal. 161 I.C. 593=1936 N. 70. The question as to when the arrears of pay claimed by a person became due. 1936 C. 277. Finding that a cause of action accrued at a particular place. 1931 A. 556. As to omission by lower Court to give effect to an admission, *see* 143 I.C. 900=1933 S. 121. Where the lower appellate Court errs in law in holding on the facts of a case that the descent has not been from preceptor to disciple, the finding can be interfered with in second appeal. 178 I.C. 58=A.I.R. 1938 Lah. 132.

QUESTION OF LAW—ILLUSTRATIVE CASES.—Points involving questions of law can be raised for the first time in second appeal. 144 I.C. 452=27 S.L.R. 41=1933 S. 176. *See also* 1935 P. 132. It is certainly open to a second appellate Court to ignore a point even of law if it is raised for the first time in that Court. At the same time, the power of that Court to give effect to a plain provision of law even though not raised in the Courts below cannot be questioned. Where the equities of a case require such a course to be adopted there is no legal bar to the point being taken cognizance of by the Court itself. 4 A.W.R. 974=157 I.C. 615=1935 A. 143. The question whether a point is one of fact or of law is itself a question of law. 109 I.C. 253=1928 N. 277; 1941 Pat. 228. Where the lower Court Judge states the law correctly and does not misdirect himself and comes to a particular conclusion, he decides the point as a question of law and not as a question of fact. 161 I.C. 331 (2)=17 Pat.L.T. 366=1936 P. 136. Questions of law and of fact are sometimes difficult to separate. The proper legal effect of a proved fact is essentially a question of law. 10 L. 360; 1928 A. 381; 1941 Lah. 62; 17 Pat. 507=19 Pat.L.T. 309=1938 Pat. 413; 36 Bom.L.R. 1055; 134 I.C. 294=1931 L. 489; 134 I.C. 1037=32 P.L.R. 727; 132 I.C. 772=1931 O. 381; 1932 O. 51=8 O. W.N. 1281; 138 I.C. 282; 129 I.C. 335=1931 O. 19 following 45 I.A. 183 and 57 I.A. 86; 1931 L. 395 following 35 C.W.N. 1047; 54 I. A. 178. So also is the question of admissibility of evidence and the question whether

any evidence has been offered on one side or the other; but the question whether the fact has been proved when evidence for and against has been properly admitted, is necessarily a pure question of fact. The High Court has no jurisdiction in second appeal to revise the evidence and set aside the decree of the lower appellate Court on the ground that it had applied the wrong standard of measurement to land of which the rent was in question. 46 C. 189=51 I.C. 760. Questions as to the proper legal effect of proved facts are questions of law for purposes of second appeal. 63 I.A. 140=40 C.W.N. 417=1936 P.C. 77=70 M.L.J. 190 (P.C.). Or 20 I.C. 951=11 A.L.J. 713; 96 I.C. 356= certain legal rights the correct tests have been 1926 N. 494; 25 A.L.J. 1014; 1929 A. 767; 135 I.C. 221=1932 L. 183; 1935 A. 143=157 I.C. 615. A provisional finding upsetting a very closely reasoned and elaborate judgment of the trial Court without any discussion of evidence whatever or without giving any reason except the general reason that the evidence is not satisfactory is contrary to law and will be set aside in second appeal. A.I.R. 1937 Mad. 282. Gross negligence of guardian is a question of law. 1926 M. 905=1926 M.W.N. 350. *See also* (1937) 1 M.L.J. 224; also question of amount of dower to be paid. 1926 O. 128. The question whether in determining the infringement of certain legal rights the correct tests have been applied is a pure question of law. 42 C. 46=27 M.L.J. 117 (P.C.). The meaning of words is a question of fact in all cases; the effect of the words is a question of law. 75 I.C. 686=1923 A. 337; 46 I.C. 794; *also* 4 O.W.N. 1229; 1926 L. 21; 1926 O. 260; 1926 A. 465. So also interpretation of a land deed is a question of law. 1941 Cal. 446. The question whether there is evidence of an agreement is a question of fact. But if the Court comes to the conclusion that there is no evidence or that the evidence in no circumstances could be held to be evidence of an agreement, a question of law might arise. 160 I.C. 1079=17 Pat.L.T. 360=1936 P. 96. Legal effect of an agreement is a question of law. 27 A.L.J. 1083. A Court of second appeal is not bound to entertain a question of law raised for the first time before it. It can however take the point of itself or if some good cause is shown it may permit that point to be argued. 43 A. 193 (F.B.). As to certain questions in relation to partnership, *see* 164 I.C. 1100=1936 R. 383. It is a question of law whether the alleged expulsion of a member effected by means of a communication operates by itself as a dissolution of the partnership which is not for fixed term. 1935 L. 132. The question whether the inference about the dissolution or non-dissolution of a particular partnership drawn by the lower appellate Court from the facts found by it is or is not correct, is a question of law. 159 I.C. 433=1935 A.L.J. 1251=1935 A. 1008. The appellant cannot in second appeal take a point of law which involves the taking of additional



## NOTES.

evidence. 72 I.C. 993=1923 B. 37. *See also* 14 L.R. 102 (Rev.)=17 R.D. 120. In such circumstances remand should not be ordered for further investigation. 32 C.W.N. 778=1928 C. 870; 33 C.W.N. 1193=1930 C. 315. Inferences drawn from documentary evidence are not questions of law and cannot be challenged in second appeal. 74 I.C. 811; 37 C.L.J. 580; 7 L.W. 210; 35 M.L.J. 304. Legal inference from proved fact—Finding of fact and inferences from facts—Liability to be disturbed in second appeal. 73 I.C. 795; 3 L. 257. The rule against interference in second appeal with the findings of fact of the lower appellate Court apply equally to the case of findings of fact based on inferences of fact drawn wholly or in part from documents. 15 Luck. 418=1940 O.W.N. 193=A.I.R. 1940 Oudh 217. A finding of fact based on oral evidence cannot be gone into in second appeal; but the legal inference to be drawn from proved or admitted facts is a matter of law. I.L.R. (1940) Bom. 505=42 Bom.L.R. 511=1940 Bom. 263. The statement that "the proper legal effect of a proved fact is essentially a question of law" does not mean that it is a question of law whether a certain inference should be drawn from proved facts. It only means that the legal effect of a finding of fact is a question of law. 1941 A.W.R. (Rev.) 778=1941 O.W.N. 1027; 190 I.C. 271=1940 Sind 138; 18 Pat. 571=1939 Pat. 448; 1939 Sind 97; 1940 Sind 43; 1941 Pat. 228; 1941 A.W.R. (Rev.) 513; 1940 Rang.L.R. 777; 73 C.L.J. 159 (Inference from entries in settlement record); 95 I.C. 636=1926 N. 416; 32 C.W.N. 184. In second appeal, the High Court can make deductions from facts found without disturbing the findings of the lower appellate Court. 32 I.C. 119=19 C.W.N. 1330. The conclusion that a certain process was not scientific involves a question of law. 95 I.C. 614=1926 N. 435; so also question of abandonment of tenancy. 32 C.W.N. 1111=1928 C. 891; 1930 L. 215=125 I.C. 188. Question of permanent tenancy. 61 C. 32=38 C.W.N. 65=1934 C. 288; 57 C.L.J. 509; 163 I.C. 415=17 P.L.T. 202=1936 P. 384. The question whether in particular circumstances a donee takes a limited estate or an absolute estate cannot be said to be a question of fact which will be binding in second appeal. 158 I.C. 611=42 L.W. 336=69 M.L.J. 320. A decision by the lower appellate Court as to whether a particular legal relationship, that of landlord and tenant, was created or existed between the parties by reason of certain transactions is one on a point of law, and is not therefore binding in second appeal. 40 L.W. 810=1935 M. 268=154 I.C. 753. The question as to whether the character of the building in suit has undergone a change from that of *payin* to that of *lettelpwa* is not purely a question of fact and the High Court is not debarred from considering it on second appeal. 158 I.C. 1092=1935 R. 129. The question whether reverisener's consent to an alienation can be inferred from the established

facts is a point of law. 31 I.C. 487. A wrong decision based upon findings contrary to the facts found raises a point of law. 18 I.C. 148. An allegation of absence of evidence to support a specific finding of fact is a ground of law. 40 I.C. 139. *See also* 134 I.C. 599=1931 O. 382; 132 I.C. 397=1931 L. 139. But 'insufficiency' is not. 134 I.C. 125. Nor the question of what weight has to be attached to documents admitted and proved. 60 C.L.J. 569=1935 C. 367. Status of tenant. 29 Punj.L.R. 162; 38 C. 278; 55 C. 355. An objection that the appeal to the lower appellate Court was presented out of time is a question of law. 65 I.C. 580=1922 L. 240. Question of plaintiff's right of suit is a question of law. 4 R. 500. The question of *onus probandi* is a question of law. 2 L. 249. The question whether a stipulation in a deed as to payment of interest is one by way of penalty is open to consideration in second appeal. 64 I.C. 350; 1929 P. 717. A decision by the lower Appellate Court opposed to the admissions of the parties amounts to a substantial error or defect in procedure. 41 I.C. 163; 42 P.L.R. (J. & K.) 21 (Findings not recorded on objections specifically raised before lower appellate Court). *See* 1939 Pat. 19. The plea of *res judicata* is question of law and may be raised at any stage of suit. 47 I.C. 685. *See also* 144 I.C. 669=1933 L. 606; 149 I.C. 93=1934 A. 770. The question if a trustee could divest himself of his office is a question of law. 21 I.C. 232. Finding in clear disregard of legal presumption is not binding in second appeal. 37 Punj.L.R. 653. Presumptions are questions of law and can be gone into in second appeal. 1929 L. 772; 118 I.C. 808. So also, the question or presumption of lost grant. 107 I.C. 522 (2). Question as to adverse possession. 149 I.C. 807=1934 A. 288; 1935 C. 760; whether tenancy is permanent. 1941 Pat. 228; 1939 Pat. 350.

MIXED QUESTION OF LAW AND FACT.—Finding as to mixed question of law and fact can be interfered with in second appeal. 36 A. 231; but not where it involves a remand. 51 I.C. 862; 72 I.C. 177; 37 M. 22=24 M.L.J. 652; (1911) 1 M.W. N. 6=9 I.C. 41. Or when raised for the first time in second appeal. 23 C. 802. Adverse possession being a mixed question of law and fact cannot be raised for the first time in second appeal. 102 I.C. 476=1927 L. 522; 130 I.C. 296=1931 A. 293. *See also* 1941 O.W.N. 537; 149 I.C. 807=1934 A. 288; 1929 O. 337=115 I.C. 440; 94 I.C. 38=1926 C. 881; 1929 P. 590=117 I.C. 644; 1936 L. 741. Existence of custom, *see* 143 I.C. 880=37 L.W. 272=1933 M. 390. *See also* 1939 All. 500=1939 A.L.J. 617. The question of family settlement. 55 A. 554=1933 A. L.J. 1185=1933 A. 493. Nuisance. 64 I.C. 169. So also negligence. 165 I.C. 882=1936 A.L.J. 262=1936 A. 771. Domicile under the Divorce Act. 58 C. 259.



## NOTES.

The question whether a party acted in good faith within the meaning of section 14, Limitation Act, is a mixed question of law and fact and can be questioned in second appeal, provided that the lower Court's findings of fact are not interfered with. (36 I.C. 702, Foll.) 40 P.L.R. 631=A.I.R. 1938 Lah. 704. Appeal decided *ex parte* wrongly by lower appellate Court—Second appeal is allowed. 117 I.C. 229 (1). Whether the facts found attract the operation of provision of law is a mixed question of law and fact. 101 I.C. 674=1927 P. 256. Also whether reasonable care has been taken. 99 I.C. 1=1927 A. 158. Also the question whether a power-of-attorney was effective on the date of transaction by agent. 6 R. 113=54 M.L.J. 517 (P.C.). Whether a gift offends against the doctrine of *musha*. 101 I.C. 126. Question as to what passed in a sale of family properties. 23 L.W. 349=94 I.C. 68=1926 M. 851. The question whether an application in question is a fresh application within the language of section 48 is a mixed question of fact and law and a second appeal is competent. 186 I.C. 860=A.I.R. 1940 Lah. 35. An issue regarding limitation is a mixed question of facts and law and it is liable to reconsideration by the second appellate Court, especially where the trial Court who had an opportunity of hearing the witnesses in person, came to a conclusion different from that of the lower appellate Court. 1940 R.D. 388=1940 A.W.R. (B. R.) 229. Bill of exchange—Presentment for payment—Reasonable time—Mixed question of law and fact. 116 I.C. 887=1929 L. 577. Constructive notice is a mixed question of law and fact. 1931 B. 430=33 Bom.L.R. 499. Question whether a piece of land is communal. 1930 M.W. N. 515. Whether a new tenancy has been created is a question of mixed fact and law. 163 I.C. 538=1936 P. 411. The question whether a Hindu can inherit to a Mahomedan father. 134 I.C. 1171=1931 S. 170. Under the Hindu Law a natural guardian can alienate the property of the minor for necessity or for benefit of the estate. The question is one of mixed law and fact. 147 I.C. 1144 (1)=1934 L. 329. The question whether an information given to the police is directed against a particular person. 1934 P. 14. Question as to the vicarious liability of master originally sued as principal. 1933 N. 299. Whether the interpretation of a particular order is a question of fact, or a question of law, or a question of mixed fact and law depends on the circumstances of each particular case. The general rule is quite clear. Where intention is to be inferred from the terms of a document, in this case the order, the question is one of law, or mixed ques-

tion of fact and law; where the intention is to be inferred from the other facts and circumstances tending to show what was the real intention of the Judge in passing that particular order, then the question may be either a question of pure fact or, again, may be a question of mixed fact and law. A.I.R. 1941 Lah. 62.

**JURISDICTION.**—Where a decree has been made by the appellate Court without jurisdiction an appeal lies against it precisely in the same way as if it had been made with jurisdiction. 45 C. 926; 1925 C. 1032; 1925 A. 737; 131 I.C. 141 (1)=1931 L. 96; 1933 A.L.J. 103. See also 94 I.C. 1=1926 A. 401. The question of jurisdiction can be for the first time agitated in second appeal. 1923 L. 551. See also 1933 A.L.J. 103=1933 A. 403; 49 I.C. 137=29 C.L.J. 48; 75 I.C. 1053; 1931 A. 556. Where a District Judge assumes a jurisdiction which he does not possess, any order which he passes on such assumption can be set aside by the High Court in second appeal. 1938 A.L.J. 988. Decision of District Court on appeal from forest officer—Madras Forest Act (V of 1882), sections 10 and 16—Second appeal to High Court is competent. 39 M. 617=31 M.L.J. 324. A decree of a Deputy Collector in a suit under section 213 of the Madras Estates Land Act—If second appeal lies. 38 M. 655. See also 37 M. 443=27 M.L.J. 451 (P.C.). Where the amendment was allowed after the expiration of the limitation period, the High Court can take notice of it in second appeal though the point was not pressed in lower appellate Court. 36 A. 370. A second appeal is not maintainable against an order rejecting cross-objections but the Courts might interfere in revision. 44 I.C. 812. In a suit of a small cause nature, order in execution proceedings is not appealable. 45 M.L.J. 651. Where the lower appellate Court hears an appeal which it has no jurisdiction to hear, it is doubtful whether a second appeal lies; but revision is competent. 150 I.C. 15=1934 L. 79.

**PRACTICE AND PROCEDURE.**—A Court before whom a second appeal is filed is entitled to reject it, if in its opinion the case is not covered by the provisions of section 100. 1940 O.W.N. 550. Where an obvious point of law arises, the practice of some lower Courts of attempting to shut out a second appeal by the use of language designed to clothe a decision on a point of law with the appearance of a finding of fact ought to be deprecated. 18 Pat. 204=1939 P.W.N. 37=A.I.R. 1939 Pat. 402. Where proper issues have not been framed and the lower Court has not discussed the real question in controversy it is open to the High Court hearing the second appeal to remand the



## NOTES.

case for proper disposal. 152 I.C. 220=35 P.L.R. 156. Refusal by the appellate Court in the exercise of its discretion to admit additional evidence given under O. 41, r. 27, is not a substantial defect or error in procedure. 33 A. 379. The refusal of the lower appellate Court to act under O. 41, r. 33, C.P. Code, is not an error of law with which the second appellate Court is bound to interfere. 123 I.C. 39. Admission of additional evidence erroneously—Second appeal. See 92 I.C. 661=1926 M. 864. Question of fact—New evidence tendered in second appeal—Permissibility. 31 Bom.L.R. 436=1929 B. 225. The High Court will reverse a finding in second appeal if there was substantial error in procedure resulting in a finding not *secundum allegata et probata* and not sustainable in law. 39 B. 149; 10 Pat.L.T. 589=1929 P. 609. Decision based on finding of fact contrary to case set up can be questioned in second appeal. 1926 L. 535. Where the appellate Court made a new case not raised by the parties and not warranted by pleadings or evidence High Court will interfere. 104 I.C. 781; 132 I.C. 426=1931 A. 219. Also in a case of misuse of judicial discretion. 94 I.C. 396=1926 L. 445 (2). Procedure—Finding of fact—False case on both sides. 45 I.C. 795=22 C.W.N. 149. Failure to appreciate true question in controversy is a defect in procedure and the appeal should be re-heard 13 I.C. 455=2 C.L.J. 380. See also 34 I.C. 30=23 C.L.J. 600; 35 I.C. 631; 17 Pat.L.T. 774=1937 Pat. 78; 43 I.C. 488; 1931 R. 312. Where the lower appellate Court decided a question of fact not upon the evidence but holding that a superior Court decided a similar case between different parties in a particular day, there was a defect in procedure and a second appeal lay. 6 P. 698 (F.B.). Second appeal lies in a case where a preliminary decree for accounts is passed and that decree is set aside by the lower appellate Court though the appellate Court did not pass a decree in pursuance of its judgment. 31 P.L.R. 386=1930 L. 125.

PROCEDURE—EX PARTE HEARING OF APPEAL.—Interference on second appeal. 3 L. 357. The failure to determine the critical question between the parties to a suit and to consider the oral evidence adduced on behalf of the defendant is a substantial error of procedure. 56 I.C. 40. So also if lower appellate Court gives decree not based on evidence. 26 I.C. 240. Where both parties agreed to proceed not only on the evidence taken before the Munsif but also on evidence recorded by the Commissioner, and the lower appellate Court discarded the evidence recorded before the Commissioner, there was defect of procedure within Cl. (1) (c). 106 I.C. 841=46 C.L.J. 558. The appellate Court has no power to go behind a finding of the

trial Court, when the appellant has accepted it in his ground of appeal. The carelessness of the appellant's Counsel in drafting the grounds makes no difference. 59 I.C. 689.

NEW PLEA IN SECOND APPEAL.—A plea not raised in either of the Courts below cannot be entertained for the first time in further appeal to the Chief Court. 29 I.C. 761. See also 29 I.C. 895; 45 I.C. 101; 67 I.C. 919=2 L.L.J. 255; 3 L.L.J. 470; 21 L.W. 69=86 I.C. 4; 40 C.L.J. 564; 47 M.L.J. 686; 28 P.L.R. 181=102 I.C. 426=1927 L. 426; 96 I.C. 304; 119 I.C. 698; 1930 A. 742; 138 I.C. 808=1932 O. 244; 21 Pat.L.T. 894; 1938 All. 396; 1937 Nag. 235; 39 Bom.L.R. 885=1937 Bom. 456; 1937 All. 666; 21 Pat.L.T. 894; 14 Luck. 678; 43 P.L.R. 499; 1941 Nag. 152 (Plea of suppression of certain particulars in evidence with intent to mislead the Court); 41 Bom.L.R. 205=1939 Bom. 117 (Point not raised even in written statement cannot be urged for first time in second appeal); 1939 O.W.N. 736=1939 Oudh 233. Where a Judge sitting in appeal bases his judgment on a new case made out for the first time in appeal, and it is clear that the new case has coloured and influenced his consideration of the facts and his decision on another aspect of the case, which, although treated by the appellate Court as a minor aspect, turns out in fact to be the most important aspect of the case, and it appears that the Court has not adequately considered that aspect and consequently has arrived at a wrong conclusion, his judgment is liable to be set aside in second appeal. A.I.R. 1938 Sind 198. So also as to point not taken in the trial Court nor even in the memorandum of appeal in the lower appellate Court. 146 I.C. 939=1933 L. 615. See also 1933 A. 911. So also as to point not pressed in Courts below. 7 O.L.J. 17=55 I.C. 441. In second appeal a question of law cannot be dealt with by the High Court if its determination is based upon a question of fact not raised in the Courts below. 51 I.C. 256; 3 Pat.L.T. 623=65 I.C. 277; 43 I.C. 857; 1 P. 23. See also 1929 R. 213; 196 I.C. 33; 133 I.C. 390=1931 N. 147; 1933 M. 836=38 L.W. 734. See also 157 I.C. 615=1935 A. 143 noted under heading 'Question of Law—Illustrative cases' *supra*. A new plea involving an issue of fact requiring fresh evidence cannot be raised in second appeal. 97 I.C. 342=1926 A. 707; 33 C.W.N. 1211; 163 I.C. 364=1936 R. 260. So also plea that a finding of fact was based on inadmissible evidence 1933 L. 951. See also (1939) 2 M.L.J. 593; 39 C.W.N. 277; 1935 M. 190. But see 1936 L. 1005. Where secondary evidence of the contents of a deed is led without objection by the other party, objection cannot be raised in second appeal. 1935 L. 628. Where there is no reference to a plea in the judgments of the Courts below or in the pleadings of the parties, the point cannot be allowed to be raised in second appeal. 1923 L. 56, 491; 1929 A. 456. So also an alternative plea not put forth in Court below. 7 Pat.L.T. 145=1926 P. 156. So also a plea in second appeal which is not only not set up in the plaint but is



## NOTES.

quite inconsistent with it. 30 L.W. 787=118 I.C. 291. An objection which is taken in the trial Court but is not urged in the lower appellate Court cannot be raised in second appeal. 43 A. 555. See also 3 O.W.N. 934. Where a point was taken in the grounds of appeal to the lower appellate Court but not noticed by it in its judgment, it must be presumed that the point was abandoned, in the absence of an affidavit to the contrary by the Advocate who argued the case before it, and it would not be entertained in second appeal. 39 P.L.R. 312. The question whether there has been a failure of justice or not is not a pure question of law and cannot be decided without finding facts and as such if the point was not taken in the lower Courts, it cannot be raised in second appeal in the High Court for the first time. I.L.R. (1939) All. 167=1939 A.L.J. 50=1939 All. 163. Matters of procedure dependent upon facts cannot be raised in second appeal. 94 I.C. 417 (2). The High Court may be justified in an exceptional case, in permitting a point of law to be taken in second appeal which goes to the root and the merits of the whole case. 71 I.C. 381=1923 A. 343; 1930 L. 937. A point of law can be raised for the first time in second appeal only when a finding favourable to the appellant would entitle him to a decree on the evidence as it stands. 1937 A. M.L.J. 71. A point of law which does not require any questions of fact to be determined but can be decided on the record as it stands may be allowed to be raised in second appeal for the first time. 66 I.C. 856; 21 A. 446; 25 Bom.L.R. 245=72 I.C. 226; 38 B. 227; 47 A. 324. See also 47 A. 932; 15 P. 356=17 Pat.L.T. 57=1936 P. 104; 164 I. C. 30=38 P.L.R. 608=1936 L. 448; 165 I. C. 66=1936 L. 612. But see 1930 A. 726; 126 I.C. 18; conflict set at rest by 53 A. 65 (F.B.). See also 1938 Bom. 291. It is well settled that the Court will allow, even in second appeal, a question of law to be raised for the first time, if it can do without any unfairness to the opponents, and if a question of law is such that it does not necessitate the taking of further evidence, the High Court in second appeal would allow it to be raised for the first time in second appeal. 175 I.C. 866=40 Bom.L.R. 359=A.I.R. 1938 Bom. 291. See also I.L.R. 1938 A. 563=1938 All. 396 (F.B.). When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. A.I.R. 1938 Rang. 376. See also 1938 Rang. 468. A question of pure law can be raised in second appeal, especially when the other party knows all the relevant facts which the latter himself has mentioned in his pleadings. 1937 A.L.J. 1252. The High Court should not in second appeal entertain a new point for the first time when all the materials for the decision of such point are not before it. If it is necessary to frame an issue and call upon the lower Court to record a finding

on such issue before the new point can be decided, the Court should not permit such a new point to be raised in second appeal. 1937 A.L.J. 855=A.I.R. 1937 All. 696. A mixed question of fact and law cannot be raised on second appeal for the first time. 4 L.L.J. 432, e.g., authority of partner to bind firm by acknowledgment. 1929 L. 266=118 I.C. 529; 134 I.C. 1171=1931 S. 170. See also 1937 Nag. 314. A point of law can be taken at any time, and though the question whether a suit falls under section 92, C. P. Code, is a mixed question of law and fact, if all the material facts are on the record, the question whether such facts do or do not show the trust to be a trust within the provisions of section 92 is a question of law which can be taken at any time. 31 S.L.R. 510=A.I.R. 1937 Sind 230. When, in both the lower Courts, the plea that the assignment of decree, though requiring registration, was not registered and that the assignee proceeding to execute the decree on the basis of such assignment, had no right to do so on account of the deed of assignment not being admissible in evidence for want of registration, was not raised. Held, that the question involved a question of fact as to whether the deed of assignment was registered or not and so the plea could not be entertained in second appeal. A.I.R. 1937 Nag. 237. A question of jurisdiction is one of pure law, which though not raised in the lower Court can be entertained and adjudicated upon in second appeal. 57 I.C. 206=18 A.L.J. 923; 9 Luck. 365=11 O.W.N. 193=1934 O. 55. Although section 21, C. P. Code, does not in terms apply to appeals, the principle underlying it is of general application so as to cover proceedings other than original suits. Hence where an objection as to jurisdiction is not taken in the lower appellate Court, the plea must be deemed to have been waived and cannot be raised in second appeal. 29 N.L.R. 342=1933 N. 318; 53 M.L.J. 688. But see 100 I.C. 37=1927 N. 164. A question of notice cannot be allowed to be raised for the first time in second appeal. 41 C. 418. Where the defendant did not raise in the Court of first appeal the point as to whether the notice to quit was legal and sufficient, the point could not be raised in second appeal. 2 Pat.L.J. 595=42 I.C. 655. See also 52 I.C. 517=10 L.W. 137. Where the question was as to the inalienability of certain property according to custom, and it was found to be so, a party who did not plead in the Courts below that the custom was qualified in the sense of the restraint against alienation being merely for the benefit of the proprietor, can raise that plea in second appeal. 1936 O.W.N. 260=1936 O. 235. New plea of *res judicata* when can be raised for the first time in second appeal. 74 I.C. 577; 8 P. 107. The High Court will not entertain in second appeal a plea of *res judicata* which was raised by the defendant in her written statement but withdrawn by her counsel on the date of issue and which was not raised in the grounds of appeal filed by her in the lower Appellate Court or in the High Court. 1937 O.W.N. 229=A.I.R. 1937



## NOTES.

Oudh 243. Where an appellant in second appeal contended that an issue should be remitted to the Court below on a question of *res judicata* by elucidating certain facts and the plea was neither taken in the Court of first instance nor in the lower appellate Court, the High Court disallowed the plea in second appeal. 149 I.C. 93=1934 A. 770. See also 144 I.C. 669. Where the basis for a plea of *res judicata* had not been laid in the lower Courts it should not be allowed to be raised in second appeal. 40 L. W. 610=1934 M. 551=67 M.L.J. 268. So also where plea of *res judicata* has been raised in written statement but abandoned by Counsel at time of issues. 1937 O. 243=1937 O.W.N. 229. Plea that suit is barred by section 47, C. P. Code, 9 Luck. 375=147 I. C. 910=1934 O. 55. But see 25 L.W. 11=100 I.C. 40=1927 M. 406. A plea of estoppel which was not made up in the plaint or disclosed by the evidence cannot be raised for the first time in second appeal. 186 I.C. 793=A.I.R. 1940 Pat. 480. Where no case of estoppel was set up in the written statement and no issue was framed on the point, it is too late to set up such a new case in second appeal as there could be no findings of fact on which any estoppel could be based. 180 I.C. 621=1938 A.L.J. 1238=A.I.R. 1939 All. 194. Estoppel is always a mixed question of fact and law, and a plea of estoppel cannot be allowed to be raised for the first time in second appeal, when it would necessitate the taking of further evidence of facts. 175 I. C. 866=40 Bom.L.R. 359=A.I.R. 1938 Bom. 291. See also 1937 Pat. 642. As to *estoppel* see 151 I.C. 263=1934 A. 941. Question of abatement—Raised for the first time in second appeal—Permissibility. 117 I.C. 665=1929 L. 119. Objections as to maintainability of suit if raised for the first time in appeal cannot be allowed. 3 L. 239. The contention that the parties did not constitute joint Hindu family cannot be raised for the first time in second appeal. 66 I.C. 881. Question whether donee has accepted the gift on the life time of the donor not to be considered for the first time in second appeal. 1940 O.W.N. 600=1940 Oudh 318. Points under the Limitation Act not taken in the Court below should not ordinarily be allowed to be raised in the High Court. 17 L.W. 169=72 I.C. 131=1937 Nag. 184; 1937 Nag. 314; 1937 All. 696. The plea of limitation or estoppel involving questions of fact which are not admitted or undisputed cannot be taken for the first time in appeal. 27 I. C. 933; 115 I.C. 680=10 Pat.L.T. 53; 56 C. 201. Plea abandoned in Courts below not to be raised in second appeal. 55 I.C. 481. Finding arrived on mistaken view of pleadings how far binding on High Court. See 1926 O. 353. A legal plea going to the root of the plaintiff's claim and arising on the facts found and not affected by any facts outside those findings can be taken for the first time in second appeal. 41 I.C. 45. Where the authority for a plea is not quot-

ed in the Court below, the Court in second appeal cannot reverse the finding on the strength of that authority. 1930 L. 737.

NEW PLEAS—FURTHER ILLUSTRATIVE CASES.—When an appellant confines himself deliberately to some of the questions decided by the trial Court and does not attack the judgment of the trial Court on other questions decided by it, if the appellate Court judgment proceed only on the questions attacked and dismiss the appeal, it will not be open to the appellant to object to the judgment in second appeal on the ground that the judgment was not in accordance with law. 150 I.C. 841=1934 P. 55 (2). A new plea attacking the validity of a sale deed on the ground of *lack of bona fides*, cannot for the first time be allowed in second appeal, the appellant having attacked it in the trial Court only on the ground of want of consideration and failed in his contention. 147 I.C. 952=10 O.W.N. 1186. Where no objection is taken by a party in the lower Courts to the *competency of the sub-agent to bring a suit*, it is not open to him to raise that point in the High Court. 1934 R. 289. See also A.I.R. 1938 M. 338 (plea of want of sanction under section 91, C. P. Code). Where the case was dealt with in the lower Courts on the footing that the defendant was a *surety* and in second appeal the plea was taken that he was co-obligor, *held*, that the new plea could not be allowed to be raised. 152 I.C. 464=40 L.W. 479=1934 M. 639.

INCONSISTENT PLEA.—Suit for ground rent—Proprietary title by adverse possession claimed by defendants—Title found against—Plea of irrevocable licence raised in second appeal not permissible. 126 I.C. 584=1933 A. 632. Where a tenant denies the relationship of landlord and tenant in his written statement, it is not open to him in second appeal to repudiate the written statement and claim that he is still a tenant and means to retain possession in that character. 156 I.C. 563=39 C.W.N. 882=1935 C. 393. See also 163 I. C. 364=1936 R. 260.

EVIDENCE—(1) ADMISSIBILITY OF EVIDENCE—Objections as to the admissibility of evidence will not as a general rule be entertained for the first time in second appeal. 104 I.C. 518; 150 I.C. 841=1934 P. 55; 41 L.W. 318=1935 M. 190. The appellant cannot raise objections to the admissibility of documents received in evidence in the lower Court if under the circumstances the application is too late. 34 I.C. 57 (F.B.); 41 C.L.J. 374=86 I.C. 734. Finding of a lower appellate Court based on inadmissible evidence can be impeached in second appeal. 74 I.C. 383=1923 C. 261; 72 I.C. 985=1923 C. 378; 148 I.C. 1158=35 P.L.R. 360; 1934 P. 48=146 I.C. 937; 16 N.L.J. 232 (Admissible evidence excluded). 48 L.W. 595. Where there is legal evidence on the record in support of the finding of fact recorded by the lower appellate Court, the finding is binding in second appeal even if the lower Court has admitted inadmissible evidence. (19 Cal. 249 (P.C.), Rel. on.) 165 I.C. 940=A.I.R. 1937



## NOTES.

Lah. 26. When the finding is based really on other evidence, and the inadmissible evidence is only used for the purpose of further support, that does not vitiate the finding or necessitate a remand. 39 C.W.N. 311. Where material evidence has been overlooked and the decision is based on wrong assumptions of fact, the finding, though one of fact, can be set aside in second appeal. 142 I.C. 673 (1)=33 P.L.R. 1013. *See also* 41 L.W. 318=1935 M. 190; 39 C.W.N. 277; 108 I.C. 264; 138 I.C. 399; 1936 L. 1005. The Court hearing the second appeal can challenge a finding of fact arrived at by illegally relying upon irrelevant and inadmissible evidence. 15 I.C. 459. *See also* 15 I.C. 515=17 C.W.N. 37; 103 I.C. 889=1927 L. 448; 2 Luck. 172. *Also* 51 B. 231; 1926 N. 99; 1935 O.W.N. 894; 39 C.W.N. 277; 11 O.W.N. 1589=152 I.C. 1042=1935 O. 41 (Where appellate Court based its finding on document rejected by trial Court as not proved, and without hearing arguments as to its admissibility). 159 I.C. 191=42 L.W. 658=69 M.L.J. 707. Where the Court imported into its judgment facts which come to its knowledge at the time of other and completely unconnected cases. Relevancy and proof of document is a question of law and can be raised at any stage, but the question as to the proof of a document is one of procedure and can be waived. 3 Pat.L.T. 149=63 I.C. 625; 2 Pat.L.T. 343=63 I.C. 226; 5 Pat.L.J. 410=57 I.C. 561. Where appellate Court duly admits additional evidence under O. 41, r. 27, and the aggrieved party does not at the time ask for any opportunity to produce further evidence, a finding of fact arrived on such evidence is quite proper and unassailable in second appeal. 156 I.C. 468=16 Pat.L.T. 49=1935 P. 105 (2). Where the appellate Court has admitted in evidence certain document because in its discretion it required that evidence to enable it to pronounce judgment, it is inexpedient for the High Court in second appeal to interfere with the discretion of the lower Court. 159 I.C. 711=1935 P. 470.

(2) APPRECIATION OF EVIDENCE.—Where the High Court differed from the lower Courts, not only in the estimate of the evidence, but also with regard to the inferences derivable from document produced in the case and other circumstances, their Lordships dealt with the case on its merits. 2 P. 38=45 M. L. J. 460=49 I. A. 399 (P. C.). If a finding of fact is recorded on a misinterpretation of the evidence it can be interfered with in second appeal. 1923 L. 585; 31 I.C. 695=19 C.W.N. 1015; 32 I.C. 862. Where the soundness of the conclusions drawn from the facts is in question, it is a matter of law and can be questioned in appeal. [20 C. 93 (P.C.). Rel. on.] 119 I.C. 674=1929 N. 270. *Per Rupchand Bilaram, A.J.C.*—Intention of parties is the inference to be drawn from proved facts. That is a question of law. *Per Havelkiala, A.J.C.*—Intention to be gathered from evidence as to whether damages or specific performance should be granted on breach of

agreement to sell is a question of fact. A.I. R. 1937 Sind 263. *See also* 40 P.L.R. 705. A second appeal lies on a finding on no evidence. 104 I.C. 781; 8 L. 30; 99 I.C. 1046; 52 M.L.J. 20. A finding cannot be contested in a second appeal if it is based on a misreading of first Court's judgment. 1923 L. 502 (2). *See also* 145 I.C. 652=10 O.W.N. 380. Although in second appeal findings of fact cannot be impugned it is nevertheless open to a party to challenge the correctness of the conclusions drawn from such findings. 1923 L. 497 (2); 65 I.C. 475. Findings of fact are conclusive in second appeal even though there has been an error on the part of the Court below in weighing the evidence. 53 I.C. 137; 92 I.C. 104=1926 C. 727; 4 Lah.L.J. 426; 1929 O. 41. *See also* 150 I.C. 306=1934 N. 124; 1933 P. 698 (Effect of admission). The ignoring of an important plea of evidence by the lower appellate Court is a good ground for second appeal. 42 I.C. 76; 153 I.C. 373=1935 O.W.N. 11=1935 O. 86. The credibility of witnesses accepted by the Courts below cannot be considered in second appeal but the sufficiency of the evidence can be considered in second appeal. 25 I.C. 869. Omission by the lower Court to give effect to an admission by a party to the suit is an error which can be rectified in second appeal. 143 I.C. 900=1933 S. 121. *See also* 1933 P. 698. Where the District Judge has not at all discussed the evidence bearing on the point in issue but merely expressed his concurrence in the finding of the lower Court on the issue, it cannot be considered a proper finding and the finding, though one of fact, is not binding in second appeal. 146 I.C. 292=34 P.L.R. 283.

(3) CONSIDERATION OF EVIDENCE.—Question of proper inference from facts found is a question of law. 8 L. 573=52 M.L.J. 663 (P. C.); 1929 A. 875; 1940 O.A. 491=1940 A. W.R. (B.R.) 106; 42 Bom.L.R. 511=1940 Bom. 263; 1940 Rang.L.R. 777. But *see* 1930 A. 218. Finding based on inadmissible evidence can be set aside by High Court. 66 I.C. 313=1922 A. 439. Where there is evidence on record which would justify the lower appellate Court in arriving at a particular finding and it has considered the evidence, the High Court will not interfere in second appeal merely because it comes to the conclusion that if the matter had been raised before it, it might have come to a conclusion different from the conclusion arrived at by the lower appellate Court. If there is no evidence upon which the finding could be supported then the matter becomes not a question of fact but a question of law. 167 I.C. 355=A.I.R. 1937 Sind 36. An appellate Court disposing of an appeal is not bound to repeat *in extenso* the arguments of the trial Judge which it accepts. But a party is entitled to a considered opinion of the appellate tribunal. It is not the first Court's view but that of the second Court that is final if the question is one of fact. (1937) 2 M.L.J. 916. *See also* 1926 O. 464; 82 I.C. 823=1925 C. 469 (Finding inconsistent with evidence); 63 I.C. 813. *See also* 43 I.C. 525; 65 I.C. 504; 25 C.W.N. 1022=



## NOTES.

63 I.C. 954=35 C.L.J. 19. Also finding of fact based on no evidence or against express *prima facie* reliable evidence. 1926 O. 37; 1926 P. 187; 28 I.C. 555; 30 I.C. 505; 38 I.C. 62; 38 I.C. 586; 42 I.C. 282; 7 R. 751; 21 Pat.L.T. 873; 1940 Rang.L.R. 777; 1941 Pat. 118=197 I.C. 275; 1937 Pat. 289; 1937 Nag. 9; 1938 O.W.N. 171; 52 C.L.J. 235; 13 L. 399; 39 C.W.N. 1233; 1936 R. 488. It is true that a finding of fact arrived at by a lower appellate Court is binding on the High Court, however erroneous it might be. But this dictum presupposes that the finding is honest, that it has been arrived at on the facts of the case uninfluenced by any extraneous considerations, that it is the result of a correct appreciation of the material on the record and that it is based on evidence and not on surmises and conjectures. Any finding of fact which does not satisfy any of the requirements stated above will not be binding on the High Court. Every finding of fact is not sacrosanct and if findings of fact are arrived at on mere surmises and conjectures or on evidence that is inadmissible or otherwise legally insufficient, those findings can be disturbed. 190 I.C. 846=A.I.R. 1940 Lah. 329. Where an appellate Court fails to come into close quarters with the evidence, the findings must be held to be vitiated and there must be a re-hearing of the appeal. 1920 M.W.N. 163=53 I.C. 308=10 L.W. 525. See also 100 I.C. 306=1927 M. 493; 103 I.C. 486=1927 N. 166; 1924 N. 91; 1928 L. 737; 1929 P. 98=115 I.C. 674. Where the lower Court erred in not referring to some important evidence, in the conclusions drawn from uncontradicted evidence of respectable witnesses and in assuming wrong legal principles, the errors vitiated the lower Court's finding so as to furnish ground for interference in second appeal. 1935 M. 701; 42 P.L.R. 94; 42 P.L.R. 136. Where a lower appellate Court has not discarded the defence evidence on any general grounds, but has attempted to discuss the evidence and to arrive at a reasoned conclusion, the mere fact that that conclusion may be different from the conclusion to which the second appellate Court might arrive, if it considers the matter *de novo* is not enough ground for discarding the finding of fact arrived at by the lower appellate Court. 1940 A.W.R. (B.R.) 149=1940 R.D. 246 (1). A finding of the lower appellate Court based upon a failure to appreciate the true legal effect of recitals of necessity in ancient documents and omission to consider other documents of recent origin consistent with those recitals, cannot be supported in second appeal. 42 C.W.N. 837=A.I.R. 1938 Cal. 541. Where a finding of fact as to the relationship of parties is vitiated by an entire misapprehension of the pedigree table, it is a finding not based on any legal evidence, and can, therefore, be interfered with in second appeal. 40 P.L.R. 162=A.I.R. 1938 Lah. 303. An unsatisfactory discussion of evidence, is not, like absence of evidence or disregard of it a ground for interference in

second appeal. 1914 M.W.N. 833=1 L.W. 772. Nor the fact that the lower appellate Court's remark about the shifting of the onus is not happily worded, if it has not really affected the decision on merits. 38 P.L.R. 577. The mere fact that the Court of first appeal has not made special mention of a document which is a piece of relevant evidence is not sufficient to show that it has not considered it at all. 43 I.C. 857=3 Pat.L.W. 213; 42 I.C. 397=2 Pat.L.W. 183. The right which a respondent in the lower appellate Court has to support the trial Court's decree in his favour on any points which were decided against him, if not availed of, cannot be used to ask the Court in second appeal to go into evidence bearing on that issue. I.L.R. (1939) Nag. 624=1939 Nag. 260. Where the lower Court deals with the entire evidence in the case in a few sentences, without any advertence to the documentary evidence on the side of a party, and gives no reason for rejecting the conclusions of the trial Judge, as regards the credibility of the witnesses examined on the side of that party, its judgment does not satisfy the requirements of law and must be deemed to be a judgment vitiated by an error in procedure. The lower appellate Court is bound, as a matter of law, not to go against the opinion of the trial Judge, who had an opportunity of seeing and hearing the witnesses before him, in deciding upon the credibility of the witnesses. Unless good reasons are given, any interference with the conclusion of the trial Judge on matters of this kind must be deemed to be erroneous in law. A second appeal is competent in such a case under section 100. 53 L.W. 160=(1941) 1 M.L.J. 174. Finding of fact—Lower Court not referring to certain evidence since its attention was not drawn to the same—Judgment not vitiated. 11 L.L.J. 381. Mere omission to consider a piece of evidence will not alter the character of a finding of fact. 162 I.C. 21=1936 P. 243.

(4) INFERENCE FROM DOCUMENTS.—Under section 100 the High Court has no jurisdiction to reverse the findings of fact arrived at by lower appellate Court however erroneous, unless they are vitiated by some error of law. The rule is equally applicable to cases in which the findings of the lower appellate Court are based on inferences drawn from documents exhibited in evidence. [11 L. 199 (P.C.), Foll.] 61 I.A. 163=57 M. 652=1934 P.C. 112=66 M.L.J. 595 (P.C.); 39 C.W.N. 1270=61 C.L.J. 369; 190 I.C. 648=1940 Lah. 205; 42 Bom.L.R. 511=1940 Bom. 263; or from conduct. 40 L.W. 755=1935 M. 70. The proper legal inference to be drawn from the proved facts of a case is a point of law. 40 Bom.L.R. 1015=A.I.R. 1938 Bom. 492. A finding based on inferences derived from documentary evidence is as good a finding of fact as that based on oral and documentary evidence. A.I.R. 1937 All. 197 (1). The rule that the High Court has no jurisdiction to reverse the findings of fact arrived at by the lower appellate Court, however erroneous, unless they are vitiated by some error of law,



## NOTES.

is applicable to cases in which such findings are based on inferences drawn from the documents exhibited in evidence. 1937 O.W.N. 330=A.I.R. 1937 Oudh 226. *See also* 1937 P.W.N. 236=1937 Pat. 479; 166 I.C. 454 (inference as to nature of tenancy drawn from record of rights). While a Court in second appeal will not interfere with findings of fact of the lower appellate Court, whether right legal inferences have been drawn from those facts, whether, for instance, the possession is adverse or ot, whether a transfer is made with intent to defeat or delay within the meaning of section 53, are questions of law which can be dealt with in second appeal. A.I.R. 1938 Sind 215. Where a Court is dealing with the question as to whether from the facts found the legal inference drawn by the lower Courts is correct in cases such as of adverse possession, or under section 53, T. P. Act, or section 82, Trusts Act, it is entitled to consider in second appeal whether the facts found by the lower Court justified the conclusions in law that they have drawn. A.I.R. 1938 Sind 206. The question whether misconduct can be inferred from a set of facts is a question of law. 1937 P.W.N. 71=A.I.R. 1937 Pat. 289. The question whether a building is a private mosque or a public mosque is not question of fact, but a question of law, that is a question of inference from proved facts. 1938 O.W.N. 937=A.I.R. 1938 Oudh 238. Where certain facts are found and an inference is drawn from the facts so found, it is open to the Court in second appeal to consider whether as a matter of law such inference is justified by the facts found. Whether the evidence is directed to prove fraud or conspiracy, this principle will equally apply because that principle applies to all circumstantial evidence and amounts simply to this that the inference drawn from such evidence must be one which necessarily flows from it. 19 Pat.L.T. 398=A.I.R. 1938 Pat. 147. *See also* 1937 Nag. 230 (Question whether a Hindu family has separated in status); 1937 Rang. 225 (Inference of partnership from proved facts). The question whether a certain payment was made by way of gift or by way of satisfaction of a debt is question of fact. 1937 M.W.N. 1166=46 L.W. 617. A second appellate Court, though it cannot entertain an appeal upon any question as to the soundness of findings of fact by the lower appellate Court, can nevertheless adjudicate as matter of law upon the soundness of the conclusions which have been derived from those findings. (19 I.A. 228, Rel. on.) 1936 O.W.N. 1057=A.I.R. 1937 Oudh 47. The question as to whether the lower Courts drew the correct inference or not from the circumstantial evidence on a certain point is a pure question of law. 1937 O.W.N. 438=A.I.R. 1937 Oudh 301.

(5) SUFFICIENCY OF EVIDENCE.—A decision that there is no evidence to support a finding is a decision of law on which the Privy Council will interfere with the findings of

fact of the Courts below. 41 C. 972=27 M.L.J. 80 (P.C.). *See also* 58 I.C. 482; 88 I.C. 584=1925 C. 1133. A finding based on no evidence is not binding in second appeal and can be interfered with. 60 C.L.J. 288. *See also* 1934 M.W.N. 1082=40 L.W. 749; 1940 Pat. 502; 1937 O.W.N. 266; 1937 M.W.N. 396; (1937) 2 M.L.J. 916; 158 I. C. 512=1935 C. 648. It is open to a Court to accept evidence of one witness in preference to that of others and a finding arrived at on such evidence cannot be said to be supported by no evidence. 161 I.C. 501=1936 S. 7. The lower appellate Court as the final Court of fact is entitled to draw such inferences from facts as it thinks proper and in second appeal there is no power in High Court to interfere with those findings; but when the appellate Court, on the slenderest of evidence, makes out a case which is not in the pleadings, its finding of fact cannot be binding in second appeal. 175 I.C. 91=1938 P.W.N. 741=A.I.R. 1938 Pat. 181. Judgment based on opinions of experts is open to challenge in second appeal. 21 A.L.J. 811=75 I.C. 502. But *see* 157 I.C. 30=1935 A. 501, where finding based on the relative weight of the opinion of the handwriting experts was held to be one of fact. The mere question of sufficiency of the evidence adduced to establish a custom is not a ground of second appeal. 45 C. 285; 69 I.C. 800. Even from a finding of fact second appeal may be taken if the finding is not supported by any evidence on record. 30 I.C. 375; 65 I.C. 398; 13 L. 399. The sufficiency or insufficiency of evidence as proof of title cannot be debated in second appeal. 9 I.C. 427. *See also* 1928 O. 352 (2)=110 I.C. 531; 1929 A. 557; but a finding on conjectures and presumptions can be questioned in second appeal. 97 I.C. 241 (2)=1926 L. 659; 7 L.R. 104 (Rev.). *See also* 145 I.C. 407=1933 M. 163. So also a finding which is based wholly upon surmise without any positive evidence to support it. 157 I.C. 1040=1935 M. 190=68 M.L.J. 648. Where certain convincing evidence has been set aside in the lower appellate Court on a ground that can have no legal basis whatever, such a glaring misapplication of law of evidence is open to correction in second appeal. A.I.R. 1938 Nag. 385. If an appellate Court, while reversing a well considered judgment of the trial Court, fails to advert to, or in any way indicate that it has considered, a most material piece of evidence which militates against its own view, its finding cannot be accepted as an unassailable finding of fact in second appeal. 47 L.W. 477=A.I.R. 1938 Mad. 568=(1938) 1 M.L.J. 582. A finding as to the existence of an agreement which has not been pleaded and based on no evidence cannot be accepted as binding. 159 I.C. 96=18 N.L.J. 104.

(6) MISREADING OF EVIDENCE.—The misapprehension of evidence is no ground for a second appeal. 21 I.C. 393. But *see* 1926 L. 541. But where a finding of fact is arrived at as a result of a complete misreading of a document a second appeal is competent. 42 I.C. 218; 1926 P. 725; 1930 L. 712; 134 I.C.



## NOTES.

21=1931 A. 499; so also a finding arrived at on an erroneous assumption of an admission by party, who did not make it. 1928 O. 333. There is an error of law when a Court's finding proceeds upon a misconception of the real nature of the issue in the case, when several facts admitted or proved are not considered in their relation to each other and weighed as whole, when a certain legal consequence which naturally follows from admitted and proved facts is overlooked, or when a material part of admissible evidence which vitally bears on the point at issue is disregarded. A case which involves such an error of law must fall within the ambit of section 100, C. P. Code. Where therefore lower Court's judgment is based on an error of law it cannot attain finality and High Court sitting in appeal over it can hear it on facts. I.L.R. (1938) Nag. 535=1938 Nag. 470.

(7) EXCLUSION OF EVIDENCE.—The High Court is not empowered to interfere in second appeal with an order of the lower appellate Court rejecting an application made to it for the admission of additional evidence. 42 M. 737=37 M.L.J. 125; 1923 L. 30; 32 P.L.R. 813; 131 I.C. 228=1931 L. 506; 1927 M.W.N. 63 (1)=99 I.C. 669 (1). Where evidence is excluded by an Original Court and such exclusion is not objected to in the first appellate Court such objection cannot be allowed in second appeal. 16 I.C. 213; 12 I.C. 751=(1911) 2 M.W.N. 495. A finding of fact after ignoring a piece of evidence which is really admissible can be attacked in second appeal. 91 I.C. 1026=1926 C. 603; 108 I.C. 191; 54 M.L.J. 600; 1929 L. 145; 112 I.C. 461; 32 P.L.R. 714; 1933 M. 163; 138 I.C. 406=1932 A. 603; 33 P.L.R. 1013; 1933 S. 121. Where the lower appellate Court rejects the oral evidence of possession adduced by one of the parties by applying an erroneous presumption of law its finding on the question of possession is vitiated by an error of law and the High Court can reverse the finding of fact so arrived at. 155 I.C. 1087=1935 O.W.N. 674=1935 O. 394. See also 39 C.W.N. 1233. (Improper rejection by lower appellate Court of Commissioner's plan relied on by trial Court).

(8) CONSTRUCTION OF DOCUMENT.—The expression 'construction' as applied to a document includes two things 'first, the meaning of the words; and secondly, their legal effect. The meaning of the words is a question of fact in all cases. The effect of the words is a question of law. Hence the interpretation placed upon the words in the deed is a clear question of fact. Even if the document admitted of more than one construction, one of which has been adopted by the lower appellate Court, the High Court will not be competent to challenge it. 158 I.C. 71=1935 L. 378; 1937 S. 51; 1937 Cal. 371; 39 P.L.R. 376; 1937 Sind 263; 1939 Nag. 197=1939 N.L.J. 297; 1939 O.W.N. 1114; 1940 A.L.J. 420=1940 All. 373 (F.B.); 193 I.C. 789. Misconstruction of a document which is not a document of title is, no doubt,

no ground for a second appeal. But where a document has been held to contain an admission by a party when as a matter of fact no such admission exists, it is not entirely a question of drawing a wrong inference from a certain document, not being a question of title, but a question of misreading of evidence, and a second appeal would, therefore, lie. 42 P.L.R. 216=A.I.R. 1940 Lah. 278. The question of the construction of document is a question of law, on which the High Court can entertain a second appeal. 43 C. 1104=31 M.L.J. 745 (P.C.); 4 Pat.L.T. 627; 45 M.L.J. 663. See also 16 Pat. 527=1937 Pat. 572 (construction of plaint); 41 P.L.R. 326=1939 Lah. 264 (construction of a document of title. See also 39 P.L.R. 376); 20 Pat.L.T. 677=1939 Pat. 364; 42 P.L.R. 660=1940 Lah. 486; 190 I.C. 604=1940 All. 441 (Construction of a receipt on which the matter in issue depends); 1940 Sind 74; 1940 Bom. 255; 1937 Oudh 295=1937 O.W.N. 356 (meaning of words); 1937 Oudh 370; 20 N.L.J. 39; 35 P.L.R. 578=1934 L. 662; 1926 O. 131; 1928 N. 289. But see 119 I.C. 667; 1926 L. 21; 1926 P. 49; 5 O.W.N. 275=1928 O. 269; 132 I.C. 844 (2)=1931 L. 686. A question of how a document should be construed if it is a document of title and not merely a piece of evidence in the case is a question of law. 52 I.C. 119; 48 A. 588; 1926 M. 542; 1926 B. 493; 5 Pat.L.J. 251. See also 1926 M. 652=93 I.C. 307=24 L.W. 88; 149 I.C. 934=1934 L. 35. Unless there has been misconstruction, a mistaken inference from documents is an error, not of law, but of fact. 60 I.A. 231=143 I.C. 437=1933 P.C. 171=65 M.L.J. 154 (P.C.). Where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundations of rights, but were merely historical materials, have to be construed for the purpose of deciding that question; and a second appeal would not lie because some portion of the evidence might be contained in a document or documents and the first appellate Court has made a mistake as to its meaning. [11 L. 199 (P.C.), Rel. on.] 61 C. 45=151 I.C. 813=1934 C. 461; 161 I.C. 465=1936 P. 129; 155 I.C. 833=60 C.L.J. 412=1935 C. 282; 61 C.L.J. 143=39 C.W.N. 581. Where the question is what is the proper inference to be drawn from documents whose construction is not open to any controversy—the words used being explicit and requiring no construction—the question is a question of fact and a second appeal is not competent to the High Court. 189 I.C. 545=42 Bom.L.R. 462=A.I.R. 1940 Bom. 255. The question of the construction of a certain documents is a question of law but the question what legal inference may be drawn from a number of documents is a question of fact and not a mere question of law. 151 I.C. 362=1934 A. 709; 162 I.C. 838=1936 P. 287; 162 I.C. 334=1936 O.W.N. 375=1935 L. 857; 161 I.C. 158=1936 O. 225; 1935 O.W.N. 365=154 I.C. 1017=1935 O. 304. But the question of



## NOTES.

interpretation of decree is a pure question of fact, the decree not being a document of title. 1935 L. 115 (1). The construction of a decree is a pure question of law. 1937 M.W.N. 292. Documents—Construction of—Question as to—Law or fact—Documents forming root of title or basis of claim—Documents forming evidence in the case—Distinction. 56 M.L.J. 1 (P.C.); 1930 L. 691; 134 I.C. 673=1931 N. 189 (48 A. 588, Foll.). A wrong construction of a document coupled with a wrong inference from certain facts constitute an error of law where there is no other evidence accepted by the Court. 55 I.C. 366=18 A.L.J. 195; 20 N.L.J. 39. The determination of the intention of the parties is a question of fact but if the sole evidence to decide it is a document of title, then a wrong interpretation of that document is a question of law on which a second appeal lies. 149 I.C. 1016=1934 L. 193. *See also* 151 I.C. 311=1934 L. 291. Where the question is whether two documents executed on the same day are connected so that one is consideration for the other, the question is not one of interpretation of documents, and if the lower Courts ascertain their connection on evidence other than of the documents themselves the finding is a finding of fact which cannot be challenged in second appeal. 1934 A. 948. Finding based on construction of or inferences drawn from documentary evidence cannot be questioned in second appeal. 99 I.C. 183; 100 I.C. 631; 104 I.C. 760. *See also* 1926 A. 75. A finding based on a recital of consideration in a mortgage deed is conclusive in second appeal. 21 I.C. 841. The misconstruction of a document which is the foundation of a suit is no doubt a question of law but the misconstruction of a document which is alleged to contain an admission, that is to say, a misappreciation of the meaning and effect of an admission is not a question of law which can be raised in second appeal. 35 C.L.J. 182=68 I.C. 1003. Construction of document in case of a deed open to one of two constructions is question of law. 65 I.C. 580=1922 L. 240; 1928 N. 30=113 I.C. 373; 1929 L. 90 (1)=30 P.L.R. 168 (2); 1929 L. 833; 1930 L. 139; 130 I.C. 103=1931 N. 25 [34 A. 579 (P.C.). *Ref.*]. But *see* 1926 L. 672. The question whether the parties to a deed of transfer intended that certain property should pass under the deed is one of fact and cannot be agitated in second appeal. 63 I.C. 746. Also question regarding whether a lease confers a heritable right or not. *See* 13 O.L.J. 565. The construction of a deposition is what the Court thinks is proved by it and it is wrong to speak of it as a construction so as to make it a question of law. 63 I.C. 575. Where the lower Court arrives at a finding of fact by a wrong construction of the pleading and without any evidence, the finding is liable to be questioned in a second appeal. 56 I.C. 466; 3 O.W.N. 460=94 I.C. 779=1926 O. 353; 69 I.C. 800. *See also* 133 I.C. 886=1931 L. 854. Where a document

leaves part of the subject-matter ambiguous, and evidence is let in to remove the ambiguity, the interpretation becomes a question of fact. 103 I.C. 255; 1927 A. 689. The question of *genuineness of signature* is a pure question of fact. 152 I.C. 597=61 C. 365=1934 C. 633. It is true that a document is said to be executed only if it is proved to have been consciously signed or thumb-marked after the alleged executant had become aware of its contents and that the mere presence of a signature or a thumbmark on a document may not in certain cases in itself amount to a proof of its execution. But where the Judge has not been impressed by the mere presence of the thumb marks on the document in question, but there are certain other attending circumstances which have influenced his mind while formulating his conclusions that execution of document is genuine, his decision cannot be interfered with in second appeal. A.I.R. 1938 Lah. 357.

OTHER ILLUSTRATIVE CASES.—Where the appellant expressly abandons a point in the Court below he ought not to be allowed to take it in second appeal. 69 I.C. 44 (1); 134 I.C. 1171=1931 Sind 170. Intent to abandon plea not to be inferred from lower Court's failure to record finding thereon. 29 P.L.R. 607=1929 L. 81. As to abandonment by tenant of holding, *see* 4 P. 838. Abandonment is a finding of fact. 32 I.C. 355; 91 I.C. 493=1926 C. 751. The question whether a particular property comes within the definition of village immovable property or urban immovable property as contained in section 3, is a question of law, but its determination wholly depends on a finding of fact and the legal definition necessarily follows from this finding of fact. So a second appeal does not lie. A.I.R. 1937 Lah. 284. The question of acquiescence is a matter of legal inference to be drawn from the facts proved in the case and can be taken up in second appeal. 41 I.C. 927; 36 I.C. 700; 82 I.C. 309; 73 I.C. 137. Where the Court holds that the document is so worded as to obscure its meaning and prevent the executants from grasping the fact that they were executing a deed of surrender, it is not an interpretation of a document and such finding does not involve a point of law. 119 I.C. 698=1929 N. 343.

ABANDONMENT.—The question as to whether there has been an abandonment of land by a raiyat is largely and principally a question of fact. But the inference from the facts found, as to whether there was abandonment or not, is a question of law. 61 C. 937.

ABATEMENT.—Though no second appeal lies from an order of abatement, it may be questioned in a second appeal if it "affects the decision of the case". 144 I.C. 133=1933 A.L.J. 561=1933 A. 294. An order that the appeal abates not only with regard to the respondent who has died but with



(a) the decision being contrary to law or to some usage having the force of law ;

(b) the decision having failed to determine some material issue of law or usage having the force of law ;

#### NOTES.

regard to all the respondents, comes within the definition of a decree and as such is appealable. 43 C.W.N. 41=A.I.R. 1938 Cal. 639.

**ACCORD AND SATISFACTION.**—The finding that there is a full accord and satisfaction is a finding of fact which must be accepted in second appeal. 152 I.C. 398=1934 N. 226.

**ACKNOWLEDGMENT.**—Although a finding as to whether certain statement amounts to an acknowledgment arrived at by the lower appellate Court is not open to second appeal, still when the lower Court fails to consider the effect of a statement, the second appellate Court can decide whether it amounts to an acknowledgment. 14 L. 587=1933 L. 345.

**ADOPTION.**—The question of adoption is clearly a finding of fact and cannot be interfered with in second appeal. 1934 L. 968 (2)=154 I.C. 675.

**ADVERSE POSSESSION.**—Where the question of adverse possession is one of inference from documents the concurrent findings of the Indian Courts may be upset by Privy Council as the question is not one of fact. 42 A. 152=38 M.L.J. 259 (P.C.). See also 87 I. C. 1021; 1939 A. W. R. (B.R.) 124. The question of adverse possession is a mixed question of fact and law. 26 C.W.N. 890; 40 I.C. 420; 75 I.C. 672; 71 I.C. 762, and cannot be allowed to be pleaded for the first time in appeal. 102 I.C. 476=1927 L. 522. But see also 94 I.C. 38=1926 C. 881; 1926 L. 482; 148 I.C. 740=1934 P. 167. The question of adverse possession is a mixed question of fact and law. Though the facts found by the first appellate Court must be accepted in second appeal as final, the question whether the proved facts substantiate the plea of adverse possession is a matter of law which can be challenged in second appeal. 1941 O.W.N. 537=1941 A.W.R. (Rev.) 289. A finding of adverse possession must, to some extent be a finding of fact, but more particularly in a case where the judgment of the lower appellate Court is a judgment of reversal, the High Court may inquire into the method adopted by the lower appellate Court in coming to its conclusion, and enquire whether the adverse possession as found is supported by evidence and whether the finding, which is said to be based on the proper legal conclusion to be drawn from the settlement and mutation records, is justified. 66 C.L.J. 455=A.I.R. 1938 Cal. 117. It is a question of fact whether adverse possession has been proved, but where the decision is whether adverse possession shall be inferred from facts, it is not a question of fact; it is a question of the legal inference to be drawn from facts. 176 I.C. 549=A.I.R.

1938 Sind 132.

**ALIENATION.**—The finding of the Courts below that a particular alienation was a gift and not a sale is a finding of fact binding in second appeal. 15 Pat.L.T. 596.

**ANCESTRAL LAND.**—A finding that property is ancestral is a finding of fact which cannot be contested on second appeal. 35 P.L.R. 532=1934 L. 517; 151 I.C. 789=35 P.L.R. 406=1934 L. 406. See also 150 I.C. 1041=1934 A. 866. (Finding that property was purchased with the funds of a certain person). A party who has all along proceeded on the assumption that the property which he was claiming was ancestral cannot, when his claim was dismissed by the lower Courts on the ground that it was barred by limitation under Punjab Limitation (Custom) Act (I of 1920), section 7, for the first time in second appeal, be permitted to contend that the property was self-acquired. 1933 L. 845=35 P.L.R. 85.

**BENAMI.**—A question of benami or fraud is not a question of pure fact; it is a mixed question of fact and law. 43 I.C. 49=3 Pat.L.W. 339. See also 34 P.L.R. 642=1933 L. 738. A finding as to *benami* given after consideration of the evidence on record is binding on the High Court in second appeal. 133 I.C. 440. When there is circumstantial evidence on which the trial Court justifiably infers that a transaction is *benami*, the finding of the lower appellate Court that it is not *benami* without considering the evidence is not a proper finding which can be regarded as binding in second appeal. 63 C. 846=1936 C. 178.

**"BONA FIDES".**—*Bona fides*, finding as to, is a question of fact. 49 M.L.J. 549; 7 L. L.J. 358; 131 I.C. 662=1931 N. 67; 1938 Lah. 704.

**BURDEN OF PROOF AND PRESUMPTION.**—The question of onus is not necessarily and in all cases one of law. How much or what evidence is sufficient to discharge the onus is a question which will depend upon the weight to be attached to the evidence adduced. 12 I.C. 691=13 Bom.L.R. 1021. See also 9 I.C. 4; 1938 Nag. 522; 1937 Nag. 9; 1941 N.L.J. 117. Where a Court considers the case and the evidence of one side only and disbelieving the evidence dismisses the claim on the ground that the assertions made have not been proved, the case is being solely decided on the question of onus and no amount of lip service to a rule which is ignored in the letter and in the spirit will serve to turn what is then a question of law into one of fact. I.L.R. (1939) Nag. 160=A.I.R. 1939 Nag. 78. The question whether the presumption attaching to a document is or is not rebutted in a particular case is a question of fact and cannot be agitated



(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

## NOTES.

in second appeal. 1937 Lah. 468; *see also* 165 I.C. 763. Whether a statutory presumption was rebutted by the rest of the evidence or not is a question of fact. (A.I.R. 1930 P.C. 91, Foll.). 40 P.L.R. 655=A.I.R. 1938 Lah. 445. If the Judge's finding is determined only by the question of burden of proof, or on a one-sided examination of the evidence due to the view taken about the burden of proof, then the finding stands in need of revision, but if the evidence and circumstances on both sides are duly considered, the question of the burden of proof is of very little importance. 152 I.C. 441=1934 N. 253. The adjustment of the burden of proof in a case is a question of law. 43 I.C. 478; 59 I.C. 973=12 L.W. 170; 1 L. 429; 2 L. 249; 7 L.R. 230 (Rev.)=94 I.C. 944=24 A.L.J.=513=1926 A. 453; 51 C.L.J. 465. A fact resulting from a finding on wrong burden of proof and disregard of evidence on record is not binding in second appeal. 2 Pat.L.T. 919=76 I.C. 347; 133 I.C. 220=53 C.L.J. 616; 59 C. 1012=62 M.L.J. 336 (P.C.). *See also* 1932 M. 415=35 L.W. 511; 19 N.L.J. 301; 163 I.C. 604=1936 R. 262; I.L.R. 1936 N. 142=164 I.C. 740=1936 N. 130. (Even when judgment of trial Court has been confirmed by appellate Court). After evidence was given by both sides and the lower Court has preferred that of one side, the objection as to wrong shifting of burden of proof is groundless in second appeal. 33 I.C. 817; 1930 L. 677=121 I.C. 377. *See also* 145 I.C. 992=34 P. L. R. 884=1933 L. 377. Where evidence has been led by both sides and findings have been arrived at on a consideration of the evidence so led, the question of onus in a second appeal would be immaterial. But where the lower appellate Court has placed the onus wrongly on the plaintiff and has discussed only the evidence of the plaintiff and his witnesses, its findings are not binding in second appeal. 45 C.W. N. 177. The question whether the presumption of the correctness of the record-of-rights has been rebutted in a particular case is more a question of fact than of law. 65 I.C. 527; 45 I.C. 65=22 C.W.N. 449; 12 L.L.J. 161. Failure to invoke a presumption under section 114, Evidence Act, is ground for second appeal. 25 A.L.J. 833; 121 I.C. 730. Refusal to draw the presumption under section 90, Evidence Act, will not be interfered with in second appeal. 134 I.C. 296. But a legal presumption wrongly raised by the lower Court where the law does not warrant such a presumption can be interfered with in second appeal. 32 P.L.R. 759.

CONDUCT, INFERENCE FROM.—*See* 40 L.W. 755.

COPYRIGHT.—In an action brought by a

plaintiff for breach of copyright, but which is in substance an action for breach of confidence in permitting the plaintiff's unpublished manuscript to be used without the plaintiff's consent, whether or not the book was used, handed over to a certain person and whether it was improperly used by him are pure questions of fact. 1933 A.L.J. 393=64 M.L.J. 193=1933 P.C. 26 (P.C.).

COSTS.—A second appeal on a question of costs can be maintained. 2 L.L.J. 310=64 I.C. 962. *See also* 27 P.L.R. 391; (1940) 1 M.L.J. 764; 100 I.C. 598. But *see* 93 I.C. 1008=1926 A. 419; 1928 O. 224=107 I.C. 881; 6 O.W.N. 689 (F.B.). It cannot be said that no second appeal lies against an order for costs. Where in the Courts below wrong principle have been applied or there is some error in awarding costs, then the High Court can interfere in second appeal. If the High Court is satisfied that the lower appellate Court has considered the matter from the right point of view, it would not be open to the High Court to interfere in second appeal. The trial Court has a discretion in the matter of costs and that discretion can be inferred with in appeal only if the trial Court has exercised its discretion improperly. Where the lower Court does not keep this principle in view but considers the matter of costs as if it had been trying the suit itself, that is not the proper way of approaching the question, and the High Court will therefore interfere in second appeal. 51 L.W. 538=A.I.R. 1940 Mad. 589=(1940) 1 M.L.J. 764. In second appeal the High Court will be very reluctant to interfere with an order of costs, unless it is shown that any grave injustice has been done to the party. 10 O.W.N. 981=1933 O. 455. Costs are in the discretion of the Courts below, and if no legal point or matter of principle is involved, the High Court on second appeal will not interfere. 35 P.L.R. 656=1934 L. 739. *See also* 148 I.C. 1166=1934 A.L.J. 803=1934 A. 434; 149 I.C. 901=11 O.W.N. 754=1934 O. 259.

COURT-FEE.—A second appeal lies from an order of appellate Court rejecting a memo. of appeal from non-payment of deficit Court-fees if there is an error in calculating the amount of Court-fees. 51 I.C. 114.

VALUATION OF SUIT.—Where the lower Courts have held that the valuation for purposes of jurisdiction placed on the suit was not unreasonable, it is not open to a party in second appeal to plead that the valuation of the suit was not correct, and that the suit, if properly valued, would be beyond the jurisdiction of the trial Court. Such a plea cannot be given effect to in second appeal. 22 Pat.L.T. 799.

CROSS-OBJECTIONS.—A second appeal lies from the decree of the appellate Court disallowing cross-objections of the respondent.



(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

## NOTES.

(10 M. 292, Foll.). 1932 L. 400.

**CUSTOM.**—Question as to the existence of an ancient custom are questions of mixed law and fact. 40 M. 709=33 M.L.J. 1 (P. C.); 143 I.C. 880=37 L.W. 272=1933 M. 390; 41 M. 374 (F.B.); 40 Bom.L.R. 1015=1938 Bom. 492; 1933 A. 603. On this point, *see also* 27 Bom.L.R. 880=88 I.C. 891; 88 I.C. 752=23 A.L.J. 932; 93 I.C. 363; 1926 A. 215; 20 A.L.J. 57=64 I.C. 956; 1928 O. 269. Whether a particular custom is proved to exist or not, is undoubtedly a question of fact, and a mere question of sufficiency of the evidence adduced to establish a custom is not a ground of second appeal. But questions of the existence of an ancient custom are generally mixed questions of law and fact; the Judge first finding what were the things done in alleged pursuance of the custom and then determining whether these facts so found satisfied the requirements of the law. The latter is a question of law and not fact. 45 C.W.N. 809. Where the concurrent findings of the lower Courts that a certain custom did not exist is based on the rejection of the evidence which should not have been rejected, the findings could be questioned in second appeal. 1941 O.W.N. 623=1941 O.A. 394. A finding of the lower Courts that a custom set up by a party has not been established by him is one of law and cannot be interfered with in second appeal when it is not vitiated by any error of law. 1937 A.L.J. 1301=A.I.R. 1938 All. 144. Where the evidence has been viewed in the lower appellate Court on a mistaken application of the rule as to burden of proof, its judgment is vitiated on a point of law and is open to attack in second appeal. 40 P.L.R. 682=A.I.R. 1938 Lah. 760. A finding as to the existence or non-existence of a custom in so far as it is a finding that a certain practice does or does not prevail, is a finding of fact. The question whether a prevailing practice has the essential attributes of a legally binding custom is a question of law. 141 I.C. 668=1933 A. 306. *See also* I.L.R. 1936 N. 13=164 I.C. 825=1936 N. 95. Whether the facts found in any given instance prove the existence of the essential attributes of a custom is a question of law which may be discussed in second appeal. 45 C. 285; 38 M.L.J. 275; 41 M. 374=34 M.L.J. 104; 40 M. 1108=32 M.L.J. 237; 1929 M. 751; 150 I.C. 758=1934 A. L.J. 879=1934 A. 890. A finding of custom cannot be challenged in second appeal on the ground that the evidence is insufficient. 35 I.C. 630; 102 I.C. 596=1927 A. 605; 100 I.C. 605=1927 A. 471; 99 I.C. 292=1927 A. 201; 4 O.W.N. 1229=1928 O. 121. 91 I.C. 942=13 O. L. J. 121=1926 O. 143. But *see* 94 I.C. 987=1926 O. 460; 1926 A. 153; 59 M.L.J. 289=53 M. 597=57 I.A. 264 (P.C.). The question whether a custom is

reasonable or not is a question of law and not of fact. 29 I.C. 312=19 C.W.N. 1188. *See also* 41 C.W.N. 503=1937 Cal. 245. When there is legally insufficient evidence to prove a custom, a finding of the existence of custom may be questioned in second appeal, but when the insufficiency depends on the weighing of the evidence, it cannot be contested in second appeal. 9 I.C. 839 (29 M. 24; 28 A. 98, Ref.); 70 I.C. 858=1923 L. 53; 3 L. 344. *See also* 92 I.C. 126=1926 O. 211; 116 I.C. 799. Where a question as to the existence of a custom has been decided by a lower Court, what has to be seen is not merely whether the decision arrived at is one of fact but whether in arriving at it, the Court has committed an error in law or not; for instance, if it was based upon the acceptance of evidence which was inadmissible, it could be questioned in second appeal but if it was so based because the Judge believed the evidence of some and disbelieved that of the others, it could not be questioned in second appeal. 14 Luck. 515=1939 O.W. N. 372=A.I.R. 1939 Oudh 210. *See also* 1939 All. 500. A decision as to the existence of a custom is a question of fact (134 I.C. 475), but an appellant in second appeal is entitled to show that the evidence, even if true, does not establish the custom. 14 I.C. 12; 134 I.C. 21=1931 A. 499; 53 A. 308. *See also* 13 L. 31; 1931 A. 583; 18 Pat.L. T. 477=1937 Pat. 458. Question of law—Question of custom—No evidence one way or the other—Question to be decided on authorities: Question involved one of law. 11 L.L.J. 110=110 I.C. 380=1929 L. 426. Where a wakf is established by user is a question of fact. 100 I.C. 626=1927 A. 377; 12 L. 540. Finding regarding custom upset in second appeal for misdirection. 132 I.C. 804=1931 A. 547.

**DAMAGES.**—When the amount of damages is fixed arbitrarily it cannot be taken as an amount arrived at on a finding which is binding on the High Court. 1923 A. 199; 28 N. L.R. 320. The amount of damages is a question of fact. 9 I.C. 984 (34 A. 333; 3 C.L.J. 140, Ref.); 140 I.C. 68 (2)=1932 N. 118. Normally the question of damages is not considered in a second appeal, but the High Court may review the matter so that substantial justice as between the parties may be done. 1934 A. 392.

**DEDICATION.**—The question whether certain property is wakf property is a question of law, at any rate a mixed question of law and fact. 17 I.C. 303=16 O.C. 76; 138 I.C. 215 (1). Whether a dedication is real or nominal is a question of fact. 131 I.C. 283=1931 L. 170. Whether instances of burial proved in any particular cases are adequate in character, number and extent to justify an inference of dedication is undoubtedly a question of pure fact. I.L.R. (1940) Kar. 174=A.I.R. 1940 Sind 43.



## NOTES.

**DEFAMATION.**—The question whether a writing is defamatory of the plaintiff the questions of fair comment, justification, *bona fides* and the quantum of damages awardable to the plaintiff in an action for libel, are all questions of fact on which the High Court in second appeal, is bound by the findings of the appellate Court. 32 M.L.J. 392. Finding of fact based only on the local investigation is not sustainable. 1923 L. 208 (1). Even if the judgment of the Appellate Court was meagre and not in conformity with the rule, unless a substantial error affecting the merits of the case is shown, High Court will not interfere. 31 M.L.J. 870. Where a judgment is of a most unsatisfactory and perfunctory character, the finding of fact contained in it can be challenged in second appeal. 70 I.C. 853=1922 P. 583; 41 I.C. 385=2 Pat.L.W. 12. Defective procedure and error of law. 85 I.C. 958=22 L.W. 352.

**DISCRETION.**—Where two Courts fully acquainted with the case exercise a discretion, the High Court will not interfere with the exercise of such discretion. 54 I.C. 731; 13 I.C. 943=9 A.L.J. 15; 11 I.C. 736=15 C. W.N. 1083; 66 I.C. 147=1922 L. 355; 131 I.C. 461 (2)=1931 M. 632. See also 1933 L. 867. (Refusal to allow amendment of pleading. 146 I.C. 683=34 P.L.R. 736=1933 L. 829. (Rejection of document tendered at late stage); 1933 L. 1014 (Admission of additional evidence). The discretion given to the trying Court is not one to be exercised arbitrarily but with due regard to the facts of the case and general principles of justice. High Court in second appeal has power to see which of the two Courts exercised discretion properly in accordance with the judicial principles. I.L.R. (1939) Nag. 452=A.I.R. 1939 Nag. 110. Per *Rupchand Bilaram, A.J.C.*—Where the appellate Court interferes with the discretion of the trial Court and the basis of the interference is wrong and arbitrary, not judicial, the judicial Commissioner's Court is justified in interfering with the discretion exercised by the appellate Court. A.I.R. 1937 Sind 263. Where the lower Courts have exercised their discretion not on the special facts of the case but on a misapprehension of the legal principles on which the discretion given by a provision of law should be exercised, it is competent to the High Court in second appeal to interfere and overrule that exercise. 1937 A.M.L.J. 49. An appellate Court has a discretion to grant or refuse an adjournment prayed for by the appellant or his pleader; and the exercise of that discretion is not a matter which can be made the subject of a second appeal. A refusal of an adjournment and the consequent dismissal of the appeal for want of prosecution cannot therefore be interfered with in second appeal. 168 I.C. 1001=1937 A.L.J. 174=A.I.R. 1937 All. 284. The High Court will always interfere in second appeal where a lower

Court has wrongly refused to grant an equitable relief. 45 L.W. 648=170 I.C. 242=A.I.R. 1937 Mad. 520. Where a judge allowing an amendment of the plaint has proceeded on a wrong view of the law so that he could not have applied his mind into the question whether he should or should not, in his discretion allow the amendment, the High Court would interfere in second appeal though the matter was one in the discretion of the lower Court. 1938 N.L.J. 198=A.I.R. 1938 Nag. 388. If the Court's discretion to extend the limitation for an appeal under S. 5, Limitation Act, has not been exercised in a legal manner the High Court is entitled to reverse the decision arrived at. 52 I.C. 225=4 Pat.L.R. 381; 123 I.C. 83; 122 I.C. 575; 1930 A.L.J. 1256; 144 I.C. 133=1933 A.L.J. 561=1933 A. 294; 1936 L. 742. But see 130 I.C. 840 (2)=1931 A. 28. Where the discretion is exercised arbitrarily on a question of costs a second appeal will lie. 100 I.C. 598. Wrong discretion by lower Court under O. 13, R. 1 can be interfered with in second appeal. 110 I.C. 821=1928 P. 537. Discretion under S. 90 of Evidence Act. See 93 I.C. 13=1926 O. 362; 134 I.C. 296. Where a discretion is given to adopt one of two methods to enforce the attendance of a witness in O. 16, R. 10, High Court will not interfere with its exercise. 101 I.C. 257 (2)=1927 L. 424. The issue of commission is a matter in the discretion of the Court, and if the discretion is wrongly exercised, the question cannot be agitated for the first time in second appeal. 1933 P. 542. Improper exercise of discretion in utilising O. 41, R. 33 will not be interfered with in second appeal. 130 I.C. 774=1931 L. 370. Nor where the lower appellate Court examines of its own motion under O. 41, R. 27, C.P. Code, a witness who, in its opinion, should have been examined by one of the parties. 38 P.L.R. 449=1937 L. 115.

**DOCUMENT.**—Rejection of document not produced at first hearing, not interfered with in second appeal. 90 I.C. 602=1926 C. 106.

**DOWER.**—A finding as to the amount of dower is a mixed question of fact and law. 89 I.C. 672.

**EASEMENT.**—Failure to draw inference of easement is question of law. 85 I.C. 81=1925 N. 270; 85 I.C. 84=1925 N. 168. Question of additional burden on the servient heritage by particular user is one of fact for a decision of which a remand is essential. 61 M.L.J. 58=1931 M. 128.

**INTERPRETATION OF FACTS FOUND BY LOWER COURT.**—Where the lower Court has arrived at a certain finding of facts, and the facts are clear but the dispute relates not to the facts but to interpretation of facts by the lower Court, it can be dealt with in second appeal. 40 P.L.R. 506=A.I.R. 1938 Lah. 180.

**LANDLORD AND TENANT.**—A finding as to the status of a tenant is a finding of fact



## NOTES.

and should not be interfered with in second appeal except on the ground of some clear error of law. 46 I.C. 351. *See also* 40 I.C. 513=21 C.W.N. 809; 87 I.C. 757=1925 C. 1238; 1925 P. 294; 85 I.C. 636=1925 C. 761; 1926 C. 264 (Recognition of tenancy); 41 C.L.J. 135=29 C.W.N. 500=1925 C. 632; 1926 C. 350 (question of uniform payment of rent). *See also* 6 P. 698=134 I.C. 296. The concurrent finding of the lower Courts that a particular lease was granted for a justifiable cause cannot be interfered with in second appeal, although some of the observations made by the lower Courts may be open to criticism. 1937 M. W.N. 1188. Findings that the tenants are raiyats and they have acquired rights of occupancy are findings of fact. A.I.R. 1938 Cal. 724. The question whether a tenancy is one at will or of permanent nature on certain given facts is mixed question of law and fact. 44 C. 119; 31 Bom.L.R. 1279. *See also* 35 C.W.N. 1047; 1938 Pat. 609; 1938 Pat. 333. But *see* 92 I.C. 899 (2)=1926 C. 592; 137 I.C. 658=1932 C. 398=54 C.L.J. 353. The nature of a tenancy is a question of law when it turns on the construction of some written instrument. 20 I.C. 363=17 C.W.N. 1073. The question whether a legal right, such as the right of tenant in the land, has determined is a question of law. 15 I.C. 857. Question of law—Division of tenancy under section 88, B. T. Act. 39 C.L.J. 289. Which of the heirs represent the tenancy is a question of fact. 91 I.C. 748=1926 C. 517. As to plea of want of notice to quit. 145 I.C. 992=34 P.L.R. 884=1933 L. 377.

**FRAUD AND UNDUE INFLUENCE.**—A finding that an allegation of fraud was unproved is a finding of fact and is not open to challenge in second appeal. 35 P.L.R. 578=1934 L. 662; 1941 O.W.N. 643=1941 A.W.R. (cc) 166. A finding as to the existence of fraud in connection with the service of a sale proclamation or as to non-service of the same, which is not based on evidence is not binding in second appeal and can be interfered with. 19 Pat.L.T. 645=A.I.R. 1938 Pat. 622. The question whether there was any fraud or not in a transaction is a question of fact, and a finding thereon by the lower appellate Court on the evidence produced by the parties is conclusive and cannot be challenged in second appeal. 1937 A.L.J. 1346=A.I.R. 1938 All. 150. A concurrent finding by both the Courts below that a sale under the Public Demands Recovery Act was not vitiated by fraud is a finding of fact and binds the High Court in second appeal. 194 I.C. 479. A finding by the lower appellate Court that the bond in suit was executed owing to undue influence, is not a pure finding of fact. It is rather a legal inference from the facts of the case. Such a finding can, therefore, be disturbed in second appeal. 1937 O.W.N. 277=A.I.R. 1937 Oudh 254. Where in a

case fraud is alleged, but there is no direct evidence of fraud and only an inference drawn from circumstances, such a finding involves a legal question as to whether the circumstances are such that the necessary inference can legally be derived. If the lower Court proceeds upon a wrong legal view of the nature of the circumstantial evidence from which fraud can be inferred, the finding is based upon a legal error and can be interfered with in second appeal. 20 Pat.L.T. 957=A.I.R. 1940 Pat. 201.

**FORFEITURE OF TENANCY.**—A finding on the question whether there was forfeiture of tenancy by denial of title of landlord is a finding of fact and cannot be interfered with in second appeal. 145 I.C. 992=34 P.L.R. 884=1933 L. 377. The lower appellate Court in coming to finding that there was no forfeiture of the tenancy failed to take into consideration the effect of a statement made by the tenants. *Held*, that the finding was open to challenge, in second appeal [1923 P.C. 187, Dist.; (34 A. 579 (P.C.), Ref.) 149 I.C. 517=1934 A. 103.

**GRANT, NATURE OF.**—The finding that it was not proved that the *lawa jama*—that is to say, the pension moneys paid by Government—were included in the *watan* or hereditary endowment, and that therefore the plaintiffs could not claim a share in them as such, is a finding of fact. 60 I.A. 231=29 N.L.R. 210=1933 P.C. 171=65 M.L.J. 154 (P.C.).

**JOINT FAMILY.**—A finding that there has or has not been a disruption of a joint Hindu family is not a finding of fact and can be questioned in second appeal. It is an inference of the legal effect of the facts found. 144 I.C. 919. The question whether the three brothers were joint or separate, would ordinarily be a question of fact but if in coming to a finding certain documents relied upon by the defendants as evidence of partition are illegally excluded from evidence on the ground that they are not admissible the finding can be challenged in second appeal. 1934 P. 48=146 I.C. 937. A finding by the lower appellate Court, that a Hindu coparcener in filing a plaint for partition was under the influence of profligate persons who were bent upon ruining him, and that in effect the institution of the suit for partition was their act rather than his act, and that therefore the institution of the suit did not evidence an unequivocal intention on the part of the member concerned to separate from the other members of the joint family, is one of fact, and the High Court in second appeal cannot disregard the same, but must accept it as conclusive. 17 Pat. 430=19 Pat.L.T. 281=A.I.R. 1938 Pat. 278.

**LEGAL NECESSITY.**—The finding as to the existence of necessity is a finding of fact and cannot be impugned in second appeal. 1923 L. 669; 70 I.C. 815. But *see* 100 I.C. 943; 96 I.C. 1006=1926 N. 486; 132 I.C. 271=1931 O. 144 (2).



Second appeal on no other grounds.

101. No second appeal shall lie except on the grounds mentioned in section 100.

102. No second appeal shall lie in any suit of the nature cognizable by

### NOTES.

**LEGITIMACY.**—Question of legitimacy cannot be gone into in second appeal, it being a question of fact. 2 L.L.J. 505.

**LIMITATION.**—The question if facts found by the lower appellate Court are such as to constitute "sufficient cause" within the meaning of section 5 of the Limitation Act, is a question of law for purposes of second appeal. 43 P.L.R. 502.

**LOAN OR DEPOSIT.**—The question whether certain money was received as a deposit or by way of loan is one of fact and the finding on that matter cannot be challenged in second appeal. 152 I.C. 319=17 N.L.J. 68=1934 N. 219.

**MISJOINDER.**—A finding of fact on a question of misjoinder arrived at on evidence cannot be disturbed in second appeal. 33 I.C. 118=(1916) 1 M.W.N. 9. Objection as to misjoinder cannot be taken for first time in second appeal. 1928 M. 635.

**NEGLIGENCE OF GUARDIAN.**—The finding of the lower appellate Court that the guardian has not been guilty of negligence is a finding of fact which cannot be challenged in second appeal. 142 I.C. 629=34 P.L.R. 110=1933 L. 337.

**NON-JOINDER.**—An objection as to non-joinder of parties cannot be taken for the first time in second appeal. 44 M. 344=40 M.L.J. 282. Notice to quit, validity of notice to quit is one of law. 29 C.W.N. 620=87 I.C. 708. The question of negligence is very largely a question of fact. 71 I.C. 346=1922 C. 317. Non-joinder of party in appeal—First Court's decree becomes final as regards that party. Joinder of that party in second appeal is not permissible. 14 R.D. 430; 32 Bom.L.R. 1252.

**PARDANASHIN LADY.**—A finding that a lady is not a pardanashin lady is a finding of fact and cannot be challenged in second appeal. 144 I.C. 720=34 P.L.R. 304=1933 L. 451.

**PROCEDURE ERROR IN.**—It does not follow that in second appeal an error of procedure will always lead to reversal of the lower Appellate Court's decision. It must be an error affecting the merits of the case but under section 100, C. P. Code, High Court can interfere on the ground of any substantial error or defect in the procedure which may possibly have produced error or defect in the decision of the case upon the merits. A.I.R. 1940 Pat. 33. In order that a second appeal might be maintainable under section 100 (1) (c), C. P. Code, it is not sufficient to show that there was a defect in the procedure of the trial Court. It is necessary to show that the alleged defect in procedure may possibly have produced error or defect in the decision of the case upon the merits by the lower appellate Court. 1937 A.L.J. 46=A.I.R. 1937 All. 105. The question whether a document, such as,

a promissory note is genuine or not purely a question of fact, and a decision on that question, being a finding of fact, cannot be interfered with in second appeal. Buo if the lower appellate Court requires too high a standard of proof for the establishment of any particular fact,—a standard of proof than that laid down by section 3 of the Evidence Act—that is an error of law or procedure justifying interference under section 100 (1) (c), C.P. Code. If the lower appellate Court differs unnecessarily from the appreciation of the evidence by the trial Court which saw and heard the witnesses, on a mistaken view as to the standard of proof, the High Court will interfere in second appeal. 1937 M.W.N. 188.

**PUBLIC RIGHT OF WAY.**—See 151 I.C. 263=1934 A. 941; 39 C.W.N. 303.

**TECHNICAL OBJECTION.**—See 145 I.C. 992=34 P.L.R. 884=1933 L. 377; 144 I.C. 573=1933 M. 353.

**REMISSION.**—When a Judge in second appeal interferes with the concurrent findings of fact of the Court below, he exceeds his jurisdiction under section 100, C.P. Code, and his decision is liable to be set aside in Letters Patent Appeal. 38 C.W.N. 763=1934 C. 707.

**REMAND.**—See 1941 Pat. 118; 1931 M. W.N. 102; 21 Pat.L.T. 873.

**REVISION.**—Where the lower appellate Court entertains an appeal which does not lie and decides it on the merits, its order may be challenged by a second appeal to the High Court. Assuming that a second appeal, is incompetent, the decision of the lower Court being one without jurisdiction, is liable to be set aside in revision under section 115, the second appeal being treated as a revision application. 7 Cut.L.T. 41.

**RESTORATION (OF APPEAL).**—Where the appellant's pleader appears when the appeal is called on for hearing and applies for an adjournment of the appeal on the ground that owing to other engagements he could not prepare the appeal, the file of which is very heavy, but the Court rejects his application and dismisses the appeal "for want of prosecution" the disposal of the appeal clearly amounts to a decree, and a second appeal lies under section 100. The dismissal is not a dismissal for default, and the appellant has no right in such case to apply for restoration of the appeal under O. 41, r. 19. 1937 A.L.J. 174=A.I.R. 1937 All. 284. Where a second appeal is dismissed under section 101, and the decree is sought to be amended then it has to be obtained by a review application. O. 47, R. 1 (b) permits a review application, because the second appeal was not one allowed by law. 1941 A.M.L.J. 54.

**SEC. 102: SCOPE OF SECTION.**—The provisions of S. 42 are controlled by those of this section when a Court of Small Causes



No second appeal in certain suits.

Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

#### NOTES.

transfers a decree for execution to another Court. 25 C. 872. See also 143 I.C. 493=1933 L. 363; 155 I.C. 888=1933 M. 636; 26 A. 358 (360); 50 I.C. 629; 32 B. 356; 2 B. 248; 46 A. 73; 1924 A. 263; 103 I.C. 344. The words "of a nature cognizable" seem to have reference to the subject-matter of the suit as distinguished from the amount of the claim. 23 M. 547 (F. B.) overruling 22 M. 229. The mere fact that a question of title is raised does not prevent the suit from being one of a small cause nature. 6 C.W.N. 687; 24 C. 557; 36 I.C. 202=4 L.W. 245; 116 I.C. 114=30 L. W. 365=1929 M. 389; 134 I.C. 251=1931 A.L.J. 967; 1935 O.W.N. 503=155 I.C. 240=1935 O. 413. S. 102, C. P. Code, does not apply to a suit *bona fide* framed as a mortgage suit, although the only claim which could be established by the plaintiff is a money claim. I.L.R. (1938) 2 Cal. 81=42 C. W. N. 381=A. I. R. 1938 Cal. 336. S. 102 of the Code contemplates a suit of the nature cognizable by Courts of Small Causes irrespective of what defence is put up in the case. 155 I.C. 240=1935 O.W.N. 503=1935 O. 413. The value of the subject-matter of the suit must be determined by reference to the value put by the plaintiff not only for fiscal purpose but also for purposes of jurisdiction. 27 A. 202; 32 I.C. 998; 13 I.C. 493; 12 N.L.R. 47. The section assumes the original character of the suit rather the character it may assume by reason of the findings of the lower Courts. 6 Bom.L.R. 781; 50 I.C. 629; 32 B. 356; 2 B. 248; (1911) 2 M.W.N. 587=13 I.C. 174=22 M.L.J. 47. The suit as originally brought must be looked to. 13 I.C. 493. But see 34 I.C. 909; 41 B. 367=38 I. C. 881. A suit of a nature cognizable by a Small Cause Court does not cease to be so because the Court in which it was instituted as a small cause suit returned the plaint to be filed on the regular side. 15 M. 98. See also 24 C. 557; 65 I.C. 7 (20 A. 480; 12 A.L.J. 1032, Foll.) Or because the suit is tried as an original suit by a Judge who has no small cause powers. 156 I.C. 607=37 Bom.L.R. 355=1935 B. 254 (2). See also (1941) 1 M.L.J. 635. Plaint returned by Small Cause Court under section 23—In suit for money due for use and occupation on the ground of permissive possession—No second appeal lies. 1929 M. 781 (1); 57 I.C. 557=23 O.C. 117; 107 I.C. 193 (2) (small cause suit tried as regular suit). See also 12 I.C. 957=10 M.L.T. 500; 134 I.C. 251=1931 A.L.J. 967. Section is not restricted to cases where the Court trying the suit on the original side was also empowered to try the suit on the Small Cause Court side. The test in deciding whether a second appeal lies or not

is to be found in the suit and not in the powers of the Court which tried the suit. 129 I.C. 174=7 O.W.N. 1112=1931 O. 49. A suit for the recovery of rent other than house rent is a suit of the nature cognizable in Courts of Small Causes. 4 M. 419 (F. B.); 56 I.C. 845; 1922 P. 154; 1922 P. 184; 1928 C. 709. A suit for rent including *galli-patti* and local cess is a suit of small cause nature. 37 Bom.L.R. 355=156 I.C. 607=1935 B. 254. As to suits for rent, not being cognizable by Small Cause Court, see also 34 M.L.J. 104=41 M. 374 (F.B.). (*Thundu varam* payable to *mirasidar*); 14 L.W. 349=42 M.L.J. 118 (suit for arrears of *kattubadi* is of small cause nature); 119 I.C. 386=1929 M. 525 (suit for rent or for damages for use and occupation); 17 I.C. 704=23 M.L.J. 517 (suit for rent, where there is only an incidental prayer for declaration). A suit to recover the rent of agricultural land is not a suit of the nature cognizable by Courts of Small Causes. (3 R. 390, overruled.) 13 R. 633=1935 R. 386 (F.B.). Suit for rent—Alternative claim for money below Rs. 500—Later claim cognizable by Small Cause Court—Second appeal in rent suit barred by S. 153, Bengal Tenancy Act—Joinder of two claims for purposes of second appeal—Permissibility. 40 C.W.N. 698. No second appeal lies from a decision in a suit for mesne profits when the value of the suit is less than Rs. 500. 24 M. 118. But see *contra* 158 I.C. 1119=18 N.L.J. 76. A claim for profits by a person who has obtained a decree for specific performance of an agreement of sale of land, against the defendant in possession is a suit for mesne profits and not for damages. 158 I.C. 1119=18 N.L.J. 76. A *mala fide* prayer for injunction does not alter the nature of a small cause suit for money. 1930 A.L.J. 1043. S. 102, bars a second appeal in suits for small sums of money, if the claim is merely to recover money. But if in addition, the suits are also, and perhaps mainly, for an injunction, a second appeal would lie and would not be barred. 48 L. W. 512=A. I. R. 1938 Mad. 941=(1938) 2 M.L.J. 530. What must be looked at is not the shape in which the case comes up to High Court, but the shape in which the suit was originally instituted in the Court of first instance. 11 A. 13. See also 35 M.L.J. 377. Where a suit cognizable by a Small Cause Court has been tried against the provisions of S. 16 as an ordinary suit by a Judge who is not invested with Small Cause Court's powers, the parties to the suit having raised no objection to the trial, it should not be considered as a small cause suit, and appeal would lie from the decision. 30 N.L.R. 252=149 I.C. 886=1934 N. 121. The section does not apply to appeals from orders. An order on appeal from a decree in an ori-



## NOTES.

ginal suit of the nature cognizable in a Court of Small Causes, remanding the suit for re-trial, is appealable. 3 A. 18 (F. B.). In the case of a suit of the nature of Small Causes no second appeal lies under S. 102, whether the appeal was against the decision in the suit or whether the matter arose in the course of execution proceedings. 1941 Oudh 101=1940 O. W. N. 1118. S. 102, not only applies to appeals, but to orders in execution under S. 47. The section applies also to second appeals from orders in execution under S. 47. Since a surety for a judgment-debtor is, for the purposes of appeal, deemed a party within the meaning of S. 47, by reason of S. 145 the bar of appeal under S. 102, would also apply to a surety for a judgment-debtor. I.L.R. (1939) Kar. 342=A.I.R. 1939 Sind 360. When the original suit is of the nature cognizable in Courts of Small Causes and the subject does not exceed Rs. 500 in value, no second appeal will lie in respect of an order made in execution proceedings relating thereto. 12 A. 579; 18 A. 481 (F.B.); 12 M. 116. See also 46 A. 73; 3 L. 141; 37 M.L.J. 303; 29 I.C. 740=11 N.L.R. 99 (section applies no less to orders in execution than to the decree itself). See also on this point, 46 I.C. 82; 18 I.C. 245; 43 I.C. 15=1917 P. 80; 34 C.L.J. 477. No second appeal lies against the decision of an Honorary Munsif in a suit of a nature cognizable by a Court of Small Causes. 155 I.C. 95=1935 A.L.J. 426=1935 A. 574.

THE FOLLOWING ARE SUITS COGNIZABLE BY SMALL CAUSE COURT.—A suit for compensation for money realised by the defendants from the actual occupants of land, who are stated to be plaintiff's tenants. 24 C. 557; suits for recovery of money under Ss. 69 and 70 of the Contract Act. 15 C. 652. See also 40 I.C. 578=15 A.L.J. 534; 34 I.C. 697=23 C.L.J. 557 (Suit for rent or damages. See also 33 I.C. 346=22 C.L.J. 564). 1939 Pat. 216 (Suit by landlord to recover price of trees cut and misappropriated by tenant). See also 1940 Rang.L.R. 1. Suit to recover *katiari* or tax for homestead. 39 I.C. 949. Suit to recover terminal tax on movable property. 1939 Sind 35. Suit against Government, for less than Rs. 500 for repairs made. 37 M. 533=23 M.L.J. 732. Suit against District Board President for damages. 46 M. 808=45 M.L.J. 25. Suit for damages for wrongfully cutting and carrying off trees. 36 I.C. 202=4 L. W. 245; 130 I.C. 481=1930 A.L.J. 1247. (But not so where there is allegation of criminal act or intent, 1936 N. 276). Suit for damages for removal of trees. 27 C. W.N. 469=1923 C. 568. See also 155 I.C. 888=1933 M. 636. Suit for refund of money paid under S. 73 as rateable distribution. 45 A. 359. But see also 43 I.C. 907=15 C.L.J. 49. Suit for money forcibly taken. 57 I.C. 505. For profits of plaintiffs wrongfully appropriated. 31 I.C. 797. Suit for declaration of title to mov-

ables. 21 I.C. 638; 11 A.L.J. 599. Suit for money due. 17 I.C. 522. Suit to recover deficiency from defaulting purchaser. 45 B. 223. Suit for recovery of compensation for want of title to lands sold. 100 I.C. 327=1927 R. 90. Suit for share of profits of an office received by co-sharer. 37 B. 700. See also 132 I.C. 201 (1)=1931 A. 551. Suit for price of fish taken from a tank. 68 I.C. 626=1923 C. 321. Suit for grazing fee. 59 I.C. 595=32 C.L.J. 83. Suit for recovery of price of coal. 59 I.C. 188. Suit for recovery of money advanced in partnership business with profits. 51 I.C. 435. (Unnecessary prayer for declaration does not alter the nature of suit. 41 I.C. 627.) Suit for damages for infringement of monopoly. 69 I.C. 431=1923 L. 244. Suit on agreement to share proceeds of tenancy. 67 I.C. 841. Suit for interest on mortgage money. 66 I.C. 285. "Choutayi" dues are not cess within Art. 13 of Sch. II. 52 M.L.J. 706. So also *swatantrams* are not cess. 53 M.L.J. 727. A suit for recovery of money value of *bhaoli* produce of some *mahua* trees standing on a plot of land, is not a suit for rent but is a suit for money, and not outside the jurisdiction of the Court of Small Causes. 160 I.C. 186=17 Pat.L.T. 88=1936 P. 102.

THE FOLLOWING ARE NOT SUITS COGNIZABLE BY SMALL CAUSE COURT.—A suit under O. 21, R. 93 is not of a nature cognizable by a Small Cause Court. 11 M. 269; but a suit for the profits of land wrongfully received by defendant is. 25 B. 625; and a suit for rent containing a prayer for the enforcement of a charge is not small cause one. 26 M. 308; also a suit to recover defendant's share in the land revenue paid. 26 B. 437. Suit for recovery of presents made on promise of marriage is not Small Cause suit. 14 I. C. 837=5 Bur.L.T. 57. Suit for *haq chaharum*. 63 I.C. 292=19 A.L.J. 719. Suit for contribution. 32 I.C. 200=23 C.L.J. 125. Suit for damages in respect of water flow. 21 I.C. 393. Suit for water-cess, defendant denying liability and pleading grant. 40 L.W. 629=1934 M. 683=67 M. L. J. 558. Suit for declaration of title to immovable property (hut). 9 I.C. 1; 1940 M.W.N. 60=1940 Mad. 507; 1940 A.L.J. 889=1941 A.W.R. (H.C.) 13 (Suit for declaration of non-liability to pay a certain tax and to recover tax realized). 41 Bom. L.R. 1174 (Suit by inamdar to recover dues from khatedar) 1940 Bom. 12. Suit for recovery of excess amount paid to decree-holder under fraud and cheating. 1928 C. 776. Or for money criminally misappropriated. 1928 L. 887. Suit for arrears of maintenance. 1931 B. 286=33 Bom.L.R. 510. Suit for damages for wrongful attachment and negligence. 1936 N. 257.

POWERS OF HIGH COURT.—As a rule, the Court is not in favour of entertaining revisions from orders of the lower appellate Courts in cases which are covered by S. 102, C. P. Code. These orders are intended by the legislature to be final. 165 I. C.



103. In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal <sup>1</sup>[which has not been determined by the lower appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error, or defect such as is referred to in sub-section (1) of section 100.]

Power of High Court to determine issues of facts.

#### *Appeals from Orders.*

104. (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders :—

Orders from which appeal lies.

#### LEG. REF.

<sup>1</sup> Substituted for "but not determined by the lower appellate Court" by Act VI of 1946.

#### NOTES.

137=1936 L. 293. Findings called for by High Court not returned—Power of High Court to find on the evidence. 43 M. 567=38 M.L.J. 476=47 I.A. 76 (P.C.) (On appeal from 24 M.L.J. 571). Also 99 I.C. 189=1927 C. 1; 51 B. 258; 8 P.L.T. 74=102 I.C. 301=1927 P. 167; 1930 M. 489. When the lower Court has not framed the appropriate issue, the second appellate Court may raise and decide it itself if there is sufficient evidence on record for deciding it. 47 C. 107 (P.C.). When the lower Court has not given any finding on a question of fact the High Court can, under S. 103, arrive at a finding on the evidence on record. 28 I.C. 673=1 L.W. 249; 8 R. 425. See also 47 I.C. 950; 3 P.L.T. 303. Or may remit the case to the lower Court for a finding on that issue with liberty to the parties to adduce additional evidence. 49 I.A. 286=45 M. 586=43 M.L.J. 640 (P.C.). Where the judgment of a Court of appeal is reversed on a question of custom or usage on a preliminary point, the High Court should not take on itself to examine the evidence as to usage but should remand the case for disposal on the merits by the lower appellate Court. 40 M. 1108=32 M.L.J. 237. Failure of the lower appellate Court to consider matters alleged by decree-holder about judgment-debtor—Procedure to be followed. 118 I.C. 312 (2).

REVISION.—Under section 102, if a suit is of the nature cognizable by Courts of Small Causes and the value of the suit does not exceed Rs. 500, no second appeal would lie, although the suit has not been tried in a Small Cause Court and although the Small Cause Court returns the plaint under section 23 of the Provincial Small Cause Courts Act to be presented on the regular side. A second appeal filed in such circumstances cannot be treated as an application for revision under section 115, and the decision of the trial Court cannot be reversed on the ground that as the Court had no jurisdiction to try the suit on the regular side, its proceedings are vitiated by lack of jurisdiction, for the simple reason that it is the nature of the suit and

C. C. M.—79

not the Court in which the suit is tried that determines the right of second appeal conferred upon a party. 1937 O.W.N. 263=A.I.R. 1937 Oudh 244.

SEC. 103.—Where the lower Court has decided a question of title, which is one of fact on inadmissible evidence and other evidence, the High Court can remand the case to the lower appellate Court directing it to record a fresh finding after eliminating the inadmissible evidence and confining itself to the other evidence in the case; or it may proceed under section 103, C.P. Code, and arrive at its own finding on a perusal of the relevant and admissible evidence. 1936 L. 788. Where the lower appellate Court has improperly admitted any evidence, the High Court has no right to look at the evidence to decide whether the remaining evidence in a case other than that which has been improperly admitted is sufficient to warrant the finding of the Court below. The only cases which can with propriety be disposed of under such circumstances without a remand, are those where independently of the evidence improperly admitted, the lower Court has apparently arrived at its conclusions upon other grounds. A.I.R. 1937 Cal. 537=I.L.R. (1937) 2 C. 661.

N.B.:—This section supersedes the rulings in 9 A. 147 (F.B.) and 9 A. 26 (30).

SEC. 103 AND O. 41, R. 25.—Order 41, R. 25 refers primarily to first appeals though the rule so far as possible can be applied to second appeals. The rule as it stands allows reference only to the Court from whose decree the appeal is preferred, which in the case of second appeals would be the lower appellate Court. Therefore, it does not follow in the case of second appeals that a finding from a first Court is to be treated on the same footing as a finding from an appellate Court. Where an issue has not been determined by the first appellate Court and in second appeal that issue is remitted on remand to the trial Court the evidence having been found to be insufficient and the trial Court after recording such evidence and giving its finding on that issue returns the case to the High Court, the issue cannot be said to have been determined by the lower appellate Court. Therefore High Court has jurisdiction to determine such issue of fact under section 103. 1939 N.L.J. 315=I.L.R. (1940) Nag. 643=A.I.R. 1939 Nag. 173.



[(a) to (f)] *Repealed by the Arbitration Act X of 1940.*

<sup>1</sup>[(ff) an order under section 35-A ;]

(g) an order under section 95 ;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the Civil prison of any person except where such arrest or detention is in execution of a decree ;

(i) any order made under rules from which an appeal is expressly allowed by rules :

<sup>1</sup>[Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.]

(2) No appeal shall lie from any order passed in appeal under this section.

#### LEG. REF.

<sup>1</sup> Clause (ff) and proviso to cl. (i) were inserted by Act IX of 1922.

#### NOTES.

SEC. 104, CL. (FF).—An order refusing compensatory costs under section 35-A. C. P. Code, is not appealable in view of the proviso to section 104 (ff). 18 N.L.J. 309.

CL. (G).—Supersedes the decisions in 28 A. 81 and 24 M. 62. An appeal lies under section 104 (g) from an order refusing relief under section 95 as well as from one granting such relief. 49 I.C. 86=9 L.W. 69. An appeal lies against an order awarding compensation for improper attachment. 11 I.C. 349=21 M.L.J. 460.

CL. (H).—Does not apply to order as to penalties under Stamp Act. 5 C. 311. Appeal lies from an order directing arrest and detention in civil prison of a person otherwise than on execution of a decree. 1932 A. 524=1933 A.L.J. 221=136 I.C. 367. Whether the decision of a question of fraud before the execution and conduct of an execution sale brings the case within the scope of section 47, C.P. Code. 40 I.C. 246=25 C.L.J. 399.

OTHER CASES WHERE NO SECOND APPEAL LIES.—No second appeal lies against an order of Small Cause Court. 36 M.L.J. 435 (26 I.C. 359, Diss.). An order passed in execution of a decree under section 9 of the Specific Relief Act is not appealable. Also an order passed in execution of such a decree directing the arrest of judgment-debtor. 39 I.C. 379=18 P.L.R. 1917. *See also* 39 I.C. 375. No second appeal lies from an order of the appellate Court against an order passed under O. 21, R. 72 (3). 28 I.C. 270=13 A.L.J. 351; *see also* 39 A. 191. No second appeal lies from a decision on appeal under the provisions of O. 43, R. 1, C.P. Code. 11 L.L.J. 546=120 I.C. 684=1930 L. 208; 1930 A.L.J. 454=121 I.C. 545=1930 A. 122. No appeal lies from an order passed in appeal remanding for trial on merits a case in which the plaint had been returned for presentation. 33 A. 479. There is no appeal from the order of an appellate Court restoring suit dismissed for want of process fee. 9 I.C. 484. Orders under O. 21, R. 90, setting aside or refusing to

set aside sale on appeal by the High Court deal finally with the rights of parties and are appealable to the Privy Council. 40 C. 635=40 I.A. 140 (P.C.); 2 Pat.L.T. 401=6 Pat.L.J. 319=107 I.C. 448. For order under O. 21, R. 92, *see* 118 I.C. 805; 7 R. 37. Order for restitution passed under inherent powers of Court under section 151, C.P. Code, setting aside sale under O. 21, r. 90. No right of appeal. 9 P. 685=122 I.C. 589=1930 P. 280. There is no second appeal against an appellate order confirming an order refusing to set aside a sale on the ground of fraud. 14 I.C. 53=17 C.W.N. 524. *See also* 15 I.C. 679=16 C.W.N. 1051. No second appeal lies from an appellate order disallowing an application under O. 21, r. 89. 38 C. 339; 107 I.C. 488=1928 L. 444; 45 C.L.J. 557 (No second appeal from order under O. 21, R. 90). Order of District Court in appeal in terms of compromise is final and is not appealable. 3 L. 175. An order in appeal setting aside the order of the lower Court returning the plaint for presentation to the proper Court is not open to second appeal nor is such order open to revision, though it may be erroneous in law or in fact. 43 A. 334. No appeal lies against an appellate order setting aside an order of the Court of first instance refusing to set aside an *ex parte* decree. 9 I.C. 55=9 M.L.T. 269.

MISCELLANEOUS.—Though a surety for failing to satisfy a decree is arrested under section 104, cl. (h), yet he is given a right to appeal under sections 42, 47 and 145 of C.P. Code. 30 I.C. 684=19 C.W.N. 1085. An appeal lies against an order refusing to take action under O. 39, R. 2 (3). 39 M. 907=30 M.L.J. 523. An appellate Court under this section has no power to stay execution of decrees. 102 I.C. 11=1927 L. 494.

SEC. 104 (2) : SCOPE OF.—*See* 42 Bom. L.R. 428 (sub-section (2), effect on cl. 15, Letter Patent). The words of sub-section (2) of section 104, are perfectly general and there is no reason to restrict their meaning by interpreting them to mean an order deciding the appeal on the merits. 1941 O.W.N. 1010 (2)=1941 A.L.J. 516. Section 104 of the Code refers to appeals to High Courts in British India and does not forbid appeals



105. (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this

#### NOTES.

to His Majesty in Council when they comply with the conditions laid down in sections 109 and 110 of the Code. 148 I.C. 1202=11 O. W.N. 57=1934 O. 291. An order recording a compromise or adjustment under O. 23, R. 3, C.P. Code, is not open to second appeal. The Code only provides for one appeal when the factum or legality of a compromise or adjustment of a suit is questioned. 60 C.L.J. 173. See also 43 Bom. L.R. 719 (Second appeal from order under O. 22, R. 10).

SEC. 105: SCOPE OF SECTION.—Though section 105 refers only to decrees, the provisions of that section also apply to appeals against orders as well. 1936 M. 936. Sub-section (2) is new and supersedes the rulings in 12 A. 510 (F.B.); 18 M. 421; 12 C. 45; 14 B. 232. See 10 I.C. 514=15 C.W.N. 830; as to the meaning of word "decision", see 90 I.C. 180=1925 A. 610 (F.B.). "Affecting the decision of the case", means "affecting the decision of the case on the merits". 131 I.C. 518=1931 A. 329; 133 I.C. 129=1931 A.L.J. 377=1934 A. 294 (F.B.) dissenting from 1927 R. 150 and following 1925 A. 610; 3 Lah.L.J. 59=59 I.C. 676. 51 L.W. 727=1940 Mad. 755= (1940) 1 M.L.J. 882; 1939 Rang. 164; 1937 Rang.L.R. 207=1937 Rang. 334 (F.B.); 1937 All. 582; 1938 A.L.J. 720=1938 All. 511 (Question of jurisdiction); 1937 A.L.J. 1237 (Applicability of section to suits and appeals under Agra Tenancy Act). But see 12 A. 200; 22 C. 981; 9 C.W.N. 584 at p. 587. See 41 C.L.J. 136=1925 C. 711; 47 A. 555; 27 A.L.J. 1103. An order refusing to record an adjustment is not an order affecting the decision of a case, but is merely an order ensuring that the merits of the case should be determined. It is not therefore open for an appellant to challenge such order in appeal under section 105 when it has not been appealed against. 31 N.L.R. (Supp.) 72=160 I.C. 202=1936 N. 8. The policy of the Legislature in enacting section 105 was to give finality to orders of remand. 72 I.C. 588=1923 C. 385; 37 I.C. 844; 89; I.C. 1009; 22 L.W. 460=1924 M. 1019; 86 I.C. 608=1925 M. 916; 47 A. 853; 51 A. 780=27 A.L.J. 448. There is no appeal from an order setting aside an *ex parte* decree. 51 B. 495; 1940 All. 305; 1937 Rang.L.R. 207=1937 Rang. 334 (F.B.); I.L.R. (1938) All. 754=1938 A.L.J. 720=1938 All. 511 (Question of Jurisdiction can be raised in second appeal) but the order can be questioned in appeal from the subsequent decree. 5 R. 80. But see also

85 I.C. 468 (469)=1925 O. 27. In an appeal from an *ex parte* decree, section 105 (1), entitles the appellant to refer to the order of the trial Court refusing him an adjournment which prevented him from putting up a defence. The refusal did affect the decision of the case. I.L.R. (1940) All. 192=1940 A.L.J. 269=A.I.R. 1940 All. 305. Remand order not conclusive on points not specially decided therein beyond possibility of revision. 23 A.L.J. 656=1925 A. 566. Order in pending suit superseding award can be questioned in appeal from decree. 10 O.W.N. 117=1933 O. 563. See also 56 C. 21; 1929 L. 174; 1939 Sind 241 (F.B.)=I.L.R. (1940) Kar. 22; 1939 Rang. 164; 1937 A.L.J. 651=1937 All. 582. An order remitting an award for reconsideration of the arbitrators is not open to challenge in appeal. 146 I.C. 22=1933 L. 530. An order under section 151 can be challenged under section 105 if it affected the decision of the case on the merits. Otherwise the appellate Court is not bound to set it aside. 147 I.C. 1013=35 P.L.R. 266=1934 L. 312. The opening words of section 105 (1), 'save as otherwise expressly provided', govern the whole sub-section and not merely the words which immediately follow them. The sub-section enlarges rights and does not curtail them; on the contrary it expressly saves rights already conferred, that is to say, among other things, the rights of appeal already conferred by section 104, C.P. Code. Where an application for extension of time fixed by a preliminary mortgage decree is dismissed and a final decree is passed, the order of refusal to extend time is appealable as an order. 1940 Nag. 104=1939 N.L.J. 514.

SECTION 105 (2).—Only prevents a party from agitating in an appeal a question which he could have objected to in the appeal against an order. 29 M.L.J. 772; 48 M. 267=47 M.L.J. 710. Hence as under section 249 of the Agra Tenancy Act no appeal lies from any order passed in appeal, an order of remand passed in an appeal under that Act can be attacked in second appeal against the decree that is passed on remand. 157 I.C. 1119=1935 A.L.J. 517=1935 A. 553. Order setting aside abatement of suit is not final and can be attacked in appeal against final decree. 47 A. 555; 52 C. 472. Though no second appeal lies from an order of abatement, it may be questioned in a second appeal if it "affects the decision of the case". 144 I.C. 133=1933 A.L.J. 561=1934 A. 294. As to the meaning of these words see (1940) 1 M.L.J. 882. An order



Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

#### NOTES.

setting aside an abatement in the course of trial and allowing substitution of the heirs of a deceased party cannot be questioned in appeal from the decree in the suit whether such an order is passed before or simultaneously with the decree, such an order not being one which affects the decision of the case with reference to its merits within the meaning of section 105. (52 C. 472, Foll.) 14 L. 361=141 I.C. 337=34 P.L.R. 221=1933 L. 152. See also 145 I.C. 170=1933 C. 498. An order refusing to set aside the abatement of a suit is one which "affects the decision of the case" within the meaning of section 105, C.P. Code, and can therefore be challenged in appeal and second appeal from the decree. 39 C.W.N. 1173. Plea not raised in appellate Court—Appeal. 35 I.C. 571. The sub-section does not apply to appeals to the Privy Council. 33 A. 391; 40 C. 635 (P.C.). See also 144 I.C. 916=35 Bom.L.R. 458=1933 B. 260. Though section 105 (2) does not apply to appeals to the Privy Council, the principle of section 105 (1) can be applied to such appeals. 145 I.C. 258=35 Bom.L.R. 415=1933 B. 251. The section does not restrict Art. 15 of the Letters Patent (25 M. 525; see also 42 Bom. L.R. 428) and embodies so much of the principle contained in 7 M.I.A. 283; 10 M.I.A. 340; 10 M.I.A. 413. "Error, defect or irregularity" within the meaning of this section, mean error, defect or irregularity in procedure or in law, and not on matters of fact. 35 I.C. 209=14 A.L.J. 610; 32 C.W.N. 1020; 9 P. 102=1930 P. 266=125 I.C. 136. But see also 12 A. 200; 25 A. 280; 31 N.L.R. 72=160 I.C. 202=1936 N. 8. Unless the objection is taken in the memorandum of appeal it is not open to the appellant at the hearing of an appeal, to question the validity of the order. 15 A. 119. See also 20 A. 370; 18 A. 19 (F.B.); 14 B. 232 and 22 A. 366.

INTERLOCUTORY ORDERS.—The principle of section 105 is applicable not only to decrees and interlocutory orders but also to orders and interlocutory orders leading to the final decree. 35 I.C. 74=4 L.W. 411. Order passed after decree on an application for amendment is not an interlocutory order. 114 I.C. 41. Notwithstanding the dismissal of an appeal against an interlocutory order it is open to a party to complain of any defect or irregularity in the order in an appeal from the final decree itself. 44 A. 533. But see also 33 I.C. 208. A plaintiff does not lose his right to raise a question of the propriety of an intermediate order with which he has complied, for the right under section 105, C. P. Code, is not a qualified right. 1 L. 54. Where the Court granted leave to the defendant to defend the suit under O. 37, C. P. Code, on certain conditions and subsequently passed a decree on the defendant not com-

plying with those conditions, it is open to the appellant at the hearing of the appeal from the decree to canvass the validity of the conditional order granting leave to defend. 13 R. 239=157 I.C. 778=1935 R. 245.

REMAND ORDER.—Where remand was ordered on one of the two points, any one of which would have been sufficient to dispose of the case, the remand order must be deemed to have confirmed the decision on the other point. 26 C.W.N. 739=74 I.C. 597=1922 P.C. 51 (P.C.). Where a decree after remand is appealed against, the appellant cannot question the correctness of the remand order. 63 I.C. 845; 64 I.C. 816; 65 I.C. 745; 2 L. 252; 1923 R. 29; 10 I.C. 514=15 C.W.N. 830 (32 C. 1023=12 C.W.N. 590, foll.; 30 A. 479, diss.; 32 M. 83; dist.). 1928 C. 325; 6 R. 506. Remand order, whether can be ignored. 2 Pat.L.J. 669. The Court remanding the case after deciding certain points can afterwards refuse to reconsider those issues. 20 C.W.N. 43. See also 46 I.C. 922. Under section 105 (2) a lower Court cannot treat an order of remand of the appellate Court as a nullity owing to the want of jurisdiction in the latter to pass it. 47 I.C. 886. In an appeal against an order of remand, no objection could be taken on the ground that the lower appellate Court had no jurisdiction to entertain the appeal which had abated and to order for substitution of names. The proper stage for such an objection is when the decree itself is appealed from. 164 I.C. 730=1936 A. L.J. 538. Where on appeal by the plaintiff the case is remanded on the ground that the burden of proof was on the defendants and not on the plaintiff, section 105 (2) precludes the defendants from questioning the correctness of that decision in second appeal. 1923 N. 283. Right of appeal against a remand order is unaffected by the disposal of the suit on remand before institution of the appeal. 14 I.C. 673=8 N.L.R. 42. (12 A. 510; 3 A.L.J. 40, Rel). A Court hearing an appeal against an order of remand has power not only to decide whether the order of remand is in accordance with law or not, but also whether the decision is correct or not and to dispose of the suit accordingly. 15 I.C. 181=15 O.C. 33; 16 A. 252; 3 A. 675; 5 C. 144; 20 M. 152. The reversal of the previous order has the effect of nullifying the final order. 37 M. 29=21 M.L.J. 1063.

MISCELLANEOUS.—Under O. 43, R. 1 (d), an appeal lies against an order refusing to set aside an *ex parte* decree but no appeal lies against an order setting aside such a decree. 31 I.C. 914=40 P.R. 1916. See also 133 I.C. 129=1931 A.L.J. 377=1931 A. 294 (F.B.); 34 I.C. 713; 12 I.C. 795=7 N.L.R. 162. Abatement—Order setting aside—Objection to, in an appeal from the decree if can be made. 71 I.C. 587=1923



106. Where an appeal from any order is allowed, it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

*General Provisions relating to Appeals.*

107. (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

NOTES.

L. 230; 35 I.C. 209=14 A.L.J. 610 (25 A. 280, foll.). See also 141 I.C. 337=1933 L. 152; 37 C.W.N. 138. Order allowing substitution of heirs or setting aside order of abatement passed by trial Court cannot be questioned in an appeal from the decree. 37 C.W.N. 138. Decision as to legal representative—Appeal whether lies. 5 L.W. 266=39 I.C. 371. In an appeal against the decision passed on review, objection may be taken that the review was improperly granted. 1 A. 363. See also 131 I.C. 518=1931 A. 329. Where a review is granted and an appeal is filed against that order, the attack has to be confined only to the grounds set out in R. 7 of O. 47. But if an appeal is preferred against the final decision itself after review, there is no such restriction. Only if the order granting review is attacked it could be done only on the grounds set out in R. 7 of O. 47. 1941 N.L.J. 519=A.I.R. 1941 Nag. 308. An appeal lies under this section from an order improperly adding a person as a plaintiff in a suit. 71 C. 148.

SEC. 106.—A sub-Court should not be deemed to be subordinate to the District Court, as regards suits the subject-matter of which exceeds Rs. 5,000. 3 M.L.J. 97. See also 17 C. 680.

SEC. 107: SCOPE OF SECTION.—This section is intended to affect only proceedings under the Code, and is not intended to extend the operation of any portion of the Limitation Act. 12 C. 590 (593) (F.B.). Section 107, Cl. (2) invests the appellate Court with the same powers as are conferred on a Court of original jurisdiction. It does not purport to give the order passed by the appellate Court the same effect as an order passed by the original Court of a like nature. 59 C. 388=138 I.C. 643=1932 C. 482. O. 7, R. 10 applies to appeals by virtue of S. 107. 74 I.C. 93=1923 N. 310=8 N.L.J. 63. An order rejecting a memo. of appeal for deficient Court-fee is not a decree or final order and does not preclude the appellant from presenting a fresh memo. on proper Court-fee. 59 C. 388=138 I.C. 643=1932 C. 482. See also 1932 M.W.N. 104 (memo. of appeal should first be returned for correct stamping). Section 107 does not confer powers not conferred by O. 41. 42 I.C. 972=7 L. W. 10.

POWERS OF APPELLATE COURT—ILLUSTRATIVE CASES.—An appellate Court is competent to

examine any of the parties to ascertain the facts of the case, if necessary, for the ends of justice. 42 A. 48=52 I.C. 289. Discretion to admit additional evidence should be exercised only in the interests of justice. 28 Bom.L.R. 1391 (P.C.); 1940 O.W.N. 1077=1941 Oudh 89. As to the principle applicable to reception of additional evidence by appellate Court, see 132 I.C. 259=1931 O. 298; 138 I.C. 513=1932 O. 227. An appellate Court has power to issue a commission for local investigation. In such a case, the Court is not bound to record its reasons. 135 I.C. 243=1932 A. 270, to refer to arbitration with the consent of the parties matters in dispute in an appeal. 3 M. 78; 18 C. 507; 12 C. 173; has power under Ss. 107 and 151 to add a new party in an appeal. 3 P.L.J. 409=46 I.C. 398=1918 P. 276; has power under Ss. 107 and 152 to correct clerical or arithmetical mistake apparent on the face of the record. 26 A.L.J. 1323=1928 A. 458. Power of appellate Court to allow withdrawal of suit or appeal—Proper procedure. See 39 C.W.N. 586. See also 40 Bom.L.R. 895=1938 Bom. 442. Amendment of plaint in second appeal—Power of Court. See 1935 R. 88. Although an appeal directed against a dead man is not appeal, if the name of such dead man appears on the petition of appeal instead of his legal representatives, through a *bona fide* error, the petition of appeal can be allowed to be amended under the provisions of O. 1, R. 10 read with Ss. 107 and 153. 123 I.C. 824=1930 A. 131. Non-joinder of absolutely necessary parties cannot be condoned in appeal. 87 I.C. 904=1925 O. 606. See also 1938 M. 329. To add necessary party on appeal and remand the case. 18 C.W.N. 259=21 I.C. 928=26 M.L.J. 86 (P.C.) affirming 35 C. 618. Where parties are transposed in appeal, no question of limitation arises. 52 M.L.J. 33; 1938 M. 329=47 L.W. 760. Has an inherent power to remand even cases not coming within O. 41, R. 23. 37 M.L.J. 536. (44 C. 929; 36 M. 492, Rel). See also 43 C. 938; 33 I.C. 576=18 Bom.L.R. 27. The High Court has inherent power to remand when the provisions of S. 107 do not apply. I.L.R. 1936 N. 188=1936 N. 140. Can pass an order of remand by consent of parties in excess of its powers under the Code. 22 I.C. 41=1914 M. W.N. 90. The powers of the High Court as to remand are not restricted by the provisions



- (a) to determine a case finally ;
- (b) to remand a case ;
- (c) to frame issues and refer them for trial ;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

108. The provisions of this Part relating to appeals from original decrees shall, so far as may be, apply to appeals—

- (a) from appellate decrees, and
- (b) from orders made under this Code or under any special or local law in which a different procedure is not provided.

#### *Appeals to the King in Council.*

109. Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—

#### NOTES.

of O. 41, Rr. 23 and 25 and the High Court can always make an order of remand if the exigencies of the case required it. 43 C. 1001. See also 36 I.C. 813. Where the pleadings and issues were clear, and the plaintiff did not produce evidence, the case should not be remanded to the trial Court in order that the suit might be reheard. 155 I.C. 10=1935 R. 19. No appeal lies against an order returning memorandum of appeal for presentation to proper Court. Revision however is competent. 56 I.C. 865=2 Lah.L.J. 366. The appellate Court can return a plaint presented in a Court of a grade lower than that competent to try it for the presentation to the proper Court. 25 A. 174 (F.B.). An appellate Court has the power to return the plaint itself for presentation to the proper Court. An order of remand for that purpose is mere surplusage. 149 I.C. 1050=36 P.L.R. 99=1934 L. 233. Even where an appeal from the final decree lies, interlocutory orders may be dealt with under the Court's powers of superintendence and revision to avoid irreparable injury to the parties. 5 Pat.L.J. 550=1 Pat.L.T. 668. Appellate Court can entertain application to have *ex parte* decree set aside, where the applicant is a party to appeal from the whole decree. 42 I.C. 972=7 L.W. 10. The appellate Court can pass an order which the Court of first instance might have passed. 39 M. 907=30 M.L.J. 523. Can award costs against the estate of a deceased plaintiff. 8 C. 440; 42 I.C. 451. Pleas raised but not proved—Inconsistent pleas raised—Best available evidence suppressed—Appellate Court can reverse a finding. 57 M.L.J. 565 (P.C.). Suit by B for alternative relief against C and D—Suit decreed against D and dismissed against C—Appeal by D—No appeal or cross-objections by B—Application by B to add C as co-respondent in second appeal—Permissibility. 1933 M. 806

=65 M.L.J. 548. Suit to enforce agreement for sale—*Ex parte* decree—Decree set aside as against some defendants and suit tried as against others—Agreement found not genuine and suit dismissed—*Ex Parte* decree against other defendants, if can be set aside—Powers of appellate Court. 145 I.C. 283=1933 M. 529=65 M.L.J. 15.

SEC. 107 (2).—Where no cross-objections have been filed by respondent, the appellant has an absolute right to withdraw his appeal unconditionally at any time before judgment, his only liability being to pay costs. 1931 A. L.J. 232=132 I.C. 194. See also 1938 Bom. 442=40 Bom.L.R. 895.

SEC. 108.—The words "so far as may be" should be taken to mean so far as is consistent with the principles on which second appeals are admitted and determined. 7 M. 52 (53); 57 B. 206=144 I.C. 448=35 Bom. L.R. 127=1933 B. 205. See also 9 A. 147, 152 (F.B.). There would be no appeal against an order recording compromise by consent of parties. 35 Bom.L.R. 127. This section must be read with Art. 175, Cl. (c) of the Limitation Act. 34 C. at p. 1023. In second appeal the High Court can bring on record persons who had been originally joined in the suit, but who were not joined in the lower appellate Court. 19 M. 151. See also 28 M. 498. The Code does not require the appellant in second appeal to file a copy of the decree of the Court of first instance. 4 M. 419 (F.B.). An appellate Court can pass an interim order of injunction pending an appeal against the order of the lower Court refusing it. 14 M.L.J. 491. As to allowing amendment of plaint in second appeal. 1935 R. 88.

SEC. 109: SCOPE AND APPLICATION OF SECTION.—Leave to appeal can be granted only when the decree appealed against is a final decree. 13 M. 349. Where the conditions prescribed by the section are satisfied it is the duty of the High Court to grant



(a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction ;

(b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction ; and

#### NOTES.

leave to appeal. The chances of success of the appellant in the proposed appeal are not material. 139 I.C. 54=35 L.W. 206=1932 M. 46. [See also Notes under Letters Patent, Cl. (15).] It does not mean the same thing as "final order" referred to in section 109 (a). 49 C. 967 (48 I.A. 31; 23 A. 227; 21 C.L.J. 281, Ref.) As to the meaning of the words "final order", see 1933 P.C. 58=64 M.L.J. 307 (P.C.). The word "order" referred to in section 109 (c) is intended to be not merely a final order but it is wide enough to include an interlocutory order. 49 C. 967. Section 109 should be read subject to the special jurisdiction conferred by section 12 of the Oudh Courts Act. 134 I.C. 1017=8 O.W.N. 1207. See also 66 I.A. 160=14 Luck. 252=1939 P.C. 122=(1939) 2 M.L.J. 181 (P.C.). There is a vast difference between an order made or a judgment passed on the appellate side of a Court and the final order passed on appeal. The latter may be included in the former but the former is necessarily not the same as the latter. 15 Pat. 659=17 P.L.T. 760=1936 P. 465. As to the meaning of the words "Any other Court of final appellate jurisdiction", see 46 L.W. 416=1937 Mad. 930. Orders passed not on appeal, but in exercise of the power of superintendence vested in a Court are not appealable under this section. 183 I.C. 169=1939 Pesh. 26. An order made in revision under section 115, is not an order made on appeal though it might have been made on the appellate side of the Court and hence High Court has no jurisdiction to give leave to appeal to His Majesty in Privy Council under section 109 (a). (*Ibid.*) As a general rule, leave ought not to be given in the case of interlocutory orders. 2 A. 65; 23 A. 220 (P.C.); 25 A. 629. See also 144 I.C. 916=35 Bom. L.R. 458=1933 B. 260; 130 I.C. 102; 8 B. 548; 6 B. 260. The words "any decree or order" in section 109 (c) do not mean any decree or order other than the decree or final order passed on appeal by High Court or by any other Court of final appellate jurisdiction. 54 I.C. 828=6 O.L.J. 664. How far decision in scheme suit is appealable to Privy Council, see 1925 P.C. 155=87 I.C. 313=49 M.L.J. 25 (P.C.). Appeal where High Court on appeal reverses the decision of the Court below, see 49 C. 560=43 M.L.J. 41=49 I.A. 108 (P.C.). Leave to appeal will not be granted upon a mere question of practice, *e.g.*, an order for inspection. 9 Bom.H.C.R. 398. The fact that appeal

lies under the Letters Patent does not preclude an appeal to the Privy Council. 7 B.L.R. 730. Consent decree is not appealable to His Majesty in Council. 5 Pat.L.J. 383. The certificate cannot be refused on the ground that no appeal lies against a judgment pronounced in accordance with an award and a decree following it. Sch. II, para. 21 (2) of the Code does not affect appeals to the Privy Council. 15 I.C. 2=15 O.C. 55. No appeal lies to the Privy Council against an order of the Calcutta High Court dismissing a Munsif under Cl. (2) of section 26 of Bengal Regulation V of 1831. 13 M.I.A. 343; also against an order cancelling a notification under which a person is admitted as a vakil. 6 A. 163. In ordinary circumstances, an appeal which *prima facie* falls under section 109 (a) cannot be converted into one under section 109 (c), merely because it fails to reach the money value required by section 110. It may be that in special cases the High Court may be able to certify under O. 45, R. 3, appeals from its own final decision which are of value less than Rs. 10,000, but such exceptional procedure can only be justified by exceptional circumstances. 10 O.W.N. 953=1933 O. 394 (2).

"DECISION."—The word "decision" in section 109 (a) means merely the decision of the suit by the Court and not judgment. Hence in order to affirm the decision of the Court below within the meaning of section 109 (a) it is sufficient for the appellate Court to affirm the decree. It need not also affirm the grounds of fact upon which the judgment was passed. [25 A. 109 (P.C.), Foll.] 14 L. 609=144 I.C. 18=34 P.L.R. 946=1933 L. 690.

SEC. 109 (b).—An appeal lies to His Majesty in Council from an order of the High Court refusing to issue a writ of *certiorari* to the Board of Revenue in proceedings under Ch. XI of the Madras Estates Land Act enhancing the rents of certain villages. Such an order is one passed in the exercise of original Civil jurisdiction falling under section 109 (b), C.P.Code. I.L.R. (1938) Mad. 816=A.I.R. 1938 Mad. 722=(1938) 2 M.L.J. 154.

"FINAL ORDER"—WHAT IS.—Final order—Suit dismissed on preliminary point—Order of remand is final order. 62 I.C. 776=25 C.W.N. 896. See also 1933 L. 82. An order is final only if it finally disposes of the rights of the parties and as an order refusing a stay would not finally dispose of those rights, but leave them to be determined by the Court in the ordinary



(c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council.

## NOTES.

way, it was not final. 47 I.A. 124=24 C.W.N. 721=39 M.L.J. 27 (P.C.). Order rejecting application to sue as pauper is not final. 88 I.C. 575=1925 O. 548; 6 P. 67=100 I.C. 886=1927 P. 175; 123 I.C. 231. Order refusing to record compromise is not final. 29 C.W.N. 832=89 I.C. 94=1925 C. 857. Order of High Court dismissing petition for adjudication of debtor is final order. 12 R. 355=1934 R. 292. *See also* 1937 Mad. 930 (Order of District Judge on appeal from Subordinate Judge under section 75 Provincial Insolvency Act). An order refusing to admit an appeal and an order dismissing an application for review of that order are both final orders within the meaning of S. 109 (a). 1936 R.D. 120. As to order dismissing application for restoration of appeal dismissed for default, *see* 145 I.C. 534=1933 A.L.J. 255=1933 A. 453. *See also* 1938 O.W.N. 231=1938 Oudh 107. As to order dismissing appeal as having abated, *see* 14 L. 609=144 I.C. 18=1934 L. 690. *See also* 1937 A.L.J. 796=1937 All. 566 (appeal dismissed for want of prosecution under O. 41, r. 10); order of remand under O. 41, r. 23 if final order, *see* 1938 Rang.L.R. 330=1938 Rang. 333. *See also* 1939 O.W.N. 659=1939 Oudh 22; 49 L.W. 713=1939 Mad. 697=(1939) 2 M.L.J. 40; 14 Luck. 675. A final order means an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. 10 I.C. 439=13 C.L.J. 507; 13 C.L.J. 90=15 C.W.N. 848; 132 I.C. 211=1931 L. 556. It is used in its ordinary sense and therefore means an order which puts an end to the litigation between the parties, or at all events disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision. 24 Bom.L.R. 925=47 B. 106. *See also* 1938 Rang.L.R. 330=1938 Rang. 333; 1 A.L.J. 26; 28 I.C. 569=21 C.L.J. 281. An order is "final" if it determines the rights of the parties, and "interlocutory" if it relates to a matter of procedure only. 1931 N. 24=130 I.C. 102=27 N.L.R. 172. (Case-law discussed.) The decision of the High Court on the point of limitation remanding the suit for decision on the other essential or cardinal points in the case is not a final order but an interlocutory order against which no appeal lies under section 109 (c). 144 I.C. 916=35 Bom.L.R. 458=1933 B. 260. Dismissal of appeal from judgment of single Judge on the Original Side is barred by limitation, if final order. 1927 R. 20. *See also* 35 Bom.L.R. 458.

## ORDERS WHICH ARE NOT FINAL—NO APPEAL

LIES.—Order granting review is not final order disposing of the case. 54 A. 401=140 I.C. 110=1932 A.L.J. 235=1932 A. 318. An order by the High Court refusing the stay of execution under O. 41, R. 15 is not a final order passed on appeal. 10 I.C. 444=13 C.L.J. 681. *So also* order refusing to appoint a receiver. 12 P. 723=144 I.C. 457=14 Pat.L.T. 302=1933 P. 293. Order excusing delay in filing appeal under section 5, Limitation Act, is not a final order. 90 I.C. 723. Order refusing to stay proceedings under section 9 of the Arbitration Act is not appealable. 47 I.A. 124=24 C.W.N. 721=39 M.L.J. 27 (P.C.). There is no appeal from a non-existent suit. *See* 89 I.C. 185=1925 P.C. 174. An order remanding a suit to the original Court for disposal on the merits is not a decree or final order. 42 L.W. 568=1935 M.W.N. 796=69 M.L.J. 497. Nor an order of the High Court remanding an execution proceeding for re-decision. 38 P.L.R. 112. Nor an order of an appellate Court under O. 41, R. 25 remitting an issue to the trial Court whether a certain party rebutted the presumption as to the applicability of a family custom. 160 I.C. 811=1936 O.W.N. 218=1936 O. 205; 1939 P.W.N. 341=1939 Pat. 564 (Order on application under O. 14, R. 2 and O. 15, R. 3 for disposal of certain issues as preliminary issues not fit case for appeal to Privy Council). The High Court in an appeal decided that a document which was not admitted in evidence by the lower Court was admissible and provable, but did not determine the legal effect of the document. The case was remanded to the trial Court directing the document to be admitted in evidence and leaving the lower Court unfettered discretion. *Held*, that the order was not in any sense a "final order". 154 I.C. 942=1935 L. 458. An order of remand made by the High Court which decided only one issue out of several raised in the first Court is not a "final order." 14 A.L.J. 50=38 A. 150. *See also* 60 I.C. 522=2 L. 106; 46 I.C. 922; 132 I.C. 211=1931 L. 556; 37 C.W.N. 405=1933 P. C. 58=64 M.L.J. 307 (P.C.); 10 R. 335=140 I.C. 420=1932 R. 137; 10 R. 449=1932 R. 189. It is final if it decides a cardinal point in the suit. 1 A.L.J. 26; 1925 R. 147. *See also* 27 N.L.R. 172=130 I.C. 102=1931 N. 24 (Case-law, discussed). 10 R. 499=1932 R. 189; 10 R. 335=140 I.C. 420=1932 R. 137; 23 A.L.J. 12=47 A. 335. An order of remand can be appealed against to His Majesty in Council provided the order decides a cardinal point in the case. 3 Pat.L.J. 339. *See also* 33 A. 391=9 I.C. 932=8 A.L.J. 192. (10 M.I.A. 340; 8 B. 548; 17 A.



## NOTES.

112; 23 A. 220, *Cons.*); 48 I.C. 132=1918 M.W.N. 844; 33 I.C. 756; 43 I.C. 290=19 O.C. 36; 38 M. 509=26 M.L.J. 96. The order of remand is not a decree, and an appeal would lie only if it amounts to a final order. The main test as to the finality of the order of remand is whether it finally decides the rights of the parties, and the decision can never be challenged again. In order to have finality it is not sufficient that a question of jurisdiction of the Court to entertain the suit has been decided. The finality must be a finality in relation to the suit itself, and if the suit is still a live suit in which the rights of the parties have still to be determined, there is yet no final order. An order of remand under which an order of Revenue Court returning the plaint for presentation to the Civil Court is set aside does not dispose of the rights of the parties, and therefore is not final. 56 A. 277=1934 A.L.J. 219=1934 A. 58. *See also* 145 I.C. 131=1933 L. 82 (Order of remand in insolvency proceedings). An order of remand to original Court for trial on the merits though it decides an important and a vital issue in the case does not finally dispose of the rights of the parties; on the contrary, it leaves the suit alive and provides for its trial on the merits in the ordinary way. It is not therefore a final order and is not appealable. (Test of finality laid down). 60 I.A. 76=11 R. 58=65 M.L.J. 307 (P.C.) *See also* 1941 A.W.R. (H.C. 219=1941 A.W.R. (Rev.) 585. Scheme suit under section 92—Trial Court finding temple to be private and dismissing suit—High Court on appeal finding temple to be public and remanding suit—High Court's order is not final adjudication. 116 I.C. 300=1929 M. 308. An order of the High Court remanding a case for trial with the direction that a person should be sued as a residuary legatee is not a decree or order within the Code. 46 I.C. 681=22 C.W.N. 640. Nor an order setting aside a compromise decree for certain technical defects and directing the Judge to re-hear the application for recording the compromise. 6 P. 282=1927 P. 363; 1940 A. 38=1939 A.L.J. 919 (Order superseding arbitration. Nor an order of the High Court deciding that a certain person should be allowed to sue as a pauper. 8 C.W.N. 296. An order refusing leave to appeal *in forma pauperis* is not a final order and so not appealable to Privy Council. 10 R. 504=1932 R. 192. Also an order refusing to admit an appeal presented after the prescribed period. 9 Bom.L.R. 566. An order of the High Court directing execution to proceed is not a final order. 1 C.L.R. 354; 4 Pat.L.J. 461. No appeal lies against an order appointing or refusing the appointment of a Receiver. 22 C. 928; 10 I.C. 439=13 C.L.J. 507; 6 Pat.L.T. 119=1925 P. 173. An order refus-

C. C. M.—80

ing to extend time for deposit of court-fees in an appeal is not a final order under section 109, C.P.Code and hence not appealable. 50 I.C. 79=17 A.L.J. 443. A High Court's order refusing to entertain an application for restoring an appeal which was dismissed for default, is not appealable to His Majesty in Council. 37 I.C. 832. No appeal lies from an order dismissing an appeal in default of the appellant's compliance with the rules of the Court as to the composition of the paper book in the case. 2 Pat.L.T. 112=5 Pat.L.J. 719. Where a decree has been made directing accounts to be taken, leave to appeal must be given. 15 B. 155 (P.C.). Temporary injunction—Refusal to issue, not final order. 28 I.C. 569=21 C.L.J. 281. An order rejecting an application for review is not an order appealable under section 109 (a). 22 I.C. 259=16 O.C. 264. An order which only determines the competency of an incorporated body as a judicial person to apply for probate but does not determine whether it would be entitled to a grant of it if it applies is not final. 60 I.C. 208=23 O.C. 34. Probate proceedings, appeal in. *See* 1925 P. 712. Order under section 8 of the Presidency Towns Insolvency Act, if appealable to Privy Council. *See* 22 L.W. 362=1925 M. 243. Where in pursuance of the direction of the Privy Council the High Court asked the Commissioner to take accounts and passed a decree in accordance with his report, the decree is not one passed in any proceeding taken by the parties in order to review or modify the decision of an inferior Court. No appeal lies to Privy Council from such a decree. 55 B. 785=33 Bom.L.R. 1476.

CASES WHERE APPEAL LIES—FINAL ORDER.—Order of High Court in revision reversing order, granting leave to sue *in forma pauperis* is a final order—Appeal to Privy Council lies. 13 C.L.J. 688=15 C.W.N. 879. "*Final order passed on appeal*" may include an order directing dismissal of appeal on appellant's failure to furnish security for costs. 54 A. 390=1932 A. 312=1932 A.L.J. 254. An order passed on appeal by a High Court, determining a question mentioned in section 47, is a final decree. 3 A. 633 (F.B.). A decision on a question relating to execution, discharge or satisfaction of a decree is a decree provided the judgment conclusively determines the rights of the parties. 3 P.L.J. 339. Order of High Court allowing appeal from order refusing to set aside *ex parte* decree and ordering *de novo* trial is final and is appealable to High Court. 1932 A.L.J. 338. An order of the High Court on appeal setting aside or refusing to set aside a sale in execution is a final order and is appealable to the Privy Council. 40 C. 635=40 I.A. 140=25 M.L.J. 140 (P.C.). Order for a personal decree in mortgage



## NOTES.

suit is final order—Appeal to Privy Council lies. 21 A.L.J. 686=45 A. 741. Final decree or order—Decision that suit is not barred by *res judicata*. 54 I.C. 504=18 A.L.J. 83. Order passed by the High Court upon an appeal made to it under section 86 of the Prob. and Admn. Act, if final. 12 Bur.L.T. 87=51 I.C. 596. (40 C. 21, Rel.) An order which deprives a party of the benefit of a final decree and directs the suits against him to be tried again is final order and an appeal lies to the Privy Council. 28 I.C. 567=21 C.L.J. 279. An order of the High Court setting aside an order of the Subordinate Court dismissing a partition suit for default after preliminary decree has been passed is a final order. 2 Pat.L.T. 155=60 I.C. 479=6 Pat.L.J. 116.

CERTIFICATE AS TO FITNESS—"FIT CASE"—The meaning of the expression 'fit one for appeal' in section 109 (c), is that the question should be either of great general importance to the public at large or great private importance to the particular litigant and the matter is not measurable in money. As it could not be said that a refusal to stay a criminal complaint would be a matter of great private importance to the particular accused, leave to appeal to Privy Council against such refusal cannot be granted. 1941 O.W.N. 455=1941 A.W.R. (H.C.) 120. Interlocutory orders are within the ambit of cl. (c). 31 C.W.N. 540=103 I.C. 561=1927 C. 481; 171 I.C. 630=1937 Sind 217. Where substantial rights are in no way affected by an order, there is *prima facie* no reason for granting a certificate that the case is a fit one for appeal to His Majesty in Council. 42 L.W. 568=69 M.L.J. 497. A case could be certified to be a fit one for appeal to His Majesty in Council under Cl. (c) of section 109, only when it is of considerable importance and the principle when finally decided by their Lordships of the Privy Council would be of benefit not only to the people who were directly involved in the litigation but to the public at large. 1939 A.W.R. (C.C.) 92=1939 O.W.N. 659=A.I.R. 1939 Oudh 224. Cl. (c) of section 109, applies even to interlocutory orders and in appropriate cases such orders can be made the subject of an appeal to His Majesty in Council. But before leave could be granted in such cases, the Court must be satisfied that the case is otherwise a fit one for appeal to His Majesty in Council. The discretion vested by Cl. (c) of section 109 on the High Court is to be sparingly exercised and a case cannot be certified as a fit one for appeal on the mere ground that it raises a substantial question of law. It has invariably to be seen whether the permission to appeal is or is not calculated to unduly delay the dis-

posal of the substantive dispute between the parties on the merits. 1939 A.L.J. 919=1940 All. 38. Leave to appeal to His Majesty in Council cannot be given when that leave is asked for for the purpose of raising for the first time a question which was not raised at any time while the litigation was pending, either in the trial Court or the High Court. Such an application would be an abuse which should not be encouraged. 52 L.W. 463=A.I.R. 1940 Mad. 810=(1940) 2 M.L.J. 433. A certificate granted under section 109 (c) must show on its face that the discretion conferred by that section has in fact been exercised. 44 M. 243=48 I.A. 31=40 M. L.J. 229 (P.C.). See also 64 I.C. 959=23 Bom.L.R. 1132. The special power of certifying a case to be a fit one for appeal has been conferred on the High Court to meet particularly hard cases and that on such a special certificate having been given the appeal to His Majesty in Council becomes competent. 147 I.C. 1067=1934 A.L.J. 1166=1934 A. 198. Section 109 (c) is intended to meet special cases such for example as those in which the point in dispute is not measurable by money though it may be of great public or private importance. 144 I.C. 916=35 Bom.L.R. 458=1933 B. 260; 35 P.L.R. 546=152 I.C. 684=1934 Lah. 515; 42 L.W. 568=69 M.L.J. 497; 44 M. 293 (P.C.). The fact that a Full Bench decision of one High Court differs from a decision of a Full Bench of another High Court is not in itself sufficient ground to make a case a fit one for appeal to the Privy Council under the provisions of section 109 (c). 171 I.C. 630=A.I.R. 1937 Sind 217. In deciding whether a certificate of fitness should be granted it is not enough to find that the order sought to be appealed against involves a substantial question of law. The tests usually applied to determine fitness are whether the point involved is of great public or private importance, and whether that litigation is not made oppressively expensive and the elucidation of the real issues in the case by a trial of the suit is not unduly postponed or delayed. 1934 P. 564. See also 56 A. 277=1934 A.L.J. 219=1934 A. 68; 15 P. 659=17 Pat.L.T. 760=1936 Pat. 465; 157 I.C. 614=1935 A.L.J. 233=1935 A. 424; 15 Luck. 716; 1941 O.W.N. 130=1941 Oudh 245; 1941 O.W.N. 455=I.L.R. 1941 A. 364=1941 A. 211. In a suit to amend a scheme for the management of the Nursapuri mosque only item in teh amended scheme which was the subject of dispute was the meaning of the term "Nursapuri" as used therein. It was held that the dispute involves the determination of the rights of a large body of persons in connection with the management of the mosque and deeply affects the religious sentiments, rights and privileges of a large body of



## NOTES.

Mahomedans and in the circumstances, the question that falls for determination in the litigation brings it within section 109 (c), C.P.Code, and therefore a certificate granting leave to appeal to His Majesty in Council ought to be granted. 13 R. 123 = 1935 R. 113. The form of ritual in an important public temple in the country is a matter of both public and private importance falling within section 109 (c), and when the case relates to religious rites and ceremonies at a temple of national importance and raises disputes between two religious sects of a community regarding the conduct and form of worship at the temple, the questions at issue are in themselves of great public importance, so as to justify grant of a certificate under section 109 (c) permitting an appeal to His Majesty in Council. 50 L.W. 252 = A.I.R. 1939 Mad. 847 = (1939) 2 M.L.J. 378. The question whether the words '*any accession is made to the mortgaged property*' in section 70 T.P.Act, mean any accession made to the mortgaged property by the mortgagor or his representatives in title or any accession to the mortgaged property by whomsoever made, is a question of great public importance having regard to the existing law in India and the large number of cases which must be affected by it. 14 R. 86 = 1936 R. 65. Every question of law is not a substantial question of law. When the question has been well settled it is not a substantial question of importance fit to be taken on appeal to His Majesty in Council. 42 L.W. 568 = 69 M.L.J. 497. Discretion to be used in granting certificate is a judicial discretion. 10 I.C. 439 = 14 C.L.J. 507. Mere questions of law are not sufficient. 21 I.C. 783 = 15 Bom.L.R. 1021. Even if they be of some difficulty, see 132 I.C. 290 = 1931 M. 642. There must be questions of public or private importance or precedents covering numerous other cases. 21 I.C. 783; 31 C.W.N. 540 = 103 I.C. 561 = 1927 C. 481; 45 M.L.J. 514 = 1924 M. 231; 21 I.C. 738; 43 M.L.J. 728; 1923 M. 125; 23 I.C. 739; 24 I.C. 620; 61 I.C. 131. See also 1 Pat.L.T. 239 = 56 I.C. 615; 6 Pat.L.J. 125; 1934 A.L.J. 1166 = 147 I.C. 1067 = 1934 A. 198. Under section 109 (c), a case can be certified to be a fit one for appeal to His Majesty in Council only when it is of considerable importance and the principle when finally decided by their Lordships of the Privy Council would be of benefit not only to the people who are directly involved in the litigation but also to the public at large. A suit in which the questions for decision are whether the building in dispute is a public mosque or a private place of worship and whether the defendants have established adverse possession of the mosque, cannot be brought within the scope of

the above principles. 1940 O.W.N. 632 = A.I.R. 1940 Oudh 378. See also 1941 O.W.N. 130 = 1941 O.A. 135. In an ejectment suit, the question whether a tribal Chief residing within British territory is a Ruling Chief within the provisions of sections 84 to 87, C.P.Code, is not a matter of such private or public importance either to himself or to the public generally or any class or section of the public that a certificate of fitness for appeal to the Privy Council can be given within the provisions of section 109 (c). 171 I.C. 630 = A. I. R. 1937 Sind 217. When the Court certifies the case as fit for appeal, it is clearly intended to meet special cases such, for example, as those in which the point in dispute is not measureable by money, though it may be of great public or private importance. To certify that a case is of that kind, though it is left entirely in the discretion of the Court, is a judicial process which could not be performed without special exercise of that discretion evinced by the fitting certificate. Leave therefore under section 109 (c) is not to be granted as a matter of course but the applicant has to prove that his case is a fit one for appeal to His Majesty in Privy Council. 167 I. C. 666 = A.I.R. 1937 All. 167. Conditions for grant of certificate. 40 I.C. 680 = 33 M.L.J. 481. For case of order of remand, see 71 I.C. 339 = 10 O.L.J. 289. When leave was granted to defendants to appeal to P.C., it would be proper to grant leave to plaintiff also to appeal against an adverse finding involving a question of law. 62 C. 992. Where two Judges have arrived at diametrically opposite conclusions on vital points leave can be granted. 54 I.C. 828 = 6 O.L.J. 664. The fact that different High Courts in India have held divergent views in respect of matters similar to those before the Court is in itself no reason for certifying the case as one fit for appeal. 1936 P. 194. Valuation of suit above Rs. 10,000—Appeal valued at less than Rs. 10,000—Leave—Question of law. 54 I.C. 450. Where the order of the Board of Revenue decides a question as to whether the decision of a special judge as to proprietary rights should be accepted or whether it should be overruled by a further inquiry by the Collector, it is not a matter of such public importance as would justify a reference to the Privy Council. 1941 R.D. 792. As to valuation of property for purpose of appeal to P.C. See 1937 R.D. 198. Where two appeals arising out of the same suit were disposed of by the High Court by one judgment proceeding on one ground common to all the appellants, and the valuation of one of the appeals was above Rs. 10,000 while that of the other was less than Rs. 10,000. Held, that as the point involved in both the appeals was a common one, a certificate of fitness can



## NOTES.

be granted in the latter case under section 109 (c). 1936 A.W.R. 883=1936 A.L.J. 1025=1936 A. 832. In ordinary circumstances an appeal which *prima facie* falls under section 109(a) cannot be converted into one under section 109 (c) of the code merely because it fails to reach the money value required by section 110. 6 O.W.N. 211=1929 O. 243.

**LEGAL PRACTITIONERS.**—Order of High Court refusing to enrol a *legal practitioner* is one under its disciplinary jurisdiction and administrative powers and is not a fit case for appeal to Privy Council. 1 P. 590. But see also 1932 A.L.J. 861 (where an advocate has been ordered to be suspended from practice, High Court can grant leave to appeal to Privy Council). In the case of an advocate the High Court found that not only was the filing of fee certificate contrary to the rules framed by the High Court but that he acted in bad faith in filing it. The point raised was that there was some contradiction in the two sub-sections of the rule at the time when the advocate had got his form of certificate printed, which contradictions had been lately removed by amendment, that there was latitude allowed to him inasmuch as it was provided that the certificate shall be so far as it is possible in the form prescribed and that in filing a certificate he had made it clear in it that he had not received the amount in cash but had accepted a promissory note in lieu of the fee. *Held*, that this was a case which should be certified as a fit one for appeal to the Privy Council under section 109 (c), C.P.Code, or at any rate under Cl. 30, Letters Patent. 4 A.W.R. 1129=1934 A. 898. In an application by a pleader for leave to appeal to the Privy Council from an order suspending him from practice for being punished for contempt of Court committed personally, *held*, that the Allahabad High Court can grant leave either under section 109 (c), C.P.Code, or section 30, Letters Patent. 55 A. 246=145 I.C. 853=1933 A.L.J. 273=1933 A. 225. It is the practice of the Allahabad High Court to treat orders striking off names of pleaders from the roll of the pleaders as falling under section 109 (c), C.P.Code. But leave under section 109 (c) cannot be granted as a matter of course and the applicant has to satisfy the High Court that the case is otherwise a fit one for appeal to His Majesty in Council. Where some points of law are raised in the case a certificate can be granted under section 109 (c). 1936 A.L.J. 1272=1937 A. 167. The High Court has got power, under section 109 (c), C.P.Code, or under Cl. 30, Letters Patent, to grant leave to appeal to Privy Council against an order passed by a Bench, suspending an advocate from practice, under cl. 8 of the Letters

Patent and the Bar Councils Act, 1926. 150 I.C. 699=1934 A.L.J. 722. Question of *construction of agreement* may be a fit case. 45 M.L.J. 514=1924 M. 231. Fit case—Certificate conclusive. See 45 M. 475=43 M.L.J. 323=1922 P.C. 257 (P.C.). A committal for a finding of contempt for breach of an injunction is not criminal in its nature and is properly dealt with under the C.P.Code. Hence in such a case a certificate to appeal granted under section 109 to person inhibited by such injunction is quite valid. *Quære*—Whether a contempt committed not by any person inhibited by injunction for breach of that injunction but by a person said to have aided and abetted a person so inhibited in breaking the injunction is of such a criminal nature as to prevent an appeal. 19 Pat.L.T. 857=17 Pat. 770=A.I.R. 1938 P.C. 295 (P.C.).

**"ON APPEAL".**—Meaning—Order refusing to admit appeal as time barred is order "on appeal". 42 I.C. 893=131 P.L.R. 1917; 62 I.C. 216=33 C.L.J. 128 (order refusing an application under section 5, Limitation Act).

**SUBSTANTIAL QUESTION OF LAW.**—A substantial question of law is one on which there may be a difference of opinion. The expression does not mean 'important' question of law. Where what is complained of is the application of the law to the facts of the case the requirements of S. 110 are not complied with. 132 I.C. 2. See also A. I.R. 1939 Mad. 95=(1938) 2 M.L.J. 904 (Question of jurisdiction). Where the principles of law on a particular point are well settled and the only question is the application of these legal principles to a particular set of facts, it cannot be said that a substantial question of law arises within the meaning of S. 110. 134 I.C. 790=1931 L. 753 (2). (50 A. 208, Ref.) See also 14 L. 609=144 I.C. 18=1933 L. 690. As to what are substantial questions of law rendering a case fit for appeal to Privy Council, see 44 M.L.J. 217=1923 M. 232; 1927 O. 43. See also 1933 M. 22; 38 A. 188=33 I.C. 345=14 A.L.J. 143. (Position of holder of succession certificate); 40 C. 685=17 C.W.N. 752; 138 I.C. 630=9 O.W.N. 103=1932 O. 134 (Question whether the use of certain words in Urdu by the husband must be held to effect a divorce under the Mahomedan Law in spite of the admitted fact that there was no intention to divorce on the part of the husband, is a *proposition of law*, but not a *substantial question of law*). 1933 M. 221 (Construction of deed), 32 P.L.R. 860. (Question as to evidence not raised before the appellate Court cannot be the basis for grant of leave to appeal to Privy Council). (Competency of District Judge to dismiss insolvency application); 44 M.L.J. 424=1923 M. 602 (Different suits involving substantial same question); 17 L.W. 445=72 I.C. 918=1923 M. 443 (Question of land tenure and for-



110. In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

## NOTES.

feiture on alienation). See also 45 M. 394; 26 A.L.J. 336=108 I.C. 238=1928 A. 220; 43 M.L.J. 728=69 I.C. 385=1923 M. 125; 138 I.C. 670=1932 A.L.J. 730 (Question whether certain proceedings are in the nature of arbitration or compromise). Substantial question of law must be such that it may result in a precedent governing numerous other cases or decide a case of great public or private importance. See 54 A. 431=141 I.C. 418 (Misconstruction of award and reference to arbitration). See also 54 A. 459. The question whether O. 1, r. 3, C. P. Code, can be so interpreted as to permit of joinder of causes of action not permitted under O. 2, r. 3, though one of law is not a substantial question of law, or a question of great public importance. So also the question of applying the law, O. 1, r. 3, to the facts of a particular case is not a substantial question of law of any importance. The questions relate only to such formal matters as the joinder of parties and causes of action. 46 L.W. 568=69 M.L.J. 497. High Courts in granting permission may impose conditions as to payment of costs. See 44 M.L.J. 217, *supra*. High Court in granting leave must also consider whether the subject-matter is above or below appealable value. See 2 L.W. 992=31 I.C. 46. The question whether fraud of the mortgagor would vitiate registration and disentitle the mortgagee to enforce his mortgage was a substantial question of law and fit for appeal to the Privy Council. 18 A.L.J. 137.

PROCEDURE.—Where there are separate appeals, and a joint application for leave to appeal in both cases is filed, *held*, (1) that a joint application is not sustainable, (2) that it is not open to the party to file another application out of time, and (3) that he can, however, amend the application by confining the prayer for certificate for leave to appeal to one of the cases. 140 I. C. 70=1932 L. 441. The applicant is not entitled as of right to appeal from an order passed on the revisional side of the High Court. 147 I.C. 1067=1934 A.L.J. 1166=1934 A. 198. Advisability of the legislature conferring a power upon the High Court to impose a condition in a fit case requiring the appellant to Privy Council to bear the costs of the appeal irrespective of the result of the appeal, at the time of granting leave to appeal to the Privy Council (at any rate in cases falling under S. 66-A (2), Income-tax Act) suggested. 163 I.C. 275=1936 S. 68. As to the correct frame of application for leave to appeal filed by one of the contributories of the wound up company, against the order of compulsory winding

up, see 165 I.C. 568=1936 L. 322 (F.B.).

SECS. 109 AND 110.—The effect of Ss. 109 and 110 is to give a proposed appellant an appeal as of right in cases where the value of the subject-matter of the suit and of the appeal are over Rs. 10,000 and the decree appealed from is not one of affirmance. On the other hand, where the decree of the High Court is one of affirmance, there is no right of appeal unless the appeal involves some substantial question of law. A.I.R. 1941 Pat. 269 (S.B.). It is difficult to regard Ss. 109 and 110, directed to prohibit an appeal being brought within a chief Court in like manner as a Letters Patent appeal is brought within a Chartered High Court. The two sections taken together seem rather to be intended to provide an appeal to His Majesty on the footing that no further appeal in India is provided. 66 I.A. 160=14 Luck. 252=43 C.W.N. 733=A. I. R. 1939 P.C. 122=(1939) 2 M.L.J. 181 (P. C.). Appeals from orders passed under S. 66 of the Income-tax Act cannot be regulated by Ss. 109 and 110, C. P. Code. 22 Pat.L.T. 341=1941 P.W.N. 267=A.I.R. 1941 Pat. 225.

SECS. 109 AND 112.—S. 109 is not only qualified by its opening words and by S. 111 but also by S. 112. It is plain from the terms of the Code that the Indian Legislature was not claiming or proposing to abridge or extend the prerogative. The discretion which S. 112 affirms and maintains applies to the rejecting as well as to the receiving of appeals and the prerogative is not wholly or finally concluded for either purpose by the provisions of S. 109. 66 I.A. 160=14 Luck. 252=43 C.W.N. 733=(1939) 2 M.L.J. 181 (P.C.).

SEC. 110: SCOPE OF SECTION.—The Madras Civil Courts Act (III of 1873) does not control the construction of this section. 15 M. 237 (F.B.). See also 42 I.C. 966=1917 P. 301 (Effect of N.W.F.P. and Assam Civil Courts Act, S. 21). Ss. 5 and 12 of the Limitation Act do not apply to applications under this section. 28 A. 391. The assent of the respondent to the issue of a certificate cannot give effect to it in the absence of the conditions required to give the right of appeal. 23 A. 227 (P.C.). See 32 C. 963. It must always be kept in view that no real mischief can arise from not allowing a very wide construction of S. 110 because such cases, if worthy of being tried by a higher tribunal, can always be dealt with under sub-S. (c) of S. 109 (52 C. 650, (P. C.) F.). Where the value of the subject-matter in dispute on appeal to His Majesty in Council was not upwards of Rs. 10,000 but the value was shown to be



## NOTES.

about Rs. 9750 and there were questions of law involved. *Held*, leave ought to be granted under S. 109, sub-S. (c). 178 I. C. 447=A.I.R. 1938 Rang. 415.

"DECREE OR FINAL ORDER MUST INVOLVE."—These words refer to suits in existence and not to suits in *gremio futuro*. 24 A. 236 (238).

CONCURRENT FINDINGS OF FACT.—No appeal lies to the Privy Council when there are concurrent findings upon questions of fact and when upon such findings no question of law arises. 27 I.A. 166=28 C. 1 (P.C.); 25 B. 332=10 M.L.J. 300 (P.C.); 28 I.A. 11=23 A. 227 (P.C.). *See also* 1927 M. 443=53 M.L.J. 375; 25 A.L.J. 970; 1931 P.C. 68=61 M.L.J. 456 (P.C.). It cannot be said that whenever the appellate Court varies the decision of the lower Court on any point then *ipso facto* S. 110 comes into operation irrespective of the nature of the intended appeal. Where the findings are concurrent there must be a substantial question of law to support an application for leave to appeal to Privy Council. 119 I.C. 771=31 Bom.L.R. 619=1929 B. 359.

AFFIRMS THE DECISION.—The word "decision" means merely the decision of the suit by the Court. In order to "affirm the decision of the Court below" it is sufficient to affirm the decree; it is not necessary to affirm the grounds of fact on which the judgment was passed. The appellate Court affirms the decision of the Court below although the reasons given by it are not the same as those of the lower Court in respect of some matters of fact. 25 A. 109 (P.C.); 30 C. 303 (P.C.); 20 A. 367; 20 B. 699, 703; 23 A. 415 (P.C.); 20 A. 118; 21 C. 523; 1 Bur.L.J. 215=1923 R. 55; 70 I.C. 283=25 O.C. 277=1923 O. 49; 63 I. C. 292=24 O.C. 164; 23 M.L.J. 219=16 I.C. 486; 31 C.W.N. 540=103 I.C. 561=1927 C. 481. *See also* 146 I.C. 744=1933 P. 703 (S.B.). In construing a decree as to whether it is one of affirmance or reversal or variation, one should look to the substance of the decree and see what is the subject-matter of the appeal to the Privy Council. 117 I.C. 193=1929 P. 561. Where both the Judges of the High Court agree on the merits with the judgment of the Court below, but differ as between themselves on a question of mere academic interest, leave should not on that ground be granted to appeal to His Majesty in Council. 178 I.C. 203. Where there are several decisions in respect of several subject-matters in the same suit, the decree embodying those decisions should not, by some fiction, be regarded as one and entire. The right way of construing S. 110 is to read the words "decree or final order" in the third clause in conjunction with, and to treat them as relating to, the subject-matter mentioned in the first clause. 44 L.W. 533=1936 M. 881=71 M.L.J. 580. A case where one

Court has relied on the oral, and the other on the documentary evidence is within the rule. 30 C. 303 (P.C.). A decree of the High Court dismissing an appeal for want of prosecution is a decree affirming the decision of the Court below. 20 A. 367. An order rejecting an appeal for failure to furnish security for costs is an order affirming the decision of the Court below. 54 A. 390=1932 A.L.J. 254=1932 A. 312. (5 I. C. 940, not foll.). Where the findings of fact of the Courts are in effect the same, the mere fact that the findings of the appellate Court do not in terms coincide with the findings of the original Court is immaterial. 21 C. 525; 22 P.R. 1915=26 I.C. 402. *See also* 1925 P.C. 122=48 M.L.J. 611 (P.C.). The question whether the judgment of the High Court is a judgment of affirmance or not does not depend upon whether the appellant is the plaintiff or defendant. It depends upon whether the judgment of the Court is one affirming the judgment of the lower Court. And this may clearly be seen by considering the position of the respondent. It is immaterial whether the effect of the modification is in favour of the appellant or adds to his detriment. 144 I.C. 320=1933 P. 262. An appeal lies from the decree and not from the judgment which is only the expression of the Court for making that decree. Extending period of grace in an appeal from a preliminary decree in a mortgage suit is not reversing the decree. 103 I.C. 703=1927 P. 379.

"AFFIRMING JUDGMENT."—The expression "the decision of the Court immediately below the Court passing such decree," as used in S. 110 means the same as the expression "decree of the Court below," and the word "decision" in the aforesaid expression means the decision of the trial Court taken as a whole. The true test for determining whether the High Court's decree affirms the decision of the lower Courts is whether the decision of the Court below as a whole has been affirmed by the High Court and not whether the decision on the point or points left in dispute have been affirmed by the High Court. Consequently, where the decree of the High Court reverses in part the decision of the lower Court whilst maintaining it with regard to the remainder of the claim, the decree of the High Court cannot be said to affirm the decision of the Court below and therefore an appeal to His Majesty in Council is competent even on points of concurrence between High Court and the lower Court without proving substantial question of law. A. I. R. 1941 Pat. 269 (S.B.). Where there is a judgment of the High Court, affirming the judgment of the lower appellate Court, there is no appeal to Privy Council. *See* 44 A. 200=20 A.L.J. 9=64 I.C. 916; 22 P.R. 1915=26 I.C. 402; 54 I.C. 400; 1937 Mad. 964=(1937) 2 M.L.J. 543. Even if the decree of the High Court affirms the decree of the Subor-



or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

## NOTES.

ordinate Judge, where the appeal involves substantial questions of law and the value of the subject-matter of the suit and of the appeal is above Rs. 10,000, the High Court is justified in granting leave to appeal to the Privy Council. 65 I. A. 182=I. L. R. (1938) All. 601=40 Bom. L. R. 811=A.I.R. 1938 P.C. 165=(1938) 2 M.L.J. 11 (P.C.); 9 R. 360=133 I. C. 494=1931 R. 283. Appellate decree modifying trial Court decree—Modifications trivial—Decree is one of affirmance. 1929 N. 85. Costs are a matter of discretion and a variation in this matter alone does not affect the question of whether the judgment of the appellate Court is or is not one of affirmance. 146 I.C. 744=1933 P. 703 (F.B.). When the appellate Court modifies the original decree upon a single point and that completely in the applicant's favour so that he has no further grievance in that matter, he cannot, because of that modification, have a right to appeal to the King in Council on other points on which the Courts have concurred, without showing a substantial question of law. 38 C.W.N. 1174; 15 P. 637=17 Pat.L.T. 602=1936 P. 553. But see 62 C. 175=39 C.W.N. 52=1935 C. 250; 156 I.C. 10=1935 O.W.N. 947=1935 O. 489; 1937 Mad. 964=(1937) 2 M.L.J. 543. Where the appellate Court affirms the decree of the original Courts as regards the subject-matter without any variation, but only reverses an order as to compensatory costs made by the original Court, the decree in appeal affirms the decision of the Court below within the meaning of S. 110, C. P. Code, and there is no right of appeal to the Privy Council in such a case unless the appeal involves a substantial question of law. 11 O.W.N. 1055=151 I.C. 307=1934 O. 433. Where there was a modification in part, appeal to Privy Council must be confined to such part; appeal cannot be directed to such portion of the judgment as was affirmed by the High Court. 44 A. 200. See also 139 I.C. 54=35 L. W. 206=1932 M. 46; 28 Nag.L.R. 142=140 I.C. 68=1932 N. 118; 43 A. 220=19 A.L.J. 3=64 I.C. 3; 31 C.W.N. 572=103 I.C. 65 (2)=1927 C. 543; 116 I.C. 541=1928 P. 609, where extension of period for redemption was held to be no modification. 106 I.C. 243; 1939 A.L.J. 736=1939 All. 723 (High Court on appeal increasing amount of compensation in land acquisition matter). Where the appellate decree affirms the decree of the lower Court in respect of all matters in dispute and modifies it only on a single point and that completely in favour of the applicant for leave to appeal upon the opposite party expressing his agreement that it should be so modified, the decree is one of affirmance, and the applicant cannot be granted leave to appeal to Privy Council in the absence of a substantial question of

law. 18 Lah. 268=A.I.R. 1937 Lah. 712. It would be anomalous to grant leave to appeal to His Majesty in Council to an applicant on matters in which a High Court has concurred with the trial Court on the mere ground that on other matters High Court has modified the decree of the trial Court but in favour of the applicant. A.I.R. 1937 Lah. 761. Where *cross-objections* have been allowed and the decree of the first Court varied to that extent, it cannot be said to be an affirming judgment. 1931 A.L.J. 968. See also 1930 L. 554=123 I.C. 523. Where two separate cross-appeals are filed in the High Court, one on behalf of the plaintiff against the dismissal of his claim and the other by the defendant in respect of that part of the claim which was decreed, and the defendant's appeal is allowed but the plaintiff's appeal is dismissed, the plaintiff has no right of appeal to His Majesty in Council as regards the decree dismissing his appeal. It does not follow that the decision in his appeal which is dismissed is not one of affirming simply because the cross-appeal by the defendant has been allowed and the adjudication varied so far as the matter in controversy in that appeal is concerned. 155 I.C. 487=1935 A.L.J. 352=1935 All. 374 (F.B.). Where there are several subject-matters comprised in the lower Court's decree, each should be regarded separately for deciding whether the High Court's decree is or is not an affirming decree under S. 110. A single decree may comprise several decisions, and each decision may relate to a distinct subject-matter. The decree embodying these several decisions in respect of different subject-matters cannot be regarded as one and entire. Consequently where the High Court reverses the decisions in respect of some, but affirms the decision in respect of others, the decree of the High Court is an affirming judgment and not a reversing one in respect of the subject-matters as to which the High Court affirms the decision of the lower Court. It cannot be held that because the decree has not been affirmed in its entirety, it cannot be regarded as an affirming decree on the ground that it is one and indivisible. 47 L.W. 393=A.I.R. 1938 Mad. 631=(1938) 1 M.L.J. 487. See also (1938) 1 M.L.J. 492. Where two appeals are preferred against the same decree one by the one party and the other by the other party, but one appeal is allowed and the other dismissed, though one decree is issued in the cases, it is in essence a document containing two decrees and in effect there are two decrees. The decree in the appeal which is dismissed is a decree of affirmance within the meaning of S. 110. No leave can be granted unless there is a substantial question of law involved. 52 L.W. 509=1941 Mad. 227=(1940) 2 M.L.J. 645. *Quære*.—Whether the two claims, one to property



and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

#### NOTES.

and the other to an account, are to be deemed two distinct subject-matters for the purpose of granting leave to appeal to the Privy Council under S. 110. A.I.R. 1937 Mad. 964=(1937) 2 M.L.J. 543. See also 1938 Mad. 598=(1938) 1 M.L.J. 492. Where the High Court on appeal enhances the amount decreed by the trial Court to the applicant for leave to appeal, the variation of the trial Court's decree is no doubt all in favour of the applicant, and he cannot have any appealable grievance against such variation, but nonetheless, the decree of the High Court is not one of affirmance. The applicant is, therefore, entitled to appeal to the Privy Council as of right without showing that some substantial question of law is involved. 40 P.L.R. 399=A.I.R. 1938 Lah 836.

THE FOLLOWING ARE AFFIRMING JUDGMENTS.—(1) Appeal dismissed for default. 29 I.C. 469=13 A.L.J. 633. (20 A. 367, Foll.) (2) Appeal dismissed with a variation as to costs. 34 C.L.J. 299=66 I.C. 407=1922 C. 316. See also 16 L.W. 262=1923 M. 30; 51 C. 869=51 I.A. 319 (P.C.); 114 I.C. 320. (3) Appeal dismissed for want of proper court-fees. 1 P.L.R. 1920=54 I.C. 400; 1940 O.W.N. 616=1940 Oudh 397; (4) Modification of lower Court decree with consent of appellant or his vakil, see 66 I.C. 621=25 C.W.N. 775. (5) Appeal dismissed as time-barred. 23 M.L.J. 219=16 I.C. 486. Partial variation of decree is not affirmance of judgment. 31 I.C. 272=1916 M.W.N. 122; 10 L. 688. So also where cross-objections are allowed. 1931 A.L.J. 968. A person in contempt cannot be heard in prosecution of his own appeal, until he purges his contempt, and his appeal, as it is not proper to keep the other party before the Court for an indefinite period, i.e., till he purges his contempt, can be dismissed. A petition, therefore, for leave to appeal to Privy Council against such dismissal is not maintainable. 117 I.C. 724=1929 M. 672. Even in case of affirmance of judgments, if the subject-matter is over Rs. 10,000 and there is a substantial question of law, an appeal lies to Privy Council as of right. 30 I.C. 372; 9 I.C. 1040. (10 O.C. 65, Foll.; 8 C.W.N. 294; 62 P.W.R. 1908, not foll.); 89 I.C. 941.

INTERLOCUTORY ORDERS.—No question of appeal to Privy Council arises in cases of interlocutory orders of High Court. 148 I.C. 54=1934 L. 26.

"COURT IMMEDIATELY BELOW."—A single Judge of the High Court is a Court "immediately below" the Division Bench of the High Court under section 110. 32 P.L.R. 833. Where a Bench of two or more judges has affirmed on a Letters Patent Appeal the judgment of a Judge of the High Court, sitting singly on the original side, the deci-

sion of the Single Judge is the decision of the Court immediately below the Court passing the decree or final order within the meaning of section 110. In such a case, a certificate of fitness for leave to appeal to His Majesty in Council can be granted only if the appeal involves some substantial question of law. 45 C.W.N. 1002.

SUBSTANTIAL QUESTION OF LAW.—As to the meaning of the words "substantial question of law," see 45 C.L.J. 458=103 I.C. 625=1927 C. 619; 17 C. 146; 18 C. 23; 18 I.C. 305; 36 I.C. 1; 68 I.C. 690=1923 R. 71; 85 I.C. 8=1924 P. 271; 106 I.C. 531; 1939 Income Tax Rep. 260; I.L.R. (1938) 1 Cal. 13; 1937 7 Pesh. 61; 1933 M. 221. See also 148 I.C. 1202=11 O.W.N. 577=1934 O. 291. It is sufficient that there should be a substantial question of law not of general importance but as between the parties. 14 L. 609=144 I.C. 18=1933 L. 690. Per *Courtney-Terrell, C.J.*—In order that a point may be a substantial question of law within the meaning of section 110 it should be such as to impress the High Court that it is debatable in view of the authorities or that the authorities themselves may require re-consideration. The mere fact that the Judges out of deference to the arguments exhibited patience in the hearing and care in the judgment does not establish that a point is substantial. Per *Mahomed Noor, J.*—A question of law does not become "substantial" simply because the Judges have stated and examined it in detail in order to show it has no substance. 146 I.C. 744=1933 P. 703 (S.B.). The existence of a point of law by itself does not give a right of appeal to the Privy Council under section 110. There must be a substantial question of law. The words "substantial question of law" do not mean a question of general importance but a substantial question of law as between the parties in the case. The question must be one in respect of which there may be a difference of opinion. 142 I.C. 711=1933 M. 221; 147 I.C. 121=10 O.W.N. 879. Where the question sought to be agitated before His Majesty in Council have been the subject of consideration by the Courts in the Punjab for a period of over 70 years and the Courts have uniformly arrived at one decision on them and the predecessor-in-interest of the petitioner was a party in several of the cases in which those questions arose and on the strength of those decisions titles have been created for a long time, no substantial question of law is involved in the appeal nor is the case otherwise fit for appeal to His Majesty in Council. 39 P.L.R. 972=A.I.R. 1937 Lah. 758. Where the legal principles governing the case do not admit of any doubt having been settled authoritatively by the highest tribunal and the real question is one of the application of these principles to the particular facts of the case, no "substantial question of law"



## NOTES.

arises, on which a certificate for appeal to His Majesty in Council can be granted. 165 I.C. 735. Where the legal principles such as were applied in the case are well defined a misapplication of such principles does not raise any substantial question of law. I.L.R. (1940) Nag. 29=1938 Nag. 482. Where the decision on a point is based on the clear language of a section of a statute in accordance with the view taken previously by several Benches of the High Court, it is hardly proper to treat the matter as involving a substantial question of law within the meaning of section 110. A.I.R. 1938 Mad. 631=(1938) 1 M.L.J. 487. In dealing with an application for leave to appeal to the Privy Council it is not part of the duty of the Court to prejudge the case on the merits, but at the same time it is the duty of the Court to determine where a point of law arises for discussion on appeal to the Privy Council, whether there is any substance in the point. 106 I.C. 362. Mere question of law is not substantial question of law. 106 I.C. 362; 16 L.W. 262=1923 M. 30; 121 I.C. 506=31 P.L.R. 17 (Question of limitation well-settled; 1933 M. 221 (Construction of deed is substantial question of law). *See also* 25 A.L.J. 970; 40 I.C. 110; 73 I.C. 407 (Question as to the applicability of section 47, Civ. P. Code, is not a substantial question of law); 26 Punj.L.R. 614. Question of law which is not doubtful or of general interest or without previous decisions of the Privy Council is not "substantial question of law". 85 I.C. 409=1925 O. 545. Where there is no doubt about legal principles, but only their application to particular facts of the case is questioned it cannot be said that there is substantial question of law. 165 I.C. 735 (L.). Substantial question of law means as between the parties in the case and not a question of general importance. 54 I.A. 126=102 I.C. 889=2 Luck. 93=1927 P.C. 110 (P.C.); 55 C. 944=32 C.W.N. 817=1928 P.C. 172 (P.C.); 128 I.C. 622=32 Bom.L.R. 1189=1930 B. 509. But *see* 53 B. 552=119 I.C. 782. Where no substantial question of law is involved, leave to appeal should not be granted. 16 A. 274 (P.C.). *See also* 28 C. 1 (P.C.); 25 B. 332 (P.C.); 23 A. 227 (P.C.). But *also see* 16 C. 287; 43 A. 513; 45 A. 667. The question whether the property in suit was a gift to the God or was an archaka service inam, which turns upon the effect of the inam proceedings and upon a construction of the various inam papers cannot be held to involve any substantial question of law so as to justify the grant of leave to appeal to His Majesty in Council. 47 L.W. 393=A.I.R. 1938 Mad. 631=(1938) 1 M.L.J. 487. The majority of cases between riparian owners give rise to questions of law. 106 I.C. 538. To justify the grant of a certificate for leave to appeal to the Privy Council a substantial question of law must be involved in the case, i.e., question of law in respect of which there is a difference of opinion. 43 A. 513=63 I.C. 837=19 A.L.J. 462. *See also* 45 A. 667=75 I.C. 100=1924 A. 66. Interpretation of Privy

Council decision is a question of general importance justifying appeal. 56 I.C. 526. *See also* 27 C.W.N. 204=1923 C. 451. Right of procession claimed by Mahomedans against Hindus is of general importance and fit case for appeal to Privy Council. 1930 A. 121=122 I.C. 415 (2). Where the proof of an alleged custom is confined to two documents, though their interpretation is challenged in appeal it could not be said that a substantial question of law is involved within the meaning of section 110, as the real question is whether the custom set up is proved or not and the interpretation of the documents was only incidental thereto. 1938 O. W.N. 1132=1939 O. 60. Where the subject-matter is less than Rs. 10,000 in value and the sole question is one of evidence the point is not one of general importance and interest to justify the grant of a certificate. 54 I.C. 463. The rejection of an application to receive additional evidence does not involve any substantial question of law. 21 C. 484. Misconstruction of a part of the evidence concerning facts is not a "substantial question of law" within the section. 30 I.C. 372. So also sufficiency of evidence to prove custom. 90 I.C. 270; 83 I.C. 180=1924 L. 473. Nor is the question of binding nature of document by widow on estate and reversioners. 103 I.C. 654. The mere question of construction of any particular document is not a substantial question of law within the meaning of section 110. 25 A.L.J. 970. *See also* 1933 M. 221; 40 I.C. 110; 14 I.C. 269; 25 O. C. 349=73 I.C. 407=1922 O. 214; 30 I.C. 372 (Misconstruction of evidence). *See also* 145 I.C. 549=1933 A.L.J. 172=1933 A. 561. The interpretation of a document may amount to a substantial question of law, but that will depend on the circumstances of each particular document. Where the language of a document is very simple, it does not involve any substantial question of law. 151 I.C. 307=11 O.W.N. 1055=1934 O. 433 (2); 83 I.C. 90=1925 O. 219. The construction of a difficult document such as an indemnity bond is a mixed question of law and fact and involves a substantial question of law so as to form a valid ground for leave to appeal to Privy Council. 103 I.C. 31=1927 M. 443=53 M.L.J. 375. High Court affirming judgment of lower Court—High Court ignoring rule regarding recitals in ancient documents—Case is fit for certification. 1929 M. 827. Construction of consent decree is not substantial question of law. 126 I.C. 719=51 C.L.J. 270=1931 C. 174. High Court dismissing appeal on appellant's failure to furnish security—Leave not granted. 36 A. 325=23 I.C. 532=12 A.L.J. 451. Whether a document was validly presented for registration is a substantial question of law. 18 I.C. 126. The question of rightful or wrongful exercise of its discretion by the High Court does not involve any substantial question of law. 46 B. 249=24 Bom.L.R. 196=1922 B. 11; 61 I.C. 131=8 O.L.J. 1. No appeal lies to the Privy Council, if the question of law which is the ground for appeal, has already been decided by the Privy



## NOTES.

Council, 30 I.C. 239; 1929 A. 339. Question concluded by authority—Likelihood of other estates being affected—Question not one of general importance. 1929 M. 780=57 M.L.J. 477. Substantial question of law—Decisions of High Court bearing on point—Correctness of the same questioned—Whether amounts to question of law. 7 R. 271=1929 R. 280. Where the point of law has been settled by a Full Bench so far as the Court in which leave for appeal is prayed, the fact that there is conflict between that Court and some other High Court does not render the case a fit one for appeal. 109 L.C. 167=1928 M. 488. Case relating to transaction common in the country—Law on the subject not clear question if can be certified. 28 Bom.L.R. 1437=100 I.C. 143=1927 B. 19. Where a matter is clearly settled by statute, certificate should not be granted. 160 I.C. 171=1936 O. W.N. 191. Where the law as to constructive *res judicata* has been applied (and correctly applied) to a set of facts concurrently found by two Courts in India, there is no such "substantial question of law". 157 I.C. 605=61 C.L.J. 69. Where the High Court in affirming a decision holds that under a clause in the memorandum of association, the directors of a company plainly had power to do a certain thing, and that such power was clear and manifest, and the whole case turns on the merits and is decided on the facts, it cannot be said that there is any substantial question of law involved in the appeal. 13 R. 774. Where, in the beginning, the plaintiff had made certain allegations which at a subsequent stage of the trial he changed and the High Court found that the new facts alleged by him were the correct facts, and having found them true, decreed the plaintiff's suit. *Held*, this was not a substantial question of law. 1935 L. 91=157 I.C. 1024; 1935 L. 302=16 L. 990. Question as to the nature of the estate acquired by a Hindu widow is not a substantial question of law. 1933 L. 1044. That a suit to set aside a decree obtained by fraud was brought by a person who was not a party to the suit in which that decree was passed is not a question of such public importance as to justify the issue of certificate under section 110. 14 I.C. 626=5 Bur.L.T. 13. No certificate can be granted to appeal to Privy Council when the Chief Court affirms the decision of the Court next below solely on facts as there was no substantial question of law and the case was not otherwise fit for appeal to Privy Council. 35 I.C. 583=64 P.R. 1916. On this point, *see also* 41 I.C. 781=133 P.L.R. 1917; 63 I.C. 222; 11 I.C. 159=13 C.L.J. 501; 62 I.C. 205=33 C.L.J. 131; 26 C.W.N. 651=70 I.C. 933=1923 C. 215; 30 I.C. 372. *See also* 45 I.C. 182 (Question of limitation); 38 I.C. 141. *See also* 102 I.C. 433=4 O.W.N. 163. Question of intention of legatees attesting will is not substantial question of law. 88 I.C. 579=1925 O. 541. In appeals to the Privy Council in partition suits, the question of valuation itself is one of sufficient importance for allowing leave to appeal. 155 I.C.

633=16 P.L.T. 279=1935 P. 266; 1938 Mad. 666=(1938) 1 M.L.J. 728. The condition laid down in the second paragraph of section 110, is independent and self-sufficient and is not in any way dependent on the fulfilment of both or either of the conditions in the first paragraph. The requirements of the second paragraph will be complied with, if there is some claim or question directly, or indirectly involved by the High Court's order either as to or respecting property of Rs. 10,000 or upwards. Where the plaintiff claims to enforce a charge and obtain a decree for sale with option to sell any part of the mortgaged property, there would be an appeal as of right under the second paragraph, if the total value of the property sought to be sold exceeds Rs. 10,000, even though the pecuniary liability of the property is limited to a sum less than Rs. 10,000. 1937 A.L.J. 38=I.L.R. (1937) All. 405=A.I.R. 1937 All. 169.

VALUATION.—The conjunction "and" between (a) and (b) cannot be read as "or" so that besides the value of the subject-matter of the suit the value of the property has to be considered both at the time of the institution of the suit and at the time of the decree of the High Court. The words "subject-matter" and property are not synonymous. The latter word is used with a view to indicate property not in suit or dispute, which may be directly or indirectly involved. 1929 N. 75; 53 M. 167=1930 P.C. 44 (P.C.); 54 A. 431=140 I.C. 418; 1937 R.D. 198; 1932 A.L.J. 838; 35 C.W.N. 669=1931 P.C. 125=61 M.L.J. 273 (P.C.). Where the plaintiff applies for leave to appeal to the Privy Council, it is not open to him to allege that the valuation given by him in his own plaint was too low and ask for its enhancement for the purposes of S. 110. 1939 A.L.J. 751=A.I.R. 1939 All. 695. If the decision in a suit for rent goes to the root of the contractual relation between the parties and determines the rights and liabilities of the parties on the basis of the lease for all time to come, the real value of the subject-matter of the suit could be taken to be beyond its apparent value. But this principle has no application where what the Court decides in substance is that there was failure on the part of the landlord to put the tenant in possession of some part of the demised land, and for the period in suit, he is entitled to reduced rent corresponding to the area in actual possession of the tenant. In such a case, the sum of money actually at stake in the suit would represent its true value. 43 C.W.N. 239. "Property" in S. 110, second para., need not necessarily be the subject-matter in dispute in the suit. 138 I.C. 670=1932 A.L.J. 730. But *see also* 9 R. 53=1931 R. 183. The word 'property' in the second paragraph of S. 110 must be taken to be the property of the applicants and it is the extent to which the decree has operated to the prejudice of the applicants that determines the value of the property for the purpose of the section. In a suit by



## NOTES.

some of the heirs of a certain person for maintenance allowances, the plaintiffs are entitled to rely only upon the value of their own share and not upon the value of the entire monthly allowances payable to all the heirs, when the other heirs, though made parties, have not made any claim. In such circumstances, it cannot be said that the decision in the suit will involve directly or indirectly the interests of others who have made no claim. 43 C.W.N. 432. The words "some claim or question to or respecting property, etc." in para. 2 of S. 110 must be interpreted to mean some claim or question to or respecting property additional to or other than the actual subject-matter in dispute in the appeal. The words cannot be construed to mean that if there were an increase in the value of the property between the date of the trial and the date of the appeal, so that property which was worth less than Rs. 10,000 at the time of the original suit was worth more than that sum at the time of the appeal, there would for that reason be a right of appeal to the Privy Council. That would be a result which the legislature did not evidently intend. I.L.R. (1937) Bom. 402=39 Bom. L.R. 332=A.I.R. 1937 Bom. 326. For the purpose of ascertaining the amount or value of the subject-matter of the suit in the Court of first instance, it is necessary to ascertain the amount or value, or the subject-matter of the suit at the date of the institution of the suit. [53 M. 167 and 10 P. 86 (P.C.), Ref.] 12 R. 164=149 I.C. 1033=1934 R. 65. And not at date of decree. 38 P.L.R. 767=1936 L. 31 (57 I.A. 56, Foll.) The value referred to in this section is the market value; and where under the Court-Fees Act or otherwise a plaint or memo. of appeal is not required to be valued according to the real market value, but is allowed or required to be valued upon some other basis, the doctrine of "approbate and reprobate" does not apply, and the party can rely on the real market value for purposes of appeal to Privy Council. 58 C. 66=132 I.C. 910=1931 C. 417. See also 39 Bom. L.R. 332=1937 Bom. 326. Section applies to the value of an annuity which is sought to be recovered, not the value of the property upon which that annuity is charged. 45 M.L.J. 253 (P.C.); 28 C.W.N. 289=45 M.L.J. 253=1923 P.C. 102 (P.C.). See also 46 I.C. 576=22 C.W.N. 282 (P.C.). The market value of immovable property is usually determined with reference to instances of sales. The multiples prescribed by the Encumbered Estates Act were fixed for the purposes of that particular Act and as such they cannot be made the basis of calculating values of properties generally. 1938 O.W.N. 1101=178 I.C. 250=1939 O. 1. It is the extent to which the decree or order has operated to the prejudice of the applicant for leave that determines whether the decree

or order is subject to appeal or not, and whatever may be the value of the property in respect of which a claim or question is involved in the appeal, no appeal lies under S. 110 unless the value of the loss or detriment which the applicant has suffered by the passing of the decree or order, and from which he seeks to be relieved by His Majesty in Council, is Rs. 10,000 or upwards. Where the application is for leave to appeal against an order of the High Court dismissing a petition for adjudication of an alleged debtor, the value of the petitioning creditors' debts is not the criterion to be applied, nor is the value of the debtor's estate as a whole. The question that falls for determination is, has the applicant been able to satisfy the Court that he has suffered loss or detriment of the value of Rs. 10,000 by reason of the decree or order from which he seeks to obtain leave to appeal. 12 R. 355=1934 R. 292. See also 1933 O. 397. Valuation of subject-matter—Counter-claim more than Rs. 10,000—Effect of appeal from portion of decree. 38 A. 488=31 M.L.J. 571=35 I. C. 939 (P.C.) (Cause of action different against several defendants). See 16 L.W. 262=1923 M. 30. Where the construction of an agreement between the parties embodied in a compromise decree is in dispute and the decision of the High Court affects the interest of a party in the suit property, which is of far greater value than Rs. 10,000, that party is entitled to a certificate under the second clause of S. 110, C.P. Code, permitting an appeal to His Majesty in Council. I.L.R. (1939) Mad. 838=A.I.R. 1939 Mad. 742=(1939) 2 M.L.J. 36 (2). Not only must the value of the suit exceed Rs. 10,000 but the subject-matter of the appeal to the Privy Council should be Rs. 10,000 or over in value. 24 A. 174. The part decreed by the High Court could not be included for purposes of valuation by plaintiff. 57 I.C. 40. The mere fact that the history of the property in dispute was the same as another valued at more than Rs. 10,000 would not bring it under S. 110 of the C.P. Code so as to give the applicant a right of appeal to His Majesty in Council. 26 I.C. 6. The value of the subject-matter of the suit in the Court of first instance must also be Rs. 10,000 or upwards. 39 M. 843=30 M.L.J. 317=31 I.C. 296. (24 A. 174, Foll.) Where the plaintiffs had estimated the market value of the property in dispute at Rs. 2,500 for purposes of court-fee of first instance and on appeal they could not be allowed to change their valuation for the Privy Council. 43 M.L.J. 728=69 I.C. 385=1923 M. 125; 34 C.W.N. 671=128 I.C. 108=1930 C. 737. As to when plaintiff may be allowed to vary the valuation for purposes of appeal to Privy Council, see 41 C.W.N. 289. For the purpose of valuation for a Privy Council appeal the value at the date of a decree is to be considered and not the value at the institution of the suit. 44 C.



## NOTES.

119=35 I.C. 605=21 C.W.N. 530. *See also* 1932 L. 526=138 I.C. 37. Appeal lies where the amount indirectly involved is more than Rs. 10,000. 35 A. 445=21 I.C. 617. The question whether a decree involves indirectly a claim to property worth more than 13,000 rupees in value must be decided with reference to actual circumstances at the time and not to circumstances which are remote, and not in particular to a mere possibility that future suits as to all or part of a large extent of the property alleged to be concerned may be instituted at some time in the future. 43 M.L.J. 728=69 I.C. 385=1923 M. 125; 84 I.C. 581=1923 C. 451; 52 C. 650 (P.C.). The value of the subject-matter must be taken to be the amount or value which the plaintiff obtained or would have obtained had he been successful at the time when the decree was passed. 60 I.C. 523=2 Pat.L.T. 340; 6 Bom.L.R. 403. To determine the value prescribed by section 110 of the C.P. Code the decree has to be looked at, as it affects the interests of the parties prejudiced by it. 4 Pat.L.J. 415=52 I.C. 723=1919 P. 257. In a suit for possession of a garden on the basis of a lease, the plaintiffs claimed possession and in the alternative the refund of premium or salary paid by them and costs of the improvements effected by them. The suit as well as the appeal to the High Court was valued at Rs. 10,000 which was not disputed by the defendants either in the written statement or at any stage of the trial. The plaintiffs, however, were given a decree only for 1/3 share of garden. The defendants applied for leave to appeal to the Privy Council and the plaintiffs objected, pleading that the subject-matter of the appeal would be only of the value of 1/3 of Rs. 10,000. *Held*, that as the original claim in the alternative was for refund of Rs. 10,000, the question whether that amount should or should not be refunded to the plaintiffs would also be a question in the contemplated appeal in case the Privy Council should think fit and proper to dismiss the claim for possession and hence the matter involved was of the requisite valuation. 157 I.C. 605=61 C.L.J. 69. A party taking advantage of the other party's valuation cannot object to it. 104 I.C. 577=1927 M. 862; *see also* 1941 Pat. 269 and plaintiff's own valuation does not absolutely bar him from setting up higher valuation. (*Ibid.*) *Also* 31 C.W.N. 268=99 I.C. 921=1927 C. 225. The mere fact that a lower valuation was put on the plaint for the purposes of Court-fee does not operate as estoppel against the plaintiff for the purposes of a Privy Council appeal so as to prevent him from showing that the real value of the subject-matter in suit in the Court of first instance was Rs. 10,000 or upwards, provided the question of valuation has not been raised and decided at an earlier stage by the Court and provided also the defendant has not been

led to act upon such valuation for the purpose of choosing forum for his appeal. 41 C.W.N. 289=64 C.L.J. 561=A.I.R. 1937 Cal. 292. In a suit for a permanent injunction and declaration, which the plaintiff had to value, for purposes of Court-fees at the actual or market value and did value in a particular way in his plaint at Rs. 2,250, and was thereby able to begin the suit in the Subordinate Judge's Court, is precluded from going back upon such valuation and from showing that the former valuation was not real or from settling up a higher valuation for the purpose of an appeal to the Privy Council so as to bring it within section 110 (1). 59 C.L.J. 448=38 C.W.N. 751. *See also* 1931 C. 417=58 C. 66=132 I.C. 910. Where the parties did not agree as to the valuation, and the Court upheld plaintiff's contention and held that the value was less than Rs. 10,000 and the suit was fought on that footing, *held*, it was open to the plaintiff to show that the value was more than Rs. 10,000 so as to entitle him for leave to appeal to Privy Council. 133 I.C. 415. *See also* 58 C. 66=1931 C. 417=132 I.C. 910; 22 Pat.L.T. 284; 34 L.W. 817=61 M.L.J. 692. The rules under the Suits Valuation Act in accordance with which the land is valued for the purposes of jurisdiction do not apply in determining the value for the purpose of section 110, but it is the market value which has to be ascertained. 6 A.L.J. 44; 75 I.C. 520=4 L. 185=1924 L. 82. *See also* 10 I.C. 990=13 C.L.J. 505; 75 I.C. 654=1923 L. 286 (2); 58 C. 66=132 I.C. 910=1935 C. 417. In cases of probate proceedings regarding estate of value of over ten thousand rupees leave can be granted. 99 I.C. 759 (1)=5 R. 119=1927 R. 56. The subject-matter of a suit in the Court of the first instance was less than Rs. 10,000. In order to make up the prescribed valuation it was sought to add the amount of the decree for mesne profits of the property, which decree was obtained in a separate suit. *Held*, that the decretal amount could not be added so as to increase the value of the appeal to the Privy Council as it did not fall within Cl. 2, section 110. (39 M. 843 and 57 I.A. 56, Rel. on.) 38 P.L.R. 767=1936 L. 31. Future mesne profits should be taken into consideration in assessing the value of the subject-matter for the purposes of section 110. 6 Pat.L.J. 246=63 I.C. 492. *See also* 3 Pat.L.J. 377=46 I.C. 137; 2 Pat.L.T. 463=62 I.C. 959=1921 P. 229; 32 C. 1286; 38 C. 400; 18 A. 196; 107 I.C. 828. Arrears of pension accrued due may also be added. 44 I.C. 475=3 Pat.L.J. 317. Costs of suit cannot be added to swell up valuation. 6 P. 444=104 I.C. 267=1927 P. 328. Under section 110 the value of the subject-matter of the suit is real market value. The fact that for the purpose of stamp duty the plaintiff under the option given to him by section 7 of the Court-Fees Act valued it at less than its market value cannot deprive him



## NOTES.

of his right to appeal to the Privy Council. 5 L.W. 542=39 I.C. 911. (15 M. 237; 31 I.C. 401, Foll.) See also 58 C. 66=1931 C. 417. Where a suit is to declare the non-liability of certain property valued at over Rs. 10,000 to attachment and sale in execution of a decree for an amount less than Rs. 10,000 leave to appeal to Privy Council could not be granted as the test laid down by para. (2) of section 110 is not satisfied by the case. 1941 O. W. N. 562. An appellant is entitled to challenge the decision of the High Court even if the High Court has modified in his favour a decision of the trial Court, where the amount involved is Rs. 10,000 or upwards. Where the trial Court awarded interest to the plaintiff which amounted to Rs. 18,700 and the High Court on appeal by the defendant reduced only the amount of interest to Rs. 12,380 and the defendant denies his liability for interest, since the decision of the trial Court in regard to the extent of the liability has been modified by the High Court the defendant is entitled to a certificate under section 110. 1940 A.L.J. 869 (F.B.). Approbate and reprobate—Suit and appeal valued below Rs. 10,000—Valuation found defective and appeal re-valued at over Rs. 10,000 without objection by defendant—Latter relying on re-valuation cannot object to valuation later. 1941 Pat. 269. Value of subject-matter in appeal—Decree for trial Court for amount less than Rs. 10,000—Award for future interest and costs amounting to over Rs. 10,000—Defendant appealing—Dismissal of suit by High Court—Application for leave to appeal—Valuation—Interest and costs awarded by trial Court not to be taken into account. 20 Pat. 481=22 Pat.L.T. 363=1941 Pat. 255. Appeal and cross-appeal—Appeal dismissed and cross-appeal allowed—Value of cross-appeal being less than Rs. 10,000—No leave to appeal to Privy Council to be granted. 123 I.C. 523=1930 L. 554. See also 1931 A.L.J. 968; 1 I.A. 317; 45 C.L.J. 225. Where decrees obtained in a number of rent suits follow a single judgment and the total amounts recoverable are more than Rs. 10,000, though the amount involved in each decree is small, the condition as to pecuniary value is satisfied and special leave can be granted. 22 I.C. 390=1914 M.W.N. 162. See also 28 Bom.L.R. 1437=100 I.C. 143=1927 B. 19. Valuation of mortgage suit. See 25 O.C. 349=73 I.C. 407=1922 O. 214. Valuation when there is variation in appeal. 3 Pat.L.T. 550=66 I.C. 663=1922 P. 555. Valuation of suit for damages. See 66 I. 606=11 L.B.R. 152. In a suit for damages for libel, plaintiff cannot ensure an appeal to the Privy Council by merely placing his damages at a high figure. 9 C.W.N. 370. In a suit for partition, the value of the matter in dispute is the value of the whole estate sought to be partitioned. 10 C.W.N. 564. See also 29 I.C. 759=140 P.L.R. 1915 which

distinguished. 10 M.I.A. 252; 10 C.W.N. 564 and 6 C.W.N. 411. But see contra 26 Bom.L.R. 1261, *infra*. In partition and partnership suits it is the value of appellant's share and not the value of the whole property that determines valuation. 49 B. 149=1925 B. 137=26 Bom.L.R. 1261. But see 138 I.C. 670=1932 A.L.J. 730 in which it was held that in a suit for partition, the value of the whole estate is the value to be taken into account when considering whether leave to appeal to Privy Council should be granted. Where the High Court refuses to issue a *mandamus* in an income-tax case under section 66 (3) of the Income-tax Act, and the value of the subject-matter is over Rs. 10,000 there can be an appeal to Privy Council. 12 L. 166=1931 L. 138 (F.B.). See also 22 Pat.L.T. 341. Valuation in suit for enhanced rent. 1925 C. 414=82 I.C. 744; 47 M. 927=47 M.L.J. 379. In a suit for enhancement of rent the value for purposes of appeal to Privy Council is twenty times the enhancement decreed in the suit. 128 I.C. 622=32 Bom.L.R. 1189=1930 B. 509. Contract of sale—Price payable or consideration is its value. 1929 N. 75. The second paragraph of section 110 is intended to deal with property other than that forming part of the actual subject-matter in dispute and which would be affected by the final decree or order. If a decree affects the petitioner's rights in or to such other property, that may be taken into consideration in estimating the amount or value of the subject-matter in dispute on appeal to His Majesty in Council. 66 I.C. 606=11 L.B.R. 1. See also 106 I.C. 538. But see 160 I.C. 799=1936 O.W.N. 181=1936 O. 181. In a mortgage suit the amount payable to a puisne mortgagee who is a party to the suit can also be added to ascertain value of appeal. 103 I.C. 831=1927 P. 391. Suit on mortgage—Trial Court decreeing suit in respect of certain items of properties and dismissing it with regard to others—High Court directing on appeal dismissal of entire suit—Not an affirming judgment. 44 C.W.N. 494. The fact that the appeal involves a mere question of law is no ground for granting leave in cases where the value is less than Rs. 10,000. 23 A. 415. Suit for Rs. 34,300—Decree for Rs. 11,950—Appeal to High Court by both parties—Dismissal of plaintiff's appeal—Defendant's appeal allowed in part and amount reduced at Rs. 6,080—Leave to appeal—Grant of, not proper. 1937 Lah. 916. "Involving question respecting property of the value of Rs. 10,000 or upwards"—Partition suit—Share valued at Rs. 5,500—Decree awarding share to plaintiff and to one defendant—Appeal—Reversal and dismissal of suit—Shares of plaintiff and of one defendant to be taken into account for purposes of valuation for leave to appeal to Privy Council. 39 Bom.L.R. 156=1937 Bom. 181.

INTEREST AND COSTS.—In calculating the



## NOTES.

valuation of the suit in the Court of the first instance *interest pendente lite* with *future interest* up to the *dies datus* might fairly be taken into account. In determining the value, however, the costs of the original suit cannot be taken into account. 28 N.L.R. 345; 12 R. 164=149 I.C. 1033=1934 R. 65. See also 20 Pat. 481=1941 Pat. 255. As to adding costs, see 6 P. 444=1927 P. 328=104 I.C. 267. As the award of interest subsequent to the date of suit was entirely discretionary to the Court and as the plaintiff would not be entitled to it as a matter of legal right, it could not, in the strict legal sense, be deemed to be part of "the subject-matter in dispute on appeal" within the meaning of section 110 of the C. P. Code. (It would be different in the case of a defendant; but he should appeal against the whole decree, including interest *pendente lite*.) (42 A. 445, Ref.) 64 M. L.J. 496=1933 M. 401=56 M. 886. Where a trial Court grants a decree on a mortgage, but the Court of appeal while affirming the validity of the mortgage, varies the rate of interest decreed but the amount of variation is less than Rs. 10,000 leave to appeal to the Privy Council cannot be granted, for the question of interest is not of sufficient value to amount to Rs. 10,000 and as to the validity of the mortgage the findings of both the Courts were concurrent. I.L.R. (1939) All. 443=1939 A.L.J. 62=A.I.R. 1939 All. 322.

**MESNE PROFITS.**—Future mesne profits may be taken into consideration in assessing the value of the subject-matter for purposes of this section. 63 I.C. 492=2 Pat.L.T. 675; 46 I.C. 137; 62 I.C. 959.

**"DIRECTLY OR INDIRECTLY INVOLVED."**—The condition laid down in para. 2 of the section is independent and self-sufficient and does not depend on fulfilment of both or either of the conditions in the first para. 1937 A. L.J. 38=1937 A. 169=I.L.R. 1937 All. 405; 1937 Lah. 95. The mere possibility of similar litigation in the Presidency will not entitle the petitioner to add to the value in one case that of the other cases as "*indirectly involved*" unless the other litigation will be affected by *res judicata*. 34 L.W. 817=61 M.L.J. 692 following 57 M.L.J. 477. Under section 110, the question whether a decree involves indirectly a claim or question respecting property the value of which is Rs. 10,000 or upwards, must be decided with reference to actual circumstances at the time and not to circumstances, which are remote, and not in particular to a mere possibility that future suits as to all or part of the larger extent of the property alleged to be concerned may be instituted at some time in the future. (43 M.L.J. 728, foll.) 42 C.W.N. 298. See also 54 A. 431; 38 P. L.R. 767=1936 L. 31; 1937 L. 95.

**CONNECTED CASES.**—Where in two connected suits the points are identical but one only exceeds Rs. 10,000 in value and is certified as fit for appeal to the Privy Council,

the other suit should also be similarly certified though its subject-matter is less than Rs. 10,000 in value. 43 A. 223=18 A.L.J. 1119=59 I.C. 794. See also 48 I.C. 124=16 A.L.J. 864; 33 I.C. 369=13 A.L.J. 1075. Connected appeals—Certificate given in one—Other also entitled to appeal. 27 I.C. 378=13 A.L.J. 57=37 A. 124. See also 50 I.C. 760=23 C.W.N. 582; 10 I.C. 967 (1)=13 C.L.J. 503. Appeal to Privy Council—Appeal and memo. of objections to High Court—If one proceeding or different proceedings. 52 M. 521=1929 M. 429.

**CONSENT DECREE.**—No appeal lies against a consent decree to His Majesty in Council and leave to appeal cannot be granted. 5 Pat.L.J. 383=57 I.C. 245 (2). But see 6 Pat.L.J. 171=62 I.C. 235=1921 P. 193.

**DISCIPLINARY PROCEEDINGS.**—Section 39, Letters Patent, empowers the High Court to declare the fitness of an appeal in a non-criminal matter, if it is a final judgment or order, of the Court made on appeal or in the first instance. A proceeding under Cl. 10, Letters Patent, does not fall under any of the jurisdictions specified in the Letters Patent, Cl. 39, and therefore no leave to appeal could be granted. 41 C. 734=15 C.L.J. 383=19 C.W.N. 593. Proceedings under Cl. 8 (Rangoon), Letters Patent, against legal practitioner—Leave to appeal cannot be granted. 8 R. 40. Proceedings for contempt in respect of a newspaper article by an advocate and published by the editor of the paper, in which the persons guilty of contempt are convicted and sentenced, are in the exercise of the inherent jurisdiction of the High Court and of a criminal nature. They are not of a civil or administrative character. The matter is of an exclusive jurisdiction and the order is final. Neither section 109 nor section 110, C.P. Code, applies to the case. 155 I.C. 188=1935 A.L.J. 810=1935 A. 811.

**PRACTICE AND PROCEDURE.**—See 1925 M. 1223=49 M.L.J. 309; 26 Punj.L.R. 123=1925 L. 468. Where leave to appeal is granted the certificate granting leave should show on its face that discretion of the Court was invoked and exercised. 25 C.W.N. 770; 6 Pat.L.J. 163; 2 Pat.L.T. 132=62 I.C. 320=13 L.W. 365 (P.C.). Under section 110 (2), C.P. Code, the question directly or indirectly involved must be one between the parties to the suit. 93 P.R. 1913=21 I.C. 624. The High Court has no jurisdiction to grant leave to appeal to the Privy Council *in forma pauperis*. 44 I.C. 731=3 Pat.L.J. 179. See also 42 M. 32=35 M.L.J. 258; 115 I.C. 832. If the appellant takes up a new position while appealing to Privy Council leave cannot be granted. 58 I.C. 179.

**LEAVE TO APPEAL.**—Grounds—Point not allowed to be raised for the first time in second appeal. 76 I.C. 516=1923 A. 463. Decree of High Court partly affirming and partly reversing decree of lower Court. 66 I.C. 721=1923 A. 243. See also as to



Bar of certain appeals. 111. Notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council—

(a) from the decree or order of one Judge of a High Court <sup>1</sup>[constituted by His Majesty by Letters Patent], or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court at the time being; or

(b) from any decree from which under section 102 no second appeal lies.

<sup>2</sup>[111-A. Where a certificate has been given under section 205 (1) of the Government of India Act, 1935, the three last preceding sections shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council, and accordingly references to His Majesty shall be construed as references to the Federal Court:]

Provided that—

(a) so much of the said sections as delimits the cases in which an appeal will lie shall be construed as delimiting the cases in which an appeal will lie without the leave of the Federal Court otherwise than on the ground that a substantial question of law as to the interpretation of the said Act, or any Order in Council made thereunder, has been wrongly decided;

(b) in determining under clause (c) of section 109 whether the case is a fit one for appeal, and, under section 110, whether the appeal involves a substantial question of law, any question of law as to the interpretation of the said Act, or any Order in Council made thereunder, shall be left out of account.]

Savings. 112. (1) Nothing contained in this Code shall be deemed—

(a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or

(b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee.

#### LEG. REF.

<sup>1</sup> Substituted for "established under the Indian High Courts Act, 1861, or the Government of India Act, 1915" by A.O., 1937.

<sup>2</sup> Section was inserted by A.O., 1937.

#### NOTES.

affirming judgments 62 I.C. 71=10 L.B. R. 307 and cases cited under section 109. See also 2 Pat.L.T. 173=60 I.C. 500=1921 P. 129 (Defendant taking no interest in the proceedings).

SEC. 111: SCOPE AND APPLICATION OF SECTION.—Section 111 applies to a single Judge of a High Court established under the Charter Act, 1861. 42 I.C. 893=131 P.L.R. 1917. Even where leave to appeal from it to Division Bench has been rejected. 160 I.C. 150 (1)=17 Pat.L.T. 173=1936 P. 106. Appeal from a single Judge acting in revision does not lie. 46 M. 958=46 M. L.J. 117=1924 M. 399. No appeal lies to Privy Council from the decree or order of one Judge of High Court passed in the exercise of either appellate or revisional jurisdiction. 33 Bom.L.R. 1106=134 I.C. 1164=1931 B. 503. (13 C.L.J. 90; 13 C.L.J. 691; 6 P.L.J. 116, Not foll.; 56 C. 512; 46 M. 958, Foll.).

SEC. 112.—See 1939 P.C. 122=(1939) 2

M.L.J. 181 (P.C.). The Code does not limit the prerogative right of the Crown to admit appeals, where leave to appeal is refused by the High Court. 15 B. 155. Where a question of great public importance arises, special leave to appeal will be granted, even though the subject-matter in dispute is under the appealable value. 8 M. I.A. 1. Also where an important principle of law is involved. 8 M.I.A. 203. In 1 I.A. 72 special leave was granted to try the question whether a District Court can review an order refusing to register a document. See Notes under sections 109 and 110. As regards the power of the High Court to grant an extension of time for furnishing security in Privy Council appeals in so far as there is any conflict between Act XXVI of 1920 and O. 45, R. 7, C.P. Code, on the one hand and R. 9 of the Privy Council Rules on the other, the Privy Council rule must prevail by reason of this section. 101 I.C. 555=51 B. 430=1927 B. 217 (F.B.). Under R. 9 of the Privy Council Rules, High Court has power not only to extend the time for making the deposit and for furnishing the security, but also to change the form of security. 132 I.C. 438=33 Bom.L.R. 487=1931 B. 278. But as a matter of practice, High Court will be



(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

## PART VIII.

### REFERENCE, REVIEW AND REVISION.

113. Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit.

Review.

114. Subject as aforesaid, any person considering himself aggrieved—

### NOTES.

reluctant to change the form of security except for good cause. 1931 B. 278.

SEC. 113.—Where it was difficult to hold that the Judge making the reference entertained any reasonable doubt as to what his decision should be or as to what decision was correct, but the respondent withdrew any objection on this ground, as he said the questions that arose would affect a very large amount of money, reference was entertained. 1 R. 220=1923 R. 193. On this section, *see also* 14 I.C. 782=14 Bom.L.R. 259 (Powers of Collector). Reference ought not to be made in a case covered by authority. 1927 M. 1186. Deputy Commissioner is not a Court within the meaning of section 113 read with O. 46. 5 O.W.N. 891=1928 O. 485. The right of reference given by section 113 is a substantive right and not a mere matter of procedure. Unless this power is given specifically by statute, a Court has no power to make a reference. The proceedings under the Relief of Indebtedness Act are not 'suits' and as they are neither 'suits' nor 'appeals' nor proceedings in execution of a 'decree', the provisions of O. 46, R. 1 are not attracted. Hence the Court acting under section 20 of the Relief of Indebtedness Act has no power of making a reference to the High Court and the High Court has no jurisdiction to entertain a reference. 1941 N.L.J. 485=I.L.R. 1941 N. 588.

SEC. 114: REVIEW—WHEN CAN BE ALLOWED—SCOPE OF SECTION.—Section 114 has to be read with O. 47, R. 1 which prescribes the grounds upon which an application for review may be made; and unless the case can be shown to be within the terms of this rule, a review ought not to be granted. O. 47, R. 1 must be read as in itself definitive of the limits within which review is permitted and the words "any other sufficient reason" must be taken as meaning a reason sufficient on ground at least analogous to those specified immediately previously. (49 I.A. 144, Foll.) 151 I.C. 41=1934 P.C. 213=67 M.L.J. 608 (P.C.). Though both section 114 and O. 47, R. 1 are general in their terms and apply to second appeals, yet it is not open to the High Court to entertain an application for review in a second appeal on the ground of discovery of material evidence, especially when the applicant

for review is not shown to have acted diligently in the matter. 1939 P.W.N. 909=A.I.R. 1940 Pat. 197. An obvious and patent error of law might be a good ground for review, but where there is no such blunder, no review lies. The High Court reversed the decree of the lower Court on the fact which was not disputed but on explanation as to the description of a certain payment made by the appellant. The respondent put in an application for review on the ground that a new contention was put forward. *Held*, that there was no new contention and that review should not be allowed. 1933 R. 85=146 I.C. 946. It is a wrong procedure for a lower Court to review its former order merely on the ground that a ruling of the High Court had not been brought to its notice on the previous occasion. 132 I.C. 815=1931 A.L.J. 889=1931 A. 91. *Held*, by the majority of the Full Bench (*Mukerji, J.*, dissenting), that an application for review of the judgment passed by a Bench hearing an appeal under the Letters Patent from the decision of a single Judge would not lie. 53 A. 535=1931 A. 244 (F.B.). (1 A.L.J. 509 and 16 A.L.J. 964, Appr.) Per *Banerji* and *Bennet, JJ.*—Procedure is one thing and jurisdiction is another. There is a clear distinction between procedure and jurisdiction. A Bench hearing a Letters Patent appeal derives its jurisdiction to hear the appeal from the Letters Patent and not from the Code, because the Letters Patent provide that such an appeal should lie to a Bench and the Code makes no such provision and as section 114 is not intended to provide for the review of judgments passed in the exercise of jurisdiction derived from other laws no review is competent. (Case-law discussed.) 53 A. 535=132 I.C. 24=1931 A. 244 (F.B.). *See also* 134 I.C. 630=1931 P. 409.

SEVERAL STAGES IN REVIEW PETITION.—A review proceeding ordinarily commences with an *ex parte* application. The Court then may either reject the application at once or may grant a *rule* calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or discharged and the hearing of this rule may involve to some extent an investigation into the merits. If the rule is discharged the case ends. If



(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,  
 (b) by a decree or order from which no appeal is allowed by this Code,  
 or

(c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

115. The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

#### NOTES.

on the other hand, the rule is made absolute, then the third stage is reached. Though in one aspect the result is the same whether the rule is discharged or on the re-hearing the original decree is repeated in law there is a material difference; for in the latter case the whole matter having been re-opened there is a fresh decree. In the former case the parties are relegated to and still rest on the old decree. Particular case held to fall at the second stage and appeal held to be competent. (30 B. 56, Rel. on.) 55 M. 871=1932 M. 669=63 M.L.J. 357.

MISCELLANEOUS.—Public Prosecutor was given sanction to prosecute an attorney—Leave to appeal to Privy Council against order granted—Review allowed. 41 C. 734=19 C.W.N. 593=22 I.C. 324. Reversal of High Court's decision in a connected case by the Privy Council is not a sufficient cause for review. 43 M.L.J. 33=70 I.C. 741=1922 M. 227. Review cannot be granted on the ground of mistake of law or on the merits. 87 I.C. 125=1925 N. 266. Review can be allowed in respect of probate proceedings. 3 R. 261=1925 R. 314. Applicability to appeals under Letters Patent—Review. 29 Bom.L.R. 371. Judgment in an income-tax case on a statement made by the Commissioner under section 66 of the Income-tax Act does not come under section 114, because the judgment is neither a decree nor an order. 1930 A.L.J. 78=122 I.C. 741. Section does not apply to Revenue Court proceedings. 54 A. 646=1932 A.L.J. 437=1932 A. 293 (F.B.). On this section see also 1940 R.D. 604.

SEC. 115: SCOPE OF SECTION.—The powers of the High Court under the section are strictly limited to those matters mentioned therein. 35 C.W.N. 775=59 C. 68=1931 C. 604. The powers of a Court of revision are strictly confined within the limits prescribed by section 115, and, unless a judgment is vitiated by any of the defects specified therein, no interference with it can be made by the revising Court. This principle is all the more applicable in cases of revision from an order making an award a rule of Court. 177 I.C. 351=40 P.L.R. 651=A.I.R. 1938 Lah. 434. When High Court as a Court of revision, under its inherent powers to remand, remands a case for further evidence on an issue and findings, retaining seizin of the case, it has no power to scrutinize or

review the evidence. The powers of that Court are limited by section 115 and all it can do is to determine whether the lower Court exercised its jurisdiction with material irregularity in arriving at the finding it did on the issue remanded to it for trial. I.L.R. 1936 N. 188=1936 N. 140. The High Court ought not to interfere in the exercise of revisional jurisdiction, unless very strong considerations and, in particular, considerations of law constrain it to interfere. 146 I.C. 933=1934 P. 41. See also 30 S.L.R. 271=1936 S. 172=166 I.C. 365. Revision is not directed against decisions on questions of law or fact in which jurisdiction is not involved. [40 M. 793 (P.C.). Ref.] 27 S.L.R. 190=1933 S. 329. Mere mistake of law or fact is no ground for revision. 1937 R. 61; 166 I.C. 215=1937 O.W.N. 39. High Court should do nothing to encourage litigants to avoid the procedure laid down and seek a speedy remedy by eliminating steps provided. 145 I.C. 261=1933 N. 221 (1). As to *locus standi* to make an application under section 115, see 177 I.C. 138. Section 115 does not require that there should be an application. 15 P. 738=165 I.C. 927=1936 P. 591; 160 I.C. 361 (2)=1936 S. 1. Or that such application need necessarily be made by an aggrieved party. The only limitation against the exercise of the power of this Court under section 115 is that the case should be one in which no appeal lies. 146 I.C. 258=1933 L. 327. See also 144 I.C. 883=1933 S. 200. The Judicial Commissioner's Court in an appropriate case can exercise powers of revision on its own motion if it appears that there had been any material irregularity in the exercise of its jurisdiction by the lower Court. A.I.R. 1938 Pesh. 81. The High Court's power to interfere in revision and set aside an illegal order setting aside an execution sale, is not affected or rendered nugatory by the fact that the original execution case has been dismissed. Any order that the High Court might pass will not in any way be affected by that fact. 62 C.L.J. 308=39 C.W.N. 913. Omission to give a finding on necessary issue is failure to exercise jurisdiction. 150 I.C. 312=36 P.L.R. 69=1934 Pesh. 33. Where the decision of a suit involves the decision of legal inferences to be drawn from the



## NOTES.

likely to work, not in the interests of justice but rather against it, such a course should not be taken. 1930 L. 417 (2). *See also* 54 C.L.J. 253=36 C.W.N. 16=134 I.C. 1045=1931 C. 607; 1933 A. 154; 42 A. 626=60 I.C. 81; 1931 M. 534. Right of revision—One party applying to Court to prevent pleader of opposite party—Court preventing pleader—Opposite party can apply for revision. 110 I.C. 544=1928 M. 592. Where a decree can be appealed against to the District Judge from whose decree a second appeal can be filed in the High Court, it is not a case in which no appeal lies to the High Court at all, although no appeal can be filed from the original decree of the first Court direct. There is no ground for restricting the scope of the words "*in which no appeal lies thereto*" to cases where no appeal lies from the order sought to be revised. So long as a party has a right to come up to the High Court by way of an appeal and has failed to avail himself of that opportunity by first going up to the District Judge and then coming up to the High Court, he cannot ask the High Court to interfere in revision. *Per Rau, J.*—Are we to interpret the expression "*in which no appeal lies*" as if it were equivalent to the expression "*in which no appeal lies or may in future lie*"? I hesitate to place so wide a construction upon these words. According to the alternative interpretation, revision is barred only where an appeal, whether first or second, lies immediately to the High Court; where no such immediate appeal lies, the High Court has jurisdiction to intervene in revision, although whether it will exercise this jurisdiction or not, will depend upon the urgency of the need for intervention. I.L.R. (1940) 1 Cal. 393=44 C.W.N. 364=A.I.R. 1940 Cal. 257.

REVISION AND APPEAL.—There is an analogy between a revision application and an appeal but the two are not identical. In a suit or an appeal, the points to be decided ordinarily are those on which the parties are at variance. A revision application stands on a different footing. It is a matter between a higher Court and a lower Court; in fact revisional powers may in certain cases be exercised without an appeal or an application by any of the parties concerned. 144 I.C. 883=1933 S. 200. Once the High Court is seized of the revision, then, it becomes its duty to cast its eyes (over) not merely on part of the proceedings but the whole of them. What come under the review of the High Court are the proceedings as a whole from start to finish and the object of the scrutiny of the High Court is that so far as possible justice may be done in the proceedings as a whole. 1941 A.W. R. (H.C.) 130.

POWERS OF LOCAL LEGISLATURE TO AFFECT REVISIONAL JURISDICTION OF HIGH COURT.—*Per Bennet, J.*—The local legislature has power (with previous sanction) to pass laws

affecting the jurisdiction and powers of the High Court, whether derived from the Government of India Act, 1919, the Letters Patent or the Codes. (ii) The power of superintendence under S. 107, Government of India Act, 1919, depends on appellate power and can also be affected by laws of the local legislature. (iii) Where a special tribunal is created by an Act of the local legislature or of the Indian legislature to determine rights created by that Act, and that Act states that the decision of the tribunal shall be final, there is no interference with the rights of appeal, superintendence, or revision of the High Court, because the High Court never had such rights over the tribunal. 147 I.C. 148=1933 A.L.J. 971. *See also* 151 I.C. 880=38 C.W.N. 986=1934 C. 666.

POWERS OF REVISION OF NON-CHARTERED HIGH COURTS.—Whatever powers Courts other than Chartered High Courts may have must be exercised under S. 115, and not under the section by which powers are conferred by the Government of India Act upon Chartered High Courts. 151 I.C. 89=1934 S. 110.

FINDING OF FACT.—The power of interference in revision is much more limited than that in case of second appeals. Hence a concurrent finding of fact of the lower Court based on evidence cannot be interfered with. 1936 P. 558. A finding of fact of the Court of appeal below is not liable to be set aside in revision. 151 I.C. 1088=59 C.L.J. 417=1934 C. 795. The question whether it has been established by evidence that a particular person became a surety for the payment of the amount due on a promissory note is a question of fact which cannot be agitated in revision. 150 I.C. 1055=1934 R. 306. The lower appellate Court decided the appeal on finding based on the construction of a power of attorney which it had jurisdiction to do. *Held*, that the finding was not open to challenge in revision. 15 L. 305=149 I.C. 1102=1934 L. 67 (1). Where a finding is arrived at after a consideration of the oral evidence and incidentally of certain letters, the question of the construction of these letters is not a matter which can be examined in revision. 151 I.C. 385 (2)=1934 A. 530. A finding that a certain document is not genuine is a finding of fact. 161 I.C. 21=1936 L. 725. So also a finding of the lower Court about the bailee having taken necessary care of the goods such as is required by S. 151 of the Contract Act. 161 I.C. 417=1936 O.W.N. 334=1936 O. 264. Where there had not been any real consideration of the evidence at all before the lower appellate Court and all that the Judge did was to seize hold of a rule of law about the burden of proof, a rule which incidentally loses most of its significance when there is evidence for consideration and then to seize hold of two or three superficial points in the case and rest content with that.



## NOTES.

*Held*, that that was not what an appellate Judge was there for, especially when he was reversing a well-considered finding of a lower Court and that interference in revision was necessary. 175 I.C. 430=A.I.R. 1938 Nag. 216.

CONSTRUCTION OF SECTION.—S. 115 being merely an empowering section granting jurisdiction regulated by the discretion of the High Courts, it ought to receive a liberal rather than a narrow interpretation. 40 B. 86=33 I.C. 358; 65 I.C. 37. High Court has revisional power under the Charitable and Religious Endowments Act (XIV of 1920). 27 A.L.J. 911=1929 A. 581. "Record of a case" means the record of the legal proceeding decided although it is only a legal proceeding in the suit. 24 S.L.R. 277=1930 S. 265 (F.B.). There is no provision in the section that the High Court cannot interfere in a case where an appeal lies to an inferior Court. Hence where the plaintiff has not filed an appeal to the District Judge which remedy he has from an order of the Sub-Judge rejecting a plaint, the High Court can interfere in revision. 154 I.C. 103=1935 P. 86. See also 63 C.L.J. 105=1936 C. 786. S. 115 clearly refers in Cls. (a) and (b) to jurisdiction, which means the jurisdiction of the Court and not the competence of any party to sue. A finding that a party is not competent to sue is not therefore a finding affecting the Court's jurisdiction. 165 I.C. 278=38 P.L.R. 315=1936 L. 783.

INTERLOCUTORY ORDERS.—As to interference in revision with interlocutory orders, see 75 I.C. 107=1923 L. 301; 54 C. 1038; 156 I.C. 162=1935 R. 122; 106 I.C. 57 (As a general rule no interference with interlocutory orders). 134 I.C. 118 (L.). See also 1938 A.M.L.J. 123. It is intolerable that where issues are decided separately, there should be what is really an interim appeal in the form of an application in revision to High Court. 146 I.C. 615=1933 R. 263. The High Court has jurisdiction under S. 115 to revise an interlocutory order passed by a Subordinate Court from which no appeal lies to the High Court. But it is only when irreparable injury will be done and a miscarriage of justice inevitably will ensure that the Court will intervene. 11 R. 36=143 I.C. 525=1933 R. 49. See also 60 C.L.J. 91=38 C.W.N. 1146; 154 I.C. 615=1935 P. 90. Where the order is extraordinary or illegal or one made by the Court without any power to do so, it is open to the High Court to interfere. 134 I.C. 118 (L.). Or, if the order is palpably incorrect and is one which gives the Court jurisdiction which it has not got. 13 R. 595=1935 R. 466. The word "case" covers interlocutory order. Such order if it goes to the root of the case can be revised. 27 N.L.R. 254=130 I.C. 145=1931 N. 17. See also 9 R. 71=134 I.C. 744=1931 R. 136; 9 R. 86; 9 R. 92. The High Court

would not ordinarily exercise its revisional jurisdiction in a purely interlocutory matter, namely, about the admission of a certain piece of evidence. It may however do so when the question is one of general importance and no objection is taken by the opposite party as to the competency of the Court to entertain the petition. But such case must not be regarded as a precedent for interference in purely interlocutory matters of procedure which do not affect jurisdiction, and do not inflict irreparable injury. The expression "case which has been decided" in S. 115 is wide enough to include an interlocutory order, and even though there may be an appeal from the final decree, that consideration will not prevent in a proper case interference in revision. The Court will not however interfere unless it seems that there has been a gross and culpable error likely to inflict grave injustice and cause irreparable injury. (A. I. R. 1931 Rang. 136, Rel. on.) 181 I.C. 527=A.I. R. 1939 Rang. 92. Interference would be justified if otherwise irreparable damage would result. 4 L.L.J. 176=65 I.C. 282; 44 B. 619; 5 M.L.J. 75; 1936 A.M.L.J. 4. See also 11 R. 36; 131 I.C. 503=1931 R. 193 (2) (Order impounding a document) or there are other special and exceptional circumstances necessitating interference. 26 I.C. 954=20 C.L.J. 426; or where there are other most cogent reasons. 43 I. C. 684. As far as the Madras High Court is concerned, it cannot be held that there can be no interference by way of revision in an interlocutory matter or proceedings on the ground that it is not a case decided. 113 I.C. 646=1929 M. 121. Sind Judicial Commissioner's Court has no jurisdiction to interfere in revision under S. 115, with interlocutory orders even in exceptional circumstances. 24 S.L.R. 227=1930 S. 265 (F. B.). The Rangoon High Court has always entertained applications in revision with a certain amount of freedom, even when the cases are not complete, if to allow a case to proceed would result in waste of time, trouble and money. 157 I.C. 814=1935 R. 225. On this point, see also 85 I.C. 619=1925 C. 1118; 28 C.W.N. 991=82 I. C. 1008; 1939 M.W.N. 621 (order granting temporary injunction). Interlocutory orders that can be rectified on appeal are not revisable although there may be no appeal directly from such orders. 5 M.L.J. 75. But see 14 C. 768. See also 9 M. 256; 5 A. 293; 18 B. 35. Where decree is against legal representative, as to whether revision lies from order in execution rejecting application by posthumous son to be impleaded as legal representative. 1936 S. 166.

THE FOLLOWING INTERLOCUTORY ORDERS ARE OPEN TO REVISION.—Though an order is interlocutory, if it goes to the root of all subsequent proceedings, the High Court would not decline to consider whether the Court passing the order in question had jurisdiction to pass it. 1938 A.M.L.J. 97.



## NOTES.

Though an order is interlocutory, the Court will not decline to hear or interfere, if a question of jurisdiction is involved. 1938 A.M.L.J. 74. Where the order is arbitrary and unwarranted in law. 58 I.C. 729=18 A.L.J. 486; 1927 M.W.N. 218 (as) where the lower Court wrongly refused to grant commission for examination of witnesses, 35 C.L.J. 78=68 I.C. 9; improper orders under Guardian and Wards Act, 42 I.C. 240; where amendment was improperly refused, 67 I.C. 335; defect of jurisdiction causing failure of justice, 67 I.C. 278; 60 I.C. 481; where irreparable damage may result, 4 L.L.J. 176=1922 L. 100; or where irreparable waste of time and money would result, 2 L.L.J. 555=64 I.C. 387; allowing a party to adduce evidence after closing of the case, 59 I.C. 450; order as to misjoinder of parties and causes of action. 43 M.L.J. 277=70 I.C. 684; misjoinder of causes of action, 43 M.L.J. 218=69 I.C. 960; 42 M.L.J. 97; order refusing to add person as party defendant, 1929 O. 148; 1929 M. 403 (2); 1930 P. 592; order directing trial piecemeal on certain issues only, 60 I.C. 528=2 Pat.L.T. 154; improper order of remand, 1922 P. 79; 1922 P. 359=50 I.C. 470; 45 C.L.J. 194. [In such a case High Court cannot go into merits of the order of remand. 39 M.L.T. 120.] Order setting aside *ex parte* decree. 32 C.W.N. 507. Question whether particular person should be next friend—Order of Court—Revisable. 1929 L. 257=113 I.C. 901. Summary rejection of application under O. 9, r. 9 is revisable. 1929 L. 878. An order refusing leave to sue as a pauper is not an interlocutory order and is revisable. 142 I.C. 379. (32 A. 623 and 48 M. 700, *Foll.*) A Court has jurisdiction to consider the merits of the case on an application to sue *in forma pauperis*; the fact that the Court placed reliance on evidence which might not be relevant to a pauper application is not an irregularity affecting its jurisdiction and no revision lies. (40 M. 793, App.; 17 S.L.R. 133, *Foll.*) 26 S.L.R. 491=142 I.C. 379=1933 section 82; 19 Pat.L.T. 101=1938 Pat. 209; 117 I.C. 908.

THE FOLLOWING INTERLOCUTORY ORDERS ARE NOT OPEN TO REVISION.—The question of whether there is "sufficient cause" for an adjournment under O. 17, R. 1 is a question of fact; whether decision on the merits is right or wrong, it must be held to be final on the point. 154 I.C. 935=1935 A.L.J. 372=1935 A. 476. Order granting adjournment on payment of costs, 25 I.C. 207=12 A.L.J. 460; order deciding preliminary issue in a suit where such order would be appealable after final decision in the suit. 56 I.C. 248; 146 I.C. 615=1933 R. 263; 156 I.C. 615 (1)=1935 R. 158. See also 1939 Pat. 564=1939 P.W.N. 341 (Preliminary issue of *res judicata* decided first); 1934 A.L.J. 1204=1934 A. 986 (Refusal to decide question of law in the first instance). See also 149 I.C. 126

=1934 C. 499. But see also 58 I.C. 729=18 A.L.J. 486; 39 A. 254=38 I.C. 828; defect of jurisdiction where no failure of justice is caused, 67 I.C. 278; order directing a party in scheme suit to give evidence, 16 I.C. 3; order deciding admissibility of certain evidence, 101 I.C. 385=29 Bom.L.R. 304; 1939 Rang.L.R. 591=1939 Rang. 448 (Rejection of evidence by trial court); orders which are open to appeal, 16 L.W. orders which are open to appeal. 16 L.W. 312=74 I.C. 812; 22 I.C. 279=1914 M.W.N. 95; 24 I.C. 781=1 L.W. 232; 71 I.C. 911; 41 I.C. 942; order refusing to stay proceedings under S. 10, C.P. Code, 1924 L. 425 (F.B.), *Rel. on*; 165 I.C. 131=1936 L. 569; 41 P.L.R. 55; order disallowing interrogatories, 58 I.C. 721; refusing to frame additional issues, 29 I.C. 876; 1923 P. 518=72 I.C. 148; order dismissing application to examine witness on commission, 64 I.C. 821; 116 I.C. 97; order as to appointment of guardian *ad litem* is not open to revision, 46 I.C. 316=5 Pat.L.W. 92; where another remedy is open to the party and no irreparable harm would be done, 5 P.L.J. 400=56 I.C. 649; order giving directions as to taking accounts, 3 Pat.L.T. 638=1922 P. 508; or giving directions as to the order in which properties ought to be sold in court auction. 1933 A. 959. Order allowing plaintiff to withdraw the suit with liberty to bring a fresh suit, supported by good reasons. 10 O.W.N. 311. As to order imposing condition of security in granting leave to defend under O. 37, R. 3 (2). See 70 M.L.J. 241=43 L.W. 298=1936 M. 246. As to order reviewing plaint rejected for non-payment of Court-fee, see 67 C. 61. An interlocutory order directing the plaintiff to pay an additional court-fee cannot be the subject of revision. The proper course for the aggrieved party would be to file an appeal if and when the plaint is rejected on his refusal to pay the court-fees. Suit for partition decree—Succeeding Judge modifying prior order—Valid—Cannot be interfered with in revision being only of an interlocutory nature. 34 C.W.N. 731=1931 C. 52. Order as to *locus standi* of a person to apply for setting aside sale under O. 21, R. 89 is not open to revision. 161 I.C. 424=1936 O.W.N. 344. So also in execution. Where the custody Court decided that certain person is not entitled to any priority, with reference to property in its hands. 163 I.C. 584=38 P.L.R. 800=1936 L. 521. Also order on application under S. 19, Arbitration Act. 1936 S. 205.

OTHER REMEDY OPEN.—Where another remedy is open to the party, *e.g.*, by a suit or appeal or otherwise, the Court will not entertain an application for revision. See 31 C.W.N. 615=98 I.C. 89=1927 C. 114; 52 L.W. 1225=(1940) 2 M.L.J. 860; 21 Pat.L.T. 629; 41 P.L.R. 381=1939 Lah. 376; 1941 N.L.J. 391; 1941 Mad. 262=(1941) 2 M.L.J. 860; 30 S.L.R. 288; 29 Bom.L.R. 1355=1927 B. 599; 1927 M.



## NOTES.

1030; 64 I.C. 469; 38 I.C. 299; 63 I.C. 809; 40 A. 216; 44 B. 595; 47 I.C. 190; 18 L.W. 105; 41 M.L.J. 373; 31 M.L.J. 827; 37 I.C. 348; 30 I.C. 845=18 M.L.T. 243; 1 L.W. 905; 29 M.L.J. 53; 1 L.W. 233; 1914 M.W.N. 95=22 I.C. 279; 23 M.L.J. 281; 1912 M.W.N. 956; 1 P. 68=65 I.C. 135; 8 O.W.N. 999=1931 O. 408; 14 L. 51; 1933 M. 217; 134 I.C. 160=12 Pat.L.T. 613; 1931 A. 294 (F.B.); 53 A. 466=1931 A. 333 (2); 161 I.C. 258=1936 R. 12; 155 I.C. 617=16 Pat.L.T. 158=1935 P. 186; 14 P. 488=16 Pat.L.T. 311=1935 P. 385; 153 I.C. 998=18 N.L.J. 72. Courts cannot help those litigants who choose a wrong remedy. (1933 L. 317 and 1933 R. 64, Rel. on.) 1935 L. 934. On this point the following cases may also be consulted. 145 I.C. 766=1933 M. 217; 152 I.C. 1014=1934 P. 664; 151 I.C. 382=1934 R. 188; 148 I.C. 333; 60 C.L.J. 197; 1933 P. 604; 14 L. 51=142 I.C. 738=1933 L. 317; 1933 P. 625; 1938 All. 6; 19 Pat.L.T. 118; 40 P.L.R. J. & K. 29; 1938 Rang. 360; 18 Pat.L.T. 833; 21 Pat.L.T. 629; 1939 All. 117; 41 P.L.R. 102 (order dismissing suit under O. 9, R. 8); 1937 M.W.N. 320; 30 S.L.R. 288 (order on claim petition under O. 71, R. 58). A revision petition will no doubt lie at the instance of a party aggrieved by an order on an application under O. 21, R. 100, C.P. Code. But the High Court will not interfere unless there are cogent reasons for such interference. 44 L.W. 703=1936 Mad. 940. *See also* 1937 P.W.N. 489=1937 Pat. 357 (order setting aside sale under O. 21, R. 90); 151 I.C. 668=1934 R. 230; 1934 R. 212; 146 I.C. 845=34 P.L.R. 262=1933 L. 509; 144 I.C. 897=35 Bom.L.R. 360=1933 B. 185. But this is simply a rule of practice which arises from the optional nature of S. 115 which says that the High Court may make such order in the case as it thinks fit, and the High Court can interfere in special cases. 11 R. 134=144 I.C. 163=1933 R. 64. *See also* 68 M.L.J. 218. It has been practice of Madras High Court to exercise revisional powers in cases where lower Court decides a preliminary issue as to the maintainability of the suit, holding the suit maintainable, although there is a remedy by way of appeal against the decree in the suit itself. But it by no means follows that, because the High Court has the power to interfere it must necessarily do so. The High Court, on the contrary, ought not to interfere unless the particular point can be shortly and conveniently disposed of by way of revision. 58 M. 771=41 L.W. 257=1935 M. 282=68 M.L.J. 218. Even where an appeal is open, if the effect of allowing a revision will be a convenience to the parties and save expense, the High Court will be inclined to interfere with the order. 55 A. 256=1933 A.L.J. 268=1933 A. 374. So also where having regard to all the circumstances of the case and in the interests of justice it considers such a course necessary. 148 I.C. 1074=

1934 L. 119. *See also* 1933 R. 259; 41 P.L.R. 374=1939 Lah. 52; 151 I.C. 1002=1934 R. 243; 146 I.C. 493=1933 O. 540; 1933 P. 86. It cannot be held that whenever there is a remedy by way of suit, the remedy by way of revision cannot be allowed. The High Court has jurisdiction to act under S. 115 and set aside an order passed without jurisdiction and prevent unnecessary multiplication of legal proceedings. 52 L.W. 810=(1940) 2 M.L.J. 860. *See also* 15 Luck. 332=1940 Oudh 237. Where a petitioner in revision has another remedy open, it depends upon the facts of each particular case whether or not the High Court will interfere in revision on that ground. 179 I.C. 845=1939 Pat. 263. Though the High Court will not ordinarily interfere in revision when a remedy lies by way of appeal, the High Court will interfere if a defect of law and a grave wrong are manifest, for the High Court will not permit a case to proceed on jurisdiction snatched, and having no basis or justification. I.L.R. (1939) Kar. 330=A.I.R. 1939 Sind 137. Where the effect of allowing a revision in a matter in which an appeal might also lie, will be a convenience to the parties and will save expense, the Court will interpret S. 115 liberally and will interfere in revision. A.I.R. 1941 Nag. 289. The dismissal of an application for a final decree in a suit for sale on a mortgage is appealable as a decree under S. 96, C.P. Code, and a civil revision petition against the order of dismissal is therefore incompetent. 54 L.W. 107=(1941) 2 M.L.J. 125. The order rejecting a plaint is a decree. An order passed in appeal from that order that no appeal lies amounts to dismissal of the appeal. Even such order is a decree and is open to a second appeal, and not a revision to the High Court. The mere fact that the lower appellate Court refuses to entertain the appeal is no ground for preferring a revision to the High Court from the original order. 49 C.L.J. 81=115 I.C. 368. *See also* 119 I.C. 481=1929 L. 605. Where a plaint presented to the Subordinate Judge, First Class, was returned for presentation to the proper Court and on appeal the District Judge affirmed the order, *held*, that a revision was not maintainable against the appellate order. 31 P.L.R. 178. The ordinary rule is that the High Court cannot interfere in revision if the party has a remedy by way of appeal or second appeal. But this rule has its exceptions, and each case must be judged upon the circumstances peculiar to it. 28 A. 72. *See also* 68 M.L.J. 218; 1935 P. 86; 9 L.L.J. 19; 15 A. 405; 34 A. 592; 8 Pat.L.T. 677=103 I.C. 32=1927 P. 316; 1931 A.L.J. 974; 67 I.C. 945 (Revision entertained in case of gross injustice, though other remedy open). *See also* 11 R. 134=144 I.C. 163=1933 R. 64; 1933 Pesh. 52=143 I.C. 87; 142 I.C. 628=1933 P. 158; 58 C. 55=1931 C. 385; 10 A. 119; 5 R. 742; 14 P.L.T. 70; 53 A. 532=1931



## NOTES.

A. 663; 1931 L. 664. The High Court will not interfere with orders allowing or disallowing claims to rateable distribution except in very exceptional circumstances. 60 I.C. 371; 14 L.W. 582=70 I.C. 20 (2). See also 1931 M.W.N. 1012; 134 I.C. 195; 33 P.L.R. 975; 41 L.W. 490=1935 M. 399; 1936 O.W.N. 262=1936 O. 185; 1936 O.W.N. 116=1936 O. 132; 1936 Pesh. 52=1935 L. 971. But where the lower Court proceeds on a clear misapprehension of a section of the Code, and refuses rateable distribution under S. 73, C.P. Code, it clearly refuses to exercise a jurisdiction vested in it by law, and the High Court will interfere in revision notwithstanding that a remedy by suit is open to the aggrieved party. 1935 M.W.N. 1300=69 M.L.J. 908. So also the High Court will not interfere in revision with a decision under O. 21, r. 61 as the party aggrieved has a remedy under r. 63. 1930 P. 394; 39 C.W.N. 733; 30 S.L.R. 288. But if it can be shown that the Judge passing the order failed to exercise jurisdiction vested in him by rr. 58 to 62, O. 21, its order is open to revision. 14 R. 516=164 I.C. 638=1936 R. 306. But see 58 C. 55=132 I.C. 631=1931 C. 385 and 44 L.W. 703=1936 M. 940 regarding proceedings under O. 21, r. 101. The High Court under section 115, C. P. Code, has no jurisdiction to interfere in revision with an order under section 144 which is subject to an appeal. 158 I.C. 908=1935 A.L.J. 995=1935 A. 873. Section 115 of C. P. Code contemplates the calling of the records from a trial Court and the appeal referred to therein means an appeal to the High Court. If, therefore, a trial Court has acted with material irregularity in the exercise of its jurisdiction or acted illegally the High Court has power to interfere in revision provided that no appeal lies to the High Court. The section does not require that no appeal in the meantime should have been preferred to the District Judge or that if preferred it is only the order of the District Judge which can be revised. 118 I.C. 189=1929 A. 793. Refusal to entertain an application for review based on the ground of fraud is revisable notwithstanding the existence of another remedy, 33 C.W.N. 572=1929 C. 513. When another remedy is open to a party, but it is very inconvenient and practically is no remedy, the Court should give relief by way of revision. 2 A.L.J. 370; 65 I.C. 476; 26 L.W. 76=104 I.C. 371=1927 M. 799; 53 M.L.J. 903; 55 M.L.J. 345=51 M. 664=1928 M. 416. See also 60 M.L.J. 713=1931 M. 1; 1933 R. 64. High Court will interfere in revision in such cases to prevent multiplicity of proceedings. 131 I.C. 14=1931 M. 511. See also 135 I.C. 199=1932 L. 176; 1933 L. 48=33 P.L.R. 975; 1937 Nag. 30=I.L.R. (1937) Nag. 82; and save parties from long and expensive litigation. 54 A. 516=1932 A. 411=1932 A.L.J. 359. Plaintiff attached certain property which the defendant alleged was under wakf. Lower Court held that the wakf was

illusory. In appeal lower appellate Court allowed to continue the attachment. Defendant came in revision to the High Court. It was contended that revision of such order did not lie. Held, that an order of this kind could be revised even though aggrieved party had remedy by regular suit. (1929 R. 297, Foll.) 1935 R. 395. Appeal to lower Court under section 47, C. P. Code—Auction purchaser can petition High Court for revision as a second appeal by him does not lie. 117 I.C. 789=1929 M. 84. There is no ground for restricting the scope of the words "in which no appeal lies" to cases where no appeal lies from the order sought to be revised. 1930 A.L.J. 924=1930 A. 604 (2). See also 123 I.C. 127=1931 L. 302 (1). Where the order of remand passed in appeal appeared to have been passed without jurisdiction, held in revision that the order should be set aside and the appeal remitted for re-decision, though the order of remand could be called in question in an appeal from the final decree. 133 I.C. 127=1931 L. 302 (1). When the order is in effect a decree, if it is appealable though it is described as a decretal order and no revision lies against it. 54 M. 337=1931 M. 471=60 M.L.J. 167. The High Court is reluctant to interfere in cases under the Dekhan Agriculturists' Relief Act where the revisional powers of District Judge suffice. 55 B. 411=33 Bom.L.R. 476=1931 B. 284. An order under section 73 is not merely a ministerial order; it is a judicial order. But the order cannot be interfered with in revision as the party has another remedy by way of suit. 27 S.L.R. 193=1933 S. 329. Order dismissing suit under section 9, Specific Relief Act, will not be revised, as remedy by regular suit is open to him. 165 I.C. 908=1936 O.W.N. 1228=1937 Oudh 183. Although the High Court will not ordinarily interfere in revision in a case under section 9, Specific Relief Act, where there has really been no trial of the case at all and the suit has been dismissed under a misapprehension of the scope of section 9, the High Court will interfere in revision. 20 N.L.J. 189=A.I.R. 1937 Nag. 326.

FAILURE TO EXERCISE JURISDICTION AND WRONG EXERCISE OF JURISDICTION.—The High Court is bound to interfere where it appears that the Court of First Instance has exercised a jurisdiction not vested in it by law. 26 M. 176; 21 M.L.J. 1020; 1935 Pesh. 21; 153 I.C. 453=68 M.L.J. 115; 68 M.L.J. 236; 1937 A.L.J. 671=1937 All. 598 (failure of Court to apply its mind to the mandatory provisions of law). See also 1937 A.L.J. 842=1937 All. 753; 55 I.C. 41; 51 I.C. 873=4 P.L.J. 340; 51 I.C. 189=4 P.L.J. 277; 49 I.C. 442=4 P.L.J. 57. Ousting jurisdiction must be patent on the face of the record before it can be predicated of a Court that it has exercised a jurisdiction not vested in it by law. 44 B. 595; 65 I.C. 50. (Error held not to be so patent); 1922 S. 1; (1933 S. 82 and Sind Misc. Appln. No. 44 of 1930. Rel. on.) 27 S.L.R. 261=1933 S. 229. The High Court has power to interfere in revision



## NOTES.

with an order passed in appeal confirming the trial Court's decision that it had no jurisdiction to try the particular suit before it. 1941 N.L.J. 245. If the defendant has a defence which the law allows him to raise, and the Court refuses to entertain it, its action goes to the root of jurisdiction, whatever the reasons given. It is a case of non-exercise of jurisdiction, and the High Court has power to interfere under section 115. I. L.R. (1937) Nag. 159=A.I.R. 1937 Nag. 267. See also 1937 A.L.J. 842=1937 All. 753; 1937 Nag. 39. There must be some limit to the latitude to be given to the principle that a Judge has jurisdiction to come to a wrong decision as well as to a right one. It is not possible to stretch the principle to the extent of holding that it precludes the High Court from interfering in a case where a Judge has given a litigant the benefit of a contract to which he has found that litigant was not a party. That is an illegal exercise of jurisdiction or at any rate a material irregularity. 41 C.W.N. 601. Where a Court has jurisdiction to make an order and refuses to make it on the ground that it has no jurisdiction, that is a good ground for interfering in revision under section 115. 36 Bom.L.R. 499=58 B. 485=1934 B. 252. "Jurisdiction" in section 115 of C. P. Code means a jurisdiction local, pecuniary, personal or with reference to the subject-matter of the suit. 23 I.C. 977=41 C. 323; 15 I. C. 669. See also 46 C.L.J. 182=103 I.C. 468=31 C.W.N. 818; 11 M. 220 (F.B.); 7 A. 345, 350; 8 A. 519. A Court's decision regarding its own jurisdiction in a particular matter is open to revision. 104 I.C. 342=1927 S. 239; 116 I.C. 172. But see 1929 L. 83. Where the lower Court itself has to determine whether it has jurisdiction or not to try the case, and it exercises its discretion wrongly and proceeds to try the case, the High Court has power to interfere in revision. 20 N.L.J. 247=A.I.R. 1937 Nag. 334. Where orders of lower Court amount to refusing to try the case and to exercise jurisdiction vested in them, revision lies. 1937 N. 39. Refusal to entertain defence which law allows is a case of non-exercise of jurisdiction, and revision lies. 165 I.C. 926 (Nag.). Where the question is whether the Civil or Revenue Court should take cognizance, an erroneous decision can form the subject-matter of revision. 27 A.L.J. 1157. An order of a Small Cause Court returning the plaint for presentation to proper Court is revisable. 1932 A.L.J. 1068=1933 A. 106. So also an order by a Court returning a plaint for presentation to the Small Cause Court and this even when the District Judge failed to make a reference under O. 46, r. 7. 1932 N. 70. Where the parties went to trial on the merits and the Court raised an issue as to want of jurisdiction *suo motu* at a late stage and returned the plaint, held that the order was not justified and should be set aside in revision. 131 I.C. 303 (2)=32 P.L.R. 737. Where the lower Court exercises jurisdiction in a proper manner,

the High Court will not interfere. 45 A. 548=73 I.C. 538; 45 A. 425. See also 68 M. L.J. 324. Ordinarily interference in revision is inadvisable in cases of decisions as to jurisdiction and should only be made in exceptional cases to remedy injustice. 1923 L. 565; 73 I.C. 755=1923 L. 524. Where a decree is obtained against a person who does not represent the estate and the estate is sought to be sold in execution of such a decree, the case falls within the principle of 32 C. 296, and the decree is liable to be set aside in revision for want of jurisdiction. 53 C.L.J. 415=134 I.C. 305=1931 C. 673. High Court's interference under section 115—If confined only to question of jurisdiction. 20 C.W.N. 1080=37 I.C. 129. On the mere ground that the decision was wrong, a High Court certainly will not interfere but where the lower Court had no jurisdiction to enquire into the question, High Court has power to interfere in revision. 1 R. 265=76 I.C. 504. See also 106 I.C. 901 relying on 6 L. 487 (P.C.); 40 M. 793 (P.C.); 27 M. 504; 30 C. 397; 46 C.L.J. 182=103 I.C. 468=31 C.W.N. 818; 27 A.L.J. 961=119 I. C. 859. The order of a Court wrongly refusing to entertain an application on the ground that it did not lie at all, is on account of the declining of a jurisdiction, liable to be set aside. 38 M.L.J. 322; 48 I.C. 139=8 L. W. 436; 31 I.C. 536=2 L.W. 1115; 31 I.C. 209; 28 I.C. 707=2 L.W. 366. Points of jurisdiction, even though not taken in the lower Court, can be argued in the High Court. 41 L.W. 20=1935 M. 89.

ILLUSTRATIVE CASES OF WRONGFUL EXERCISE OF JURISDICTION.—Where a Court has acted by inventing a rule of procedure for itself which is not warranted by law the High Court is not only competent to interfere but should interfere in its revisional jurisdiction. 27 A.L.J. 769=1929 A. 593. The High Court can interfere in revision when a Civil Court has wrongly entertained a suit cognizable by a Revenue Court. 56 I. C. 946=23 O.C. 281. Also when a suit is wrongly tried by a Court of Small Causes. 1932 L. 637. District Munsiff exercising small cause jurisdiction when not invested with such powers—Revision lies. 22 I.C. 909=12 A.L.J. 109. But High Court would not interfere in revision, in a suit cognizable by a Small Cause Court, but tried by a District Munsiff and appeal suit heard by the District Court without any objection. 21 B. 417; 75 I.C. 769. Revision lies against order wrongfully refusing to file appeal. 99 I.C. 690. Jurisdiction, want of—Plea to be substantiated by evidence. 52 I.C. 32. An order without enquiry is without jurisdiction. 24 L.W. 839=99 I.C. 383=1927 M. 188. Omission to refer to evidence. 104 I.C. 321; 99 I. C. 946=44 C.L.J. 565. The omission of an appellate Court to deal with an appeal before it on the merits is a failure to exercise jurisdiction vested in it by law. 40 C. 518=20 I.C. 420. The High Court has power to set aside the order of the lower appellate Court on the ground that no appeal lay to it at all. 5 Pat.L.J. 97=55 I.C. 15. See also



## NOTES.

140 I.C. 48=1932 L. 416. But see 1929 R. 198. Where the lower Court accepts an appeal which is incompetent, the High Court may interfere in revision and set aside its order. 152 I.C. 622=1934 L. 540. Where an order, not being appealed against, becomes final, it cannot be set aside by the appellate Court when hearing an appeal against a later order; nor can such Court pass an order which is inconsistent with the earlier order. Such an order of the appellate Court is liable to be set aside in revision. 152 I.C. 693=1934 L. 538. An order of the appellate Court directing the rehearing of a suit without any finding as to the sufficiency of the cause for the non-appearance of the defendant is illegal and without jurisdiction. 54 I.C. 965=1 Pat. L.J. 69. See also 100 I.C. 135=1927 M. 335. Where the appellate Court has jurisdiction to hear an appeal and passes an order directing the first Court to proceed with the suit the order cannot be attacked in revision, even though it may be erroneous in law. 53 A. 519. An erroneous decision of the lower appellate Court that the first Court had or had not jurisdiction to entertain a suit can be interfered with in revision. 39 M. 195=24 M.L.J. 112; 76 I.C. 1010=1923 L. 412. Where a Court assumes jurisdiction to pass an order on an erroneous view of the law, in a matter where it has in fact no jurisdiction, it is a case for interference of the High Court. 46 M. 536=44 M.L.J. 1; 100 I.C. 936=1927 L. 342. Jurisdiction—Refusal to exercise—Court misinterpreting section 73 of the C. P. Code and consequently refusing help. 10 I.C. 527=15 C.W.N. 842. See also 1927 M. 1030; 60 I.C. 371; 70 I.C. 20 (2) (Mad.). Where the Court below does not judicially consider what it ought to have considered, and decides something that it is not called upon to decide, there is illegal or irregular exercise of jurisdiction. 155 I.C. 1088=1935 A.L.J. 527=1935 A. 310. When a Court, upon an erroneous view as to the scope of a section of the Code, applies it to a case to which it has no application, it acts without jurisdiction. 33 C. 487; 99 I.C. 425=1927 M. 427. See also 191 I.C. 217; 36 C.W.N. 788=1932 C. 857 (B.T. Act). Where a Court rejects the application of two idols, represented by their shebait for permission to file a suit in *forma pauperis* on the erroneous assumption that they are not "persons" entitled to present such an application under O. 33, C. P. Code, its decision amounts to a conscious violation of the specific rules of the C. P. Code and is open to revision. (1931 N. 17; 1924 N. 44 and 1922 B. 584, Foll.) 31 N. L. R. 413=18 N.L.J. 347=158 I.C. 660=1935 N. 209. See also (1941) 1 M.L.J. 31; 1936 A.M.L.J. 4. A mere misconstruction by a subordinate Court of section 87 of the Negotiable Instruments Act is not a ground for revision by the High Court under section 115, C. P. Code. 12 I.C. 138. Issues framed not arising from plaint and rejecting application to confine issues to matters stated in plaint

—Revision lies. 1929 N. 347. Suit dismissed on questions not raised—Revision lies. 1929 L. 294. Case of misconstruction of pleadings. 1927 L. 44. Where the lower Court has found a different case for the petitioners from that set up by them in their petitions, and allowed their claim, it is an irregularity which justifies interference in revision. 133 I.C. 301=1931 M. 534. A Judge who passes a decree which is not supported by any evidence on the record has taken upon himself a jurisdiction not vested in him by law. 10 C.W.N. 14; 9 A. 398, 404. See also (1941) 1 M.L.J. 250; 39 P.L.R. 499. Finding of fact without evidence. 64 I.C. 85. Holding particular evidence as inadmissible was vastly different from failing to exercise a jurisdiction vested by law in the Court of the first appeal. 1929 P. 633. Where, by an error of law, the Court excludes certain evidence from consideration, the evidence being the main evidence in the case, there is such a material irregularity in the exercise of its jurisdiction as may lay the judgment open to revision. 119 I.C. 417 (2). See also 14 Pat.L.T. 70; 35 C.W.N. 1242; 1931 A. 452. When a document has some legal effect on the decision, its exclusion can be treated as a refusal to exercise jurisdiction. 25 I.C. 204. When the conclusion of the lower Court is obviously opposed to the finding expressed in the body of the judgment, the High Court can interfere in revision with such an order. 1929 M. 841 (1)=119 I.C. 64; 1930 M.W.N. 1227. Where a subordinate Court proceeds with the trial of a suit in contravention of section 10, C. P. Code, it usurps a jurisdiction not vested in it by law and its order refusing to stay the suit though interlocutory, is open to revision by the High Court. 42 A. 409; 70 I.C. 5=16 L.W. 607. An order under section 10 staying a suit amounts to a decision that the Court has no jurisdiction to try the suit. If wrongly used, it is a refusal to exercise jurisdiction and is open to revision under section 115. 50 I.C. 212; 14 I.C. 711; 14 I.C. 221; 1929 L. 694. See also 139 I.C. 48=33 P.L.R. 787. But see 1929 L. 662. An order refusing to stay a suit during the pendency of another suit in the same Court is not an interlocutory order and it is not subject to revision under section 115, C. P. Code, and section 44 of the Punjab Courts Act. However, if circumstances justify such a course the Court may interfere either under section 151, C. P. Code or under section 107 of the Government of India Act. 31 Punj.L.R. 174=1930 L. 525. An order refusing to stay the trial of a suit which is connected with an appeal pending in the appellate Court is revisable. 1933 L. 50. Where a Judge refused to try the issues raised before him, he has declined to exercise a jurisdiction vested in him by law and the High Court can interfere. 39 A. 297=38 I.C. 335. The failure of a District Judge to decide a plea amounts to a refusal to exercise a jurisdiction and his decision is liable to be set aside in revision. 54 I.C. 662. Omission to decree claim admitted.



## NOTES.

1922 P. 355; 1923 P. 41. Also where an objection to the place of suing is overruled and embodied in a formal order. 41 A. 602=51 I.C. 331. As to order allowing amendment of plaint, see 36 P.L.R. 264=1934 L. 974. The refusal by the lower Court to allow an eminently just and equitable application for amendment is tantamount to a refusal to exercise a jurisdiction vested in the Court under sections 151 and 152 of the Code. 8 Luck. 734=11 O.W.N. 550=1934 O. 352. See also 148 I.C. 347=15 Pat.L.T. 602=1934 P. 425; 38 C.W.N. 1183. An order directing a plaint to be returned for amendment without a prayer being without jurisdiction, is open to revision by the High Court. 24 M.L.J. 455=19 I.C. 672; 1913 M.W.N. 1024=21 I.C. 767. Also an order dismissing summarily an application by plaintiff to restore a suit dismissed for default. 100 I.C. 677=1927 L. 239. Where an order refusing to re-open a suit decreed *ex parte* is set aside on appeal, the order setting aside the trial Court's order is open to revision. 145 I.C. 370=1933 R. 156. The Judge had before him an application for re-opening the *ex parte* decree which on the face of it was time-barred and which he recognised as being time-barred on its face. Yet he allowed an extension of time. *Held*, that in re-opening the case he exercised a jurisdiction which he had not got and that the order re-opening the case should be set aside. 144 I.C. 980=1933 R. 110. Failure to exercise jurisdiction vested by the Calcutta Rent Act can be interfered with under section 115, C. P. Code. 26 C.W.N. 711=49 C. 328. Failure to deal with question of limitation arising in the case is no material irregularity requiring interference in revision. 32 I.C. 785=3 L.W. 176. But see 18 I.C. 391=17 C.W.N. 667. Where a suit was withdrawn by the plaintiff without the Court's considering the terms of withdrawal especially as to costs, it was held that the omission to consider the question of costs which resulted in injustice to defendant is a failure to exercise the jurisdiction vested in the Court. 31 I.C. 617=13 A.L.J. 10 (Rev.); 1929 A. 683. Application for decree absolute—Declining to entertain objections. 5 Pat.L.J. 342. When a date is appointed for the hearing of parties in order to ascertain valuation on sale proclamation, the Court acts without jurisdiction in fixing valuation at an earlier date without hearing the parties. 3 P.L.T. 342=65 I.C. 360. Where the Court wrongfully cancelled a lease granted by a guardian which was perfectly within his competence, *held*, in revision, that the order was made without jurisdiction and must be set aside. 1930 L. 1017=132 I.C. 203. Where a Court orders that a guardian is responsible for the income of the estate of minor only from the date of the grant of the certificate of guardianship, and the order is not appealed against, it is not competent for the successor of the former Judge to hold him liable from an earlier date on which he was

appointed; and such an order is liable to be set aside in revision. 152 I.C. 691 (1)=1934 L. 592 (1). Where executing Court allows a person not entitled to deposit amount in satisfaction of decree the Court acts without jurisdiction within S. 115. 26 C.W.N. 167=70 I.C. 127; 45 A. 425=21 A.L.J. 313; 52 I.C. 344. Where the lower Court took a *wrong view of the law relating to procedure* and refused to proceed with the execution proceedings, *held*, that the lower Court had refused to exercise a jurisdiction vested in it and the High Court could interfere. 143 I.C. 189=10 O.W.N. 263=1933 O. 225. In deciding that certain property was not saleable the lower Court was only exercising its jurisdiction and it cannot be said to have refused to exercise its jurisdiction, by refusing to execute the decree by attachment of property which it held to be not saleable. 149 I.C. 815=1934 R. 263. The High Court has jurisdiction to interfere with the wrong exercise by the Courts below of powers vested in them under O. 21, rr. 89 to 92 dealing with confirmation and setting aside of auction-sale. 67 I.C. 286; 32 C.W.N. 57=104 I.C. 199=1927 C. 63; 17 Pat.L.T. 852=1937 P. 104; 17 Pat.L.T. 940 (F.B.). See also 1937 Pat. 357. Where a Judge has proceeded on the assumption that a Court has no jurisdiction to order addition of parties to a suit in which one of the defendants died before the institution of the suit, he has failed to exercise a jurisdiction vested in him by law. 147 I.C. 782=1934 A.L.J. 126=1934 A. 25. Appellate Court wrongly entertaining appeal from order passed under O. 21, r. 58, in claim by judgment-debtor of attached property in representative capacity. 17 Pat.L.T. 810. The refusal to entertain an application under O. 1, r. 8 without proceeding in accordance with law comes under section 115. 145 I.C. 387=14 Pat.L.T. 361=1933 P. 302. Issuing notice under Regulation not in force is revisable. 10 Pat.L.T. 787=1929 P. 537. Defect in the signature of plaint in a suit in the Village Court cannot be interfered with by Munsif under section 73, Village Courts Act, nor by the High Court in revision. 30 L.W. 499. Where the lower Court refuses to set aside a sale of a Patni, erroneously holding that section 14 of the Patni Regulation is not retrospective, it fails to exercise a jurisdiction vested in it by law and consequently the order is open to revision. 61 C. 903=38 C.W.N. 720=1934 C. 512.

REVISIONAL JURISDICTION TO ATTAIN "ENDS OF JUSTICE".—The powers under section 115 are intended to be exercised with a view to subserve and not to defeat the ends of justice. 144 I.C. 904=1933 A. 154. See also 145 I.C. 164=35 Bom.L.R. 388=1933 B. 245; 41 L.W. 20=1935 M. 89. The rule that where substantial justice has been done between the parties, even if the lower Court has erred in law the High Court ought not to exercise its discretion in favour of the party relying on a technical plea, though a sound one, has to be applied with care. The substantial justice referred to above relates



- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material

## NOTES.

to rights to which a party has a legal right as opposed to a purely moral claim. The rule applies when owing to some technical rule of procedure or to some stupid blundering the claim is likely to fail whereas had the proper rule or remedy been applied it would have succeeded. It does not refer to cases where whatever the plaintiff had done his claim could not in any event have succeeded. If a plaintiff's suit is barred by time, the rule referred to is not attracted to such a case. 1941 N.L.J. 324. *See also* 42 P.L.R. 227. Where the conditions set out in section 115 are present, a summary view of justice is frequently not a conclusive or even a very safe guide, especially, where the real obstacle in the way of the opposite party is a statutory bar of limitation. 1934 P. 50. An order under section 145 passed by a Sub-Judge can, if necessary, be revised by the High Court although an appeal lies to District Court from such order and a further appeal from the order of the District Court lies to the High Court. 11 R. 134=144 I.C. 163=1933 R. 64. Where the Court passed an order in the course of execution *assessing mesne profits on an erroneous basis*. *Held*, that the preliminary decree was erroneous in so far as it failed to fix the basis for the assessment of mesne profits and that, having regard to the fact that if this Court had pursued the proper course and fixed the basis in the preliminary decree, it would have been open to revision and with a view to save a great deal of money, time and labour, the order should be interfered with in revision. 151 I.C. 922=38 C.W.N. 384=1934 C. 503. Where the burden of proof has been wrongly placed by the lower Court and there has been a miscarriage of justice the High Court should interfere. 159 I.C. 70 (1)=1935 R. 131.

SEC. 115, CL. (a).—Where a Court professing to act under O. 21, r. 90 sets aside a sale without proof of substantial injury, such an order is one passed without jurisdiction within the meaning of this section. 9 M. 145. *See also* 106 I.C. 568; 1941 O.W.N. 835; 1937 Rang. 537 (Application not conforming to r. 89 of O. 21). Proceeding under O. 41, r. 23 instead of under O. 41, r. 25 does not create a point of jurisdiction so as to justify interference. 64 I.C. 436. A Court has jurisdiction to hear an application for review though insufficiently stamped and the High Court will not interfere on that ground. 21 I.C. 942 (C.); 43 A. 288; 2 L.W. 366. Where the trial Court extended time for paying deficient Court-fee after the passing of a decree, *held*, that the order was without jurisdiction and must be set aside in revision. 129 I.C. 732=1931 A. 318. A general order of remand by an appellate Court which misunderstands its own duties and in substance declines jurisdiction is liable to be revised by the High Court. 63 I.C. 358. The investigation contemplated

by O. 33, r. 7 must be confined to the applicant's pauperism, and if the Court receives evidence on the merits, it exercises a jurisdiction not vested in it by law. 13 M.L.J. 292 (F.B.). *See also* 45 A. 548. Subordinate Court legally incompetent to try suit—Appellate Court ordering it to hear and dispose of it—Appellate Court acts without jurisdiction. (Case-law reviewed.) 1930 A. 713=1930 A.L.J. 1233 (F.B.).

SEC. 115, CL. (b).—If by taking a mistaken notion of his legal powers, a Judge fails to exercise a jurisdiction vested in him by law, the High Court can interfere. 12 M.L.J. 473. *See also* 10 O.W.N. 263=1933 O. 225; 1931 A. 756=1932 A.L.J. 13. Where a Judge puts an erroneous construction upon the provisions of an Act, this does not amount to failing to exercise a jurisdiction vested by law. 13 C. 90 (93). Where no application is made under O. 21, r. 90, but, nevertheless, the Court refuses to confirm the sale under O. 21, r. 92, it has failed to exercise a jurisdiction vested in it. 20 C. 8 (11) (P.C.). *See also* 13 A. 761. Court's refusal to set aside sale, when judgment-debtor deposits the decree amount and applies under O. 21, r. 89, is revisable. 118 I.C. 805=1930 O. 9. *See also* 133 I.C. 407=1931 A. 756. When a Court refuses to investigate a claim under O. 21, rr. 58 to 60 it refuses to exercise jurisdiction vested in it by law. 4 C.L.R. 74; 49 C.L.J. 51=1929 C. 225. Where the Court refused to adjudicate the claim and it appeared that it had failed to consider the law applicable and prejudice was thereby caused, *held*, that the High Court could interfere in revision. 1929 R. 152=7 R. 132. Where the Judge refuses to consider the objections to an award though filed within time, he refuses to exercise a jurisdiction which vests in him. 1933 R. 38. Where the lower Court has failed to take notice of the real point in the case, the High Court can interfere in revision. 106 I.C. 226 (2)=1928 L. 299; 5 R. 803. When a Judge refuses to accept a plaint he fails to exercise a jurisdiction vested in him by law. 32 C. 146. Where the Court rejects an application for leave to sue *in forma pauperis* for defective verification and does not give a chance to the applicant to correct the defect, it amounts to failure to exercise the jurisdiction vested in it under section 153. 1933 A.L.J. 110=1933 A. 295. A purchase by the decree-holder's pleader for himself may be attacked on principle and may be, in certain cases, avoided, but it is not an error of law or jurisdiction if the Court does not avoid it. 117 I.C. 727=1929 M. 624. Failure to comply with provisions of r. 22 of O. 21—Illegality—Objection not taken—Appeal not maintainable—Interference of High Court in revision. 7 R. 110.

SEC. 115, CL. (c): COURT ACTING ILLEGALLY OR WITH MATERIAL IRREGULARITY.—Test as to applicability of this clause. I.L.R. 1936



irregularity, the High Court may make such order in the case as it thinks fit.

## NOTES.

N. 73=164 I.C. 848=1936 N. 157; 1940 Pat. 263; 1940 Pat. 437; 1939 P.W.N. 341=1939 Pat. 564; 1939 Pat. 74; 1939 Pesh. 9. Cl. (c) of section 115 has a distinct meaning from that of the other two clauses. It does not refer only to defects of procedure; nor is it confined to errors in the method or manner of trial. It empowers the High Court to interfere and correct gross and palpable errors of Subordinate Courts for the ends of justice. 38 C.W.N. 1146=60 C.L.J. 91. Cl. (c) of section 115 contemplates cases other than those referred to in cls. (a) and (b). The words in cl. (c) did not occur in the Code of 1877 and were introduced for the first time in the Amending Act of 1879. They are intended to re-refer to cases where the Court has jurisdiction and has exercised it but has acted illegally or with material irregularity in the exercise of jurisdiction. 34 C.W.N. 515. For the meaning of the words "illegally" and "material irregularity", see 7 B. 341, 358 (F.B.); 7 R. 339=1929 R. 145; 1929 A. 683. See also 1932 A.L.J. 803; 149 I.C. 1126=1934 Pesh. 29. "Acting illegally or with material irregularity" does not mean committing an error in the decision arrived at; but where a procedure has been adopted which is grossly improper and leads to a denial of justice, it amounts to a material irregularity in the exercise of its jurisdiction. 1933 A.L.J. 110=1933 A. 295; 34 Bom.L.R. 1273; 1932 A. 154. The High Court as a Court of revision is not expected to weigh the evidence which is led before the lower Court. But when it is found that there is no evidence at all from which the inference as drawn by the lower Court could be deduced, the High Court has no alternative but to interfere. Further where the lower Court has acted without any clear conception of the law on the subject or has failed to apply the law to the facts of the case, it acts illegally, and in any case with material irregularity, justifying interference by the High Court in revision. I.L.R. (1938) Mad. 988=47 L.W. 578=1938 Mad. 634=(1938) 2 M.L.J. 100. A Court acts with material irregularity in the exercise of its jurisdiction if it arrives at a finding without reference to unequivocal evidence on record. 42 P.L.R. 48=A.I.R. 1940 Lah. 180. The ignoring of a reported ruling of the High Court or complete failure to grasp its essentials, must be taken as material irregularities. A.I.R. 1941 Rang. 22. Failure by the lower Court to notice that a certain ruling which it has followed does not apply to the case is a case of material irregularity. A.I.R. 1941 Pesh. 76. When the lower Court commits an illegality in the exercise of its jurisdiction in refusing to follow a ruling of the Chief Court by which it is bound, it is incumbent on the High Court to interfere in revision. 171 I.C. 527=A.I.R. 1937 Rang. 197. Where the Court passes an erroneous order on a wrong view of the law, allowing an application, when it ought to reject it for non-compliance with the require-

ments of the statute, the error amounts to such an illegality or material irregularity in the exercise of jurisdiction as to call for the interference of the High Court under section 115. That is a fit case for the exercise of the revisional jurisdiction of the High Court. 18 Pat.L.T. 409=1937 P.W.N. 497=A.I.R. 1937 Pat. 537. A Court acts with material irregularity, "if not illegally," within the meaning of section 115, (i) if it shuts its eyes to a proposition of law or to an important fact in evidence before it as distinct from misapplying the one or attaching a wrong legal consequence to the other; (ii) if it saddles the wrong party with a burden of proof; (iii) if it decides an appeal on a point of fact not raised at all before the Court from which the appeal is brought. It is also a material irregularity if a Court decides an appeal on a point of law which the party in whose favour it decides has waived and which is not one (such, for example, as limitation, gambling and public policy), of which the Court is bound to take cognizance irrespective of the parties. A.I.R. 1941 Rang. 244. It is a material irregularity to come to a finding which is based entirely on a guess. 151 I.C. 429=1934 R. 214. Or on surmises for which there is no justification from the evidence on the record. 1936 O. W.N. 237. Where the lower Court decrees the suit on a case which is not to be found in the pleadings and is inconsistent therewith, it acts illegally in the exercise of its jurisdiction and with material irregularity. 14 R. 511=163 I.C. 668=1936 R. 235. Or where suit is decided on a case not put forward by parties. 1935 Pesh. 174. Where in a pre-emption suit the lower Courts import irrelevant considerations into the discussion of evidence and refuse to give the vendee the full sum proved to have been paid, merely because those considerations raise suspicions in the minds with regard to genuineness of the price paid, it, commits a material irregularity. 160 I.C. 452=1936 Pesh. 12. As to whether revision lies where a wrong order impleading party to suit was rectified by a subsequent order by successor in office, see 39 C.W.N. 1010. Only in an exceptional case High Court investigates the evidence in the exercise of its revisional powers. 12 P. 862=14 Pat. L.T. 651=1933 P. 575 (F.B.). If the Court refuses a party a right to lead evidence on a matter on which the parties are at issue, it exercises its jurisdiction with such material irregularity as to vitiate its order and the proper course is to set aside that order. 144 I.C. 461=14 Pat.L.T. 300=1933 P. 278. There is material irregularity in the exercise of jurisdiction, if there is no proper consideration of pleadings and evidence and the High Court would interfere in revision with a finding of fact reached owing to misconception of the method by which the question should be considered. 144 I.C. 834=29 N.L.R. 164=1933 N. 188; 1938 Mad. 321; 186 I.C. 530; 1939 Rang. 413 (Lower Court misread-



## NOTES.

ing evidence on record). *See also* (1941) 1 M.L.J. 250. Unless the Judge confines himself to the case of the plaintiff as set out in the plaint he acts with material irregularity in determining the question of whether the plaint discloses a cause of action. 145 I.C. 307=14 Pat.L.T. 338=1933 P. 284. A Court acts improperly when, without directing an amendment of the pleadings or revising the relevant issues, it allows a question to be argued before it which cuts at the very root of the plaintiff's suit, but which is not raised in the pleadings at all and decides it; in doing so it ignores some of the most material provisions of the C. P. Code. The High Court in such a case will interfere under section 115. I.L.R. (1939) Kar. 330=A.I.R. 1939 Sind 137. The fact that the burden of proof as to certain issues has not been correctly placed is no ground for interference in revision. 151 I.C. 548 (1)=35 P.L.R. 334. An order of the lower Court which is virtually a refusal to go into the question of jurisdiction before proceeding to hear the suit on the merits amounts to an irregularity open to the High Court to interfere in revision. 152 I.C. 369=1934 M. 617 (1). Order allowing plaintiff to *withdraw suit* on grounds not covered by O. 23, r. 1. *See* 25 A.L.J. 870=103 I.C. 229=1927 A. 704; 25 A.L.J. 838=103 I.C. 372. *See also* 145 I.C. 222=1933 O. 255; 147 I.C. 441=1934 A. 214; 1935 A. 284=153 I.C. 684. Where a mortgage bond was on the face of it discharged, and in the possession of the obligor, it was however, held to be a material irregularity to make the latter prove the fact of discharge. It was for the plaintiff, who sued on mortgage to prove the loss of the document and further to show that the debt was subsisting. 163 I.C. 809=1936 M. 526. *See also* 61 C.L.J. 18=1935 C. 710. Where the lower Court in framing the issues, definitely places the burden of proof wrongly and refuses to recast the issues correctly, where the matter is one of considerable importance, the High Court will properly interfere in revision. 158 I.C. 601=1935 M. 784=69 M.L.J. 239. *See also* 50 L.W. 459=1939 Mad. 733=(1939) 2 M.L.J. 44. A Court does not act illegally or with material irregularity in refusing to dispose of certain issues in a case as preliminary issues without going into the merits of the whole case, when the issues in question are not clear cut issues of law but are mixed up with questions of fact. 1939 P.W.N. 341=A.I.R. 1939 Pat. 564. It is a material irregularity in the exercise of jurisdiction, if the Court holds that the defendant has admitted a certain claim of the plaintiff when the defendant has not done any such thing; it is also a material irregularity to hold an item proved which the trial Court has held not proved without stating on what evidence the appellate Court relies for the proof of the item. 41 P.L.R. 492=A.I.R. 1939 Lah. 470. When the only issue tried by the lower Court is not one upon which the dispute between the parties can be properly adjudicated, Court

acts with material irregularity. 7 Bom. L.R. 12 (16). Where in disposing of an objection under O. 21, r. 58, C. P. Code, the Court failed to decide the only real issue, namely, the question of possession; and decided the other issue as to title, *held*, that the Court had acted with material irregularity and it was a proper case for interference in revision. 132 I.C. 666=1931 L. 666. *See also* 1938 Rang. 319. The expression, "material irregularity" was held to include an irregularity of procedure materially affecting the merits of the case. 13 C. 225. Where the decree in suit is contrary to the judgment and the terms of a compromise filed by the parties and the Court rejects an application for correction under section 152, C. P. Code, it is open to the High Court to interfere in revision with the order of the lower Court. 134 I.C. 1009=1931 O. 422. But a wrong interpretation of a deed of compromise filed in the execution proceedings does not amount to a material irregularity in the exercise of jurisdiction. 1935 L. 971. Material irregularity—Application under O. 21, r. 89—Deficient sum deposited—Same due to miscalculation of Court Officer—Objection raised after 30 days—Court refusing permission to depositor to deposit deficient amount—Interference in revision. 33 C.W.N. 1170=1930 C. 249. *See also* 28 C. 574 (583); 1928 M.W.N. 49. Where the Court did not consider the question of extension of time under section 5, Limitation Act, *held* that it acted with material irregularity in rejecting the appeal as having been filed out of time. 1933 L. 260=145 I.C. 153; 40 Bom. L.R. 152=1938 Bom. 209 (order dismissing an application in disregard of section 4, Lim. Act). A mere error in law is not an illegality or material irregularity. 23 B. 177. *See also* cases under "Error of Law". If the Subordinate Court follows the decision of other High Courts in preference to those of its own High Court, it acts in the exercise of its jurisdiction with material irregularity. 11 P. 616=140 I.C. 572=1932 P. 346. Where there is a wilful disregard or conscious violation of a rule of law or procedure, the case is one of material irregularity calling for interference in revision under section 115, C. P. Code. 59 B. 430=156 I.C. 662=37 Bom.L.R. 241=1935 B. 222. An order by the Full Bench of the Presidency Small Cause Court, allowing an application under section 38 of the Presidency Small Cause Courts Act and sending the case back for retrial, which order is influenced by what was told them in their private room at an *ex parte* enquiry, is improper and ought to be set aside in revision. 62 C. 289. Granting leave under section 20 (b) without issuing notice to opposite party does not amount to acting in the exercise of jurisdiction illegally or with material irregularity so as to justify interference in revision. 1933 L. 266. But where an order under section 24 (1) directing the transfer of a suit is passed without notice, it is tainted with material irregularity. 1931 A.L.J. 1061. Where the result of an erroneous



## NOTES.

decision is to perpetuate the error and cause multiplicity of suits not for one year but for all time, the High Court would be justified in interfering in revision. 115 I.C. 351=56 M.L.J. 273. *See also* 1931 M. 511. Rent decree executed as money decree for want of proper parties—Simultaneous attachment and proclamation of sale—No notice to judgment-debtor—Encumbrance not mentioned—Price fetched inadequate—High Court could interfere in revision. 1929 P. 588. Where in such a matter the Court, after due inquiry under O. 21, r. 17, directs the release of part of the land and to order the sale of only so much as was necessary to satisfy the decree, there is no ground justifying interference in revision. 153 I.C. 1024 (1)=1935 P. 143. The mere fact that notice did not proceed in the peculiar way prescribed in section 61 of the Presidency Small Cause Courts Act, does not deprive the Court of jurisdiction or vitiate the trial under that section and does not call for interference in revision. 59 C. 311=36 C.W.N. 530=1932 C. 441. Execution sale—Order setting aside in contravention of statutory requirements as to deposit—Revision. *See* 39 C. W.N. 913. An order contravening provisions of O. 21, rr. 89 and 92 is an illegal exercise of jurisdiction and is a material irregularity within section 115 (c). 1930 A. 843. Confirmation of a sale in execution before an application under O. 21, r. 90 by the judgment-debtor has been decided is a material irregularity which adversely affects the judgment-debtor. 1933 A. 137=145 I.C. 732. There is no material irregularity in a Court confirming a sale to a decree-holder, who did not happen to go herself to the auction, but sent her husband who did not have a proper power of attorney to act on her behalf; hence the order confirming the sale is not open to revision. 1935 R. 521. As to order refusing to proceed with execution of decree on plea of uncertified adjustment, *see* 1935 R. 481. Where in a petition under O. 21, r. 100, the lower Court asked the decree-holder to begin his case and examine his witness before the examination of the claimant's witnesses, it is a serious irregularity which justifies interference in revision. 132 I.C. 301=1931 M. 534. *See also* 1932 M. 513 (Proceedings under section 53, Provincial Insolvency Act). Court refusing leave to adduce evidence in guardianship proceeding—Order is revisable. 34 C.W.N. 763=1931 C. 59. Wrong order on pauper application. 19 Pat. L.T. 844=1938 P.W.N. 804; 1938 Rang. 453. An inference based on a mere conjecture is vitiated by material irregularity. 1931 R. 318. Omitting to give grounds for allowing to bring fresh suit, while suit is withdrawn is material irregularity and therefore revision lies. 34 C.W.N. 912=1931 C. 107. If grounds are given, they cannot be scrutinized in revision. 125 I.C. 580. Order consolidating two suits against the wishes of the parties and when the issues and the evidence in them had little in com-

mon can be raised. 13 Pat.L.T. 726=1933 P. 61. A Court acts with material irregularity when it sends a suit for trial to the wrong Court. 138 I.C. 136=1932 M. 217. Security-bond given for grant of succession certificate—Application for its assignment—Rejection without perusing bond. *See* 154 I.C. 816=1935 A. 705. The failure of a Court to fix a time for payment of process amounts to a material irregularity; and if the Court, which has not fixed a time for the same, dismisses a suit under O. 9, r. 2, C.P.Code, for failure to pay process-fees, the High Court will interfere in revision and set aside the order of dismissal. 158 I.C. 250.

ILLUSTRATIVE CASES—ABUSE OF PROCESS OF COURT.—Where in a mortgage suit a preliminary decree was passed and the judgment-debtors failed to pay up the amount and thereupon the plaintiff applied for a final decree but the parties were absent on that date and the Court dismissed the suit under O. 9, R. 3, and the plaintiffs subsequently applied under section 151 praying for the setting aside of the order, *held*, that the Court had no power to dismiss the suit but should have proceeded to pass the final decree. *Held also*, that the order of dismissal was an abuse of the process of the Court and could be rectified in an application under section 115. 8 Luck. 496=10 O.W.N. 293=1933 O. 229. Arbitrators in a case claimed a certain amount as their fees for their work. The Court reduced the amount to less than 1/7th without giving any opportunity for the arbitrators to put up their case. *Held*, that failure of the Court to hear the arbitrators fell within purview of Cl. (c) of section 115. (53 I.A. 27, Rel. on). 160 I.C. 361 (2)=1936 Sind 1. When executing Court did not give any consideration to the question whether the Collector's proposal ought to be confirmed in the circumstances, but proceeded to adopt it as a matter of course, the Court failed to exercise judicially the discretion which is vested in it under section 72, C.P.Code. It amounted to a material irregularity. 1935 L. 964. Where the Court dismisses an application for restoration of a suit dismissed in default under the impression that Art. 163, Limitation Act, applies to the case which does not in fact so apply, it constitutes a material irregularity and the order is open to revision. 1935 Pesh. 186. An appellate Court failing to notice an important ground of appeal when dealing with the appeal, commits a material irregularity. 162 I.C. 416=1936 Pesh. 97. It is obligatory on Court to record a proper judgment complying with the requirements of law even in dismissing an appeal under O. 41, r. 11, C.P.Code. Where the appellate Court simply dismisses the appeal with the remark that there was ample material to support the order passed by the trial Court, its



## NOTES.

order is liable to revision. 38 P.L.R. 431. The Court acts with material irregularity in refusing to allow an amendment under O. 6, R. 17. Where the real question between the parties could not be properly decided without allowing the amendment and where the amendment, if allowed, would prevent a multiplicity of suits on a matter which is rather trivial. 157 I.C. 112=1935 A. 651. Where a judge summarily deals with an application to be added as party to a suit and dismisses it, totally misapprehending the nature of the application he acts with material irregularity. 62 I.A. 257=57 A. 678=39 C.W.N. 1249=1935 P.C. 185 (P.C.).

**ADDITION OF PARTIES.**—Addition and substitution of parties when open to revision. 45 C.L.J. 146; 1927 M.W.N. 301. *See also* 1940 A.L.J. 445=1940 All. 448. No revision lies from an order striking out a defendant, as such an order does not decide anything between the parties. 14 I.C. 263; 32 A. 623. So also where parties are added. 64 I.C. 563; 90 I.C. 721. When in a suit the mortgagee claimed land from a third party through the mortgagor and the suit was decreed though the mortgagor was not a party the Court acted with material irregularity. 54 C. 338=99 I.C. 749=52 M.L.J. 368 (P.C.). Where addition of parties causes not only misjoinder of parties, but also causes of action, revision lies. 90 I.C. 721. Where the right to raise an objection as to non-joinder came into existence during the suit, and such objection was not taken in the trial Court, it cannot be raised in revision. 46 I.C. 648. But *see* 44 I.C. 564. Where an order for addition of parties was made due to devolution of interest during pendency of suit, appeal and not revision is the remedy. 14 C. 716. Addition of parties—Order refusing to make a transposition of parties when open to revision. 34 I.C. 186=20 C.W.N. 712. As to addition of party financing litigation, *see* 68 M.L.J. 236. *See also* 45 M.L.J. 703; 39 I.C. 160=5 L.W. 207; 25 A.L.J. 991. As to exercise of power under O. 1, R. 10, *see* 47 I.C. 721. Where a Court does not apply its mind to real dispute in the case and wanders into discussion of extraneous matters and disallows an application by a person who is directly affected by the result of the suit, to be impleaded as defendant, and, directs him to seek his remedy by separate suit; the order is open to revision. 164 I.C. 882=1936 L. 619.

**AMENDMENT OF PLAINT AND PLEADINGS.**—The High Court has power to interfere under section 115 with an order directing that a plaint should be amended. 63 I.C. 419. *See also* 36 P.L.R. 264=1934 L. 974; 8 Luck. 734=1934 O. 352; 1925 M. 188; 1940 O.W.N. 1194=1940 A.W.R. (C.

C.) 474; 1940 O.W.N. 500; 1938 A.L.J. 854=1938 All. 460 (F.B.); 41 P.L.R. 146; 1940 P.W.N. 797; 1941 Oudh 87; 1941 O.W.N. 1100=1941 A.W.R. (Rev.) 873; 89 I.C. 782; 87 I.C. 90=48 M.L.J. 349; 1922 L. 394 (1); *see contra* 15 C.W.N. 682=10 I.C. 308; 101 I.C. 701 (1)=9 Lah.L.J. 357; 30 L.W. 557=1933 M. 322; 1933 A.L.J. 27 relying on 43 A. 564. The refusal of the Court to allow an amendment in order to enable the controversial matter between the parties to be settled once for all amounts to failure to exercise a jurisdiction vested in it by law. 55 A. 256=1933 A.L.J. 268=1933 A. 374. *See also* 55 A. 169. If the result of the amendment allowed by the lower Court be to convert the suit into one of another and different character by the addition of the prayer for a relief barred by limitation at the date of plaint it is a case of material irregularity which should be put right by revision. 133 I.C. 497=1931 M. 542=61 M.L.J. 316. A Court is not empowered to accept additional written statement to meet allegations not raised in the plaint. The proper course is to amend the plaint, if allowable, and direct filing of written statement, and frame issues and decide. 30 I.C. 41=29 M.L.J. 53. Where a Court dismisses a suit refusing an opportunity to amend the plaint, if necessary, the High Court can interfere under section 115. 1 P.L.T. 188; 55 I.C. 445; 22 M.L.J. 136=12 I.C. 173; 15 L.W. 667=68 I.C. 167; 98 I.C. 458=1927 M. 212. *See also* 1932 M. 603=141 I.C. 420. Where there is another remedy open to a party, such as an appeal, if eventually the judgment is passed against him, the High Court would not entertain revision. 10 I.C. 308=15 C.W.N. 682; 15 L.W. 667=68 I.C. 167.

**AMENDMENT OF DECREE.**—*See* 1941 Oudh 66. Where the lower Court refused an application to amend a decree by inserting a provision for the taking of accounts mentioned in the award in accordance with which the decree was passed, *held*, that the omission to incorporate that provision was accidental, that the order of the lower Court may be set aside and application for amendment allowed in revision. 34 P.L.R. 802. The Chief Court has power under its revisional jurisdiction to amend a decree so as to make it conform with the judgment. 1938 O.W.N. 331=A.I.R. 1938 Oudh 107. *See also* 1938 A.M.L.J. 88; 1938 Lah. 4; 41 Bom.L.R. 800; 39 P.L.R. 769=1937 Lah. 894; 1936 A. M. L. J. 117. Application under section 115, are entertainable against orders of amendment, of decrees made under section 152. 1940 O.W.N. 1010.

**APPEAL.**—An appeal can be treated as an application under this section. 17 M.L.J. 119; 28 B. 458 (460); 4 A.L.J. 492; 1939 Pat. 570; 1940 Cal. 257; 45 C.L.J.



## NOTES.

194; 1929 M. 205 and *vice versa*. 6 C.W. N. 346; 50 I.C. 931=9 L.W. 596. See also 34 I.C. 264; 31 I.C. 812=23 C.L.J. 235; but not one filed after limitation for appeal has expired. 2 L.L.J. 734. See also 41 M. 554=34 M.L.J. 309; 9 L.W. 81; 30 M.L.J. 486=34 I.C. 372. Nor where appeal is expressly prohibited by Code. 1935 P. 177. It is the settled practice of the Patna High Court that the revisional powers of the High Court are not exercised in cases in which a party entitled to appeal has not appealed. 18 Pat. 694=20 P.L.T. 492=A.I.R. 1939 Pat. 570. Section 115 was only intended to relate to questions of jurisdiction and not to questions of law or construction of document, or a wrong decision by a Judge. These are not matters affecting jurisdiction and cannot constitute sufficient grounds for treating an appeal as an application in revision, when an appeal is expressly prohibited by law. Section 115 is intended only to supplement the Code in relation to matters on which the Code is silent, and not to provide the parties with a right of second appeal. I.L.R. (1939) Kar. 342=A.I.R. 1939 Sind 360. Incompetent appeal entertained by appellate Court can be set aside in revision. 25 Bom.L.R. 147=72 I.C. 256. But see 131 I.C. 561=35 C.W.N. 31=1931 C. 425. See also 18 Pat.L.T. 812 (Summary disposal of appeal under O. 41, R. 11); see also 1937 Pat. 349=18 Pat. L.T. 321; (1940) 2 M.L.J. 374 (Order allowing appeal when no appeal lies). 17 Pat.L.T. 815 (Appeal wrongly entertained against non-appealable order). Where the appellate Court rejects a memorandum of appeal on the ground that it is out of time before registering the appeal, the appellate Court assumes a jurisdiction which it does not possess, as the Civil Procedure Code does not authorize the appellate Court to pass such order at that stage. The order rejecting the appeal can therefore be interfered with in revision under section 115. 42 C.W.N. 72=A.I.R. 1937 Cal. 732.

ARBITRATION.—Where in arbitration proceedings an appeal is not allowed, revision would be still more objectionable. 47 A. 121. Order of reference to arbitration—Jurisdiction of Court challenged—Revision. See 1927 C. 52=106 I.C. 93; 110 I.C. 881=1928 A. 740. Where the applicant wishes to challenge the validity of the order of reference to arbitration, a revision is competent. 54 A. 297=1932 A. 665; 1932 S. 128. Where a reference is made to an arbitrator whom the Court has no power to appoint, the High Court can interfere in revision. 1931 A.L.J. 682=1931 A. 761. In arbitration proceedings taken in the course of a pending suit an order superseding the reference to arbitration is not open to revision. 160 I.C. 1052

=38 P.L.R. 121=1936 L. 538. So also in the case of an order passed under section 19, Arbitration Act, 1936, section 205. Order appointing arbitrator against party's wish—If revisable. 51 A. 54=115 I.C. 611. Where the parties had agreed that the case should be decided by arbitration and counsel for parties made statements before the Court giving the names of the two persons whom to appoint arbitrator but the statements were silent as to what was to happen in case both the persons refused to act and there was no express provision that the Court would have no power to appoint a third arbitrator and the Court appointed a third arbitrator on refusal of the named arbitrators, held that there was no material irregularity and that the fact that the Court had misinterpreted the statements of counsel on a point of law would not justify interference in revision. 151 I.C. 148=1934 A.L.J. 711=1934 A. 368.

AWARD.—The order of a Court decreeing a suit in terms of an award is not open to revision. 152 I.C. 90=11 O.W.N. 1203=1934 O. 494; 38 P.L.R. 783. No revision is maintainable against an order passing a decree in terms of an award. 190 I.C. 257=1940 O.W.N. 794. A Court acts with material irregularity in the exercise of its jurisdiction in placing a construction on an award which is not in accordance with the evidence given by the arbitrator himself. 39 P.L.R. 582. Where only some of the arbitrators take part in the hearing, but no objection is then taken and the merits of the award are not affected thereby, an order confirming such award is not open to revision on this ground. 38 L.W. 927=1933 M. 862=65 M.L.J. 755. See also 1933 M. 697=65 M.L.J. 376. Where the Judge refuses to consider the objections to an award though filed within time, he refuses to exercise a jurisdiction which vests in him, and a revision application against it should be allowed. 142 I.C. 835=1933 R. 38; 30 S.L.R. 271=1936 S. 172. See also 1937 M. 405=45 L.W. 405; 170 I.C. 487=1937 Sind 171. Where in superseding an award the Court acted illegally and with material irregularity, the High Court could interfere in revision. 20 A.L.J. 125=64 I.C. 934=1922 A. 69; 192 I.C. 371; 27 A.L.J. 918=1929 A. 743. On this point, see also 87 I.C. 371; 133 I.C. 416=1931 A. 721; 133 I.C. 465=1931 A.L.J. 727=1931 A. 659. The scope of S. 115 is very limited and the High Court cannot interfere in revision merely because the lower Court has taken a mistaken view as to what does or does not constitute misconduct on the part of the arbitrator. I.L.R. (1940) Nag. 659=A.I.R. 1940 Nag. 386. Where a Court overrules objections raised against the validity of an award in arbitration on the ground that no leave of Court was obtained under O. 32, r. 7, C. P. Code, and directs a decree to be drawn up in terms of the award, dismissing an application to set aside the award, its order is revisable by the High Court



## NOTES.

under S. 115, provided it is shown that the Court below has exercised a jurisdiction not vested in it by law, or failed to exercise a jurisdiction so vested or has acted in the exercise of its jurisdiction illegally or with material irregularity. The order of reference to arbitration which has been made without the leave of the Court being expressly recorded is itself open to revision. 41 Bom.L.R. 485=A.I.R. 1939 Bom. 296. Where an award is impugned on the ground that the arbitrator held his enquiry in the absence of the objector and the latter applies to the Court to summon the arbitrator as a witness to substantiate his allegation, the refusal of Court so to do is not only a material irregularity but is an illegality and the order passed by the Court filing the award and passing a decree on its basis is improper. 145 I.C. 329=34 P.L.R. 397=1933 L. 538. Where after the matter in dispute in suit was referred to arbitration and an award passed the objections of the petitioner were rejected and the Court proceeded under Sch. II, para. 16 to pronounce judgment according to the award, *held*, that the order was of an interlocutory nature and incapable of being revised. The arbitration proceedings are merely a portion of a branch of a suit and a part of a suit cannot be a "case" within the meaning of S. 115, C. P. Code. (Case-law discussed.) 143 I.C. 309=34 P.L.R. 651=1933 L. 692; 38 P.L.R. 121=160 I.C. 1052=1936 L. 538. See also 41 Bom.L.R. 490=1939 Bom. 279; 1937 All. 65=1936 A.L.J. 1333 (F. B.); 163 I.C. 380=38 P.L.R. 725=1936 L. 466. Revision is not maintainable against an order setting aside an arbitration award while the case has not been fully decided. 164 I.C. 722=1936 A.L.J. 517. An order passed under Sch. II, para. 15, setting aside an award is not revisable. 34 Bom.L.R. 376=138 I.C. 215=1932 B. 232. Where a Court sets aside an award of arbitration on the ground of misconduct on the part of the arbitrators its order is not open to revision. 47 B. 721=73 I.C. 464; 43 A. 101=59 I.C. 667; 59 I.C. 811=45 B. 832; 1929 L. 688; 1931 A.L.J. 842; 157 I.C. 1017=1935 A. 456; 1939 O.W.N. 716=1939 Oudh 238; 1939 O.W.N. 751. Where no notice was given of the filing of the award as required by the rules, the High Court can interfere in revision with a decree passed in terms of the award. 63 I.C. 243. When a Court passing a decree on an award has committed an error in procedure or has misused the jurisdiction prescribed by Sch. II, whether there is revision against the decree. See 64 I.C. 363; 64 I.C. 294; 38 I.C. 769; 105 I.C. 105. If it can be shown that the lower Court acted altogether without jurisdiction in passing a decree in terms of the award, it would be permissible to entertain a revision under S. 115. 146 I.C. 582=10 O.W.N. 1196=1933 O. 547. The High Court is generally reluctant to interfere with awards made in arbitration,

the parties having been content to submit the matter in dispute to lay Judges of their own choosing. But if there is a question of jurisdiction involved which is important and which goes to the root of the matter, the High Court may and will interfere to remedy injustice. 30 S.L.R. 478=A.I.R. 1937 Sind 174. See also 1937 Lah. 63=39 P.L.R. 139. A Court which does not follow the provisions of O. 32, R. 7 in a matter of a reference to arbitration by the next friend of a minor plaintiff exercises its jurisdiction with material irregularity, and the High Court can and will interfere in revision under S. 115, even though the question of jurisdiction was not raised in the Court below. I.L.R. (1940) Kar. 327=A.I.R. 1940 Sind 178. Where the party has consented to the illegal procedure, he cannot afterwards move the High Court in revision. 135 I.C. 230=1932 A. 154=1931 A.L.J. 1087. Nor where no objection was taken in lower Court to the filing of private award on the ground that it was not registered. 1937 C. 201. Interference in revision is not rightful where there is no irregularity in the proceedings or error in procedure or misuse of a jurisdiction and the decree of the Court is passed according to award of arbitrators. 16 I.C. 996; 28 I.C. 427. The Court on filing an award not containing decision on a point in dispute cannot be considered to have exercised a jurisdiction not vested in it by law or failed to exercise a jurisdiction vested in it by law. 17 I.C. 33=1912 M.W.N. 1076. Where a Court accepts an award filed by the arbitrator without giving the parties time to file exceptions to the award, there is material irregularity in the exercise of discretion, and the order accepting the award should be set aside. 1933 A.L.J. 149=1933 A. 313. High Court would not interfere with an award, if substantial justice has been done. 1933 A. 924=147 I.C. 746. Where the arbitrators improperly admit crucial evidence in the case, which must strongly affect their minds, the High Court will interfere in revision and set aside the whole award notwithstanding that it has been filed in Court and a decree passed in accordance therewith. 41 L.W. 51=1935 M. 184. High Court should not interfere with the award if no illegality is apparent and the irregularities in procedure are formal. 12 I.C. 269=21 M.L.J. 1005. High Court would not interfere with a decree based on an award on a technical objection. 137 I.C. 151=1932 O. 156. Also in case of arithmetical error in award. 53 M.L.J. 38=103 I.C. 829. It should not interfere unless it finds not only an illegality committed but some substantial harm resulting from that illegality. 61 M.L.J. 761=34 L. W. 725. Whether revision lies from order refusing to give opportunity to party to produce evidence in support of objections to award, see 37 I.C. 400; 53 A. 778=1931 A. 761. High Court has power to revise the proceedings of the lower Court after the



## NOTES.

delivery of the award to it and can rectify any illegality or material irregularity in the lower Court's procedure in dealing with the award. 34 I.C. 845=9 S.L.R. 183. See also 50 I.C. 52=4 P.L.J. 267; 65 I.C. 50. But where the ground of attack on an award has failed and the Court has refused to set aside the award under para. 16 (1) of the second schedule a decree must be passed in accordance with the award and a finality attaches to such a decree and the matter cannot be allowed to be challenged in revision. 1931 A.L.J. 906=1932 A. 76; 1936 O. 1=11 Luck. 441=1935 O.W.N. 1036. Where suit is decreed in terms of award, the fact that the Court rejected the application of the applicants to withdraw the matter from the arbitrator wrongly thinking that it had no jurisdiction to do so, is no ground for interference in revision. 157 I.C. 649=1935 O.W.N. 920=1936 O. 150. See also I.L.R. (1940) Kar. 34 (Award of fees to arbitrator by Court).

**BOARD OF REVENUE.**—The Board of Revenue have no authority under S. 115 to call for the record of cases disposed of under the Oudh Rent Act and pass such orders thereon as it may think fit. 1937 O.W.N. 1164.

**BURDEN OF PROOF.**—A mistake as to onus of proof gives rise to a revision petition. 41 P.L.R. 513=A.I.R. 1939 Lah. 562. See also 1941 Rang. 244. Where a statute specifically puts the burden of proof upon a certain party, the Court in placing the burden of proof the other way is acting with material irregularity in the exercise of its jurisdiction, and the High Court may in a proper case interfere in revision to set right an issue framed in such a manner as to disregard the statutory provision regarding burden of proof. To disregard the direction of the statute with regard to burden of proof is a perverse decision and conscious departure from the rule of procedure. A.I.R. 1939 Mad. 644=(1939) 1 M.L.J. 334.

**"CASE DECIDED."**—A "case decided" within the meaning of S. 115 might fall within the category of orders passed in the assumption of jurisdiction not vested in the Court by law. Where an invasion of vested rights of the subject is threatened by a Court assuming a jurisdiction which it does not possess, and it is about to resort to the use of the machinery at its disposal, the High Court will, as a superior Court, exercise its powers under S. 115, and will not restrict its jurisdiction. 41 Bom.L.R. 490=A.I.R. 1939 Bom. 279. Meaning of—Order under S. 10 of the Religious Endowment Act—Revision—Powers of interference. 40 M. 793=33 M.L.J. 69 (P.C.). Order deciding that Sikh Gurdwara Act applies terminates proceedings and revision lies. 8 L. 362=1927 L. 394. "Case" is not defined in the Code; it cannot be confined to litigation in which there is a plaintiff who seeks to obtain a particular relief against a defen-

dant before the Court, but includes an *ex parte* application praying that persons in the position of trustees or officials should perform their trust or discharge their judicial duties. 40 M. 793 (P.C.); 1937 All. 691. See also 1938 O.W.N. 1054 (Revision of orders under S. 3 of Charitable and Religious Trusts Act). The word "case" in S. 115 is a word of wider import than such words as "suit" or "appeal". 40 B. 86=33 I.C. 358; 48 B. 43; 41 C. 632; 1936 S. 205. The word "case" does not necessarily mean "suit" but can mean a proceeding. If any proceeding in a suit has terminated it is certainly a case decided within the meaning of S. 115 although the suit itself has not been finally disposed of. 1929 A. 743=51 A. 1010. In the case of a suit, it is the suit itself and not any branch of it which can be regarded as a "case". But proceedings before the commencement of a suit as well as proceedings after a suit has come to an end, being proceedings independent of the suit, must stand on a different footing. 11 Luck. 529=1936 O. 22=1935 O.W.N. 1158 (F.B.). The words used in S. 115 do not contemplate the invoking of the revisional jurisdiction of the High Court in the case of interlocutory orders passed during the trial of a pending suit. 11 Luck. 529 (F.B.). A case must be something complete in itself so that it may be treated as independent matter. 1929 A. 957. Where the Court below decides that it should proceed with a suit, it does not decide a case within the meaning of S. 115 and no revision lies. 1929 A. 957. The words "case decided by a Court" mean a matter which has been disposed of effectually by the Court and not merely for the time being. A purely *ad interim* order that does not effectually dispose of the matter before the Court would not be case decided. 51 A. 957=1929 A. 581. See also 1941 O.W.N. 1136. The decision on a single issue by a subordinate Court in a suit which is still pending in that Court is not a "case" decided. 43 A. 564=63 I.C. 15. See also 138 I.C. 30=1932 O. 271. See also 1941 Mad. 84=(1941) 2 M. L.J. 606. The High Court will not ordinarily entertain revision applications against decisions on issues which are not decisions of the whole suit. But where such a decision relates to the question of the jurisdiction of the Court to entertain the suit and it relates to a matter which, if decided wrongly, would result in an elaborate trial which would otherwise be unnecessary, the High Court will interfere in revision. 52 L.W. 522=(1940) 2 M.L.J. 606. Where the matter under revision is still under investigation and the lower Court has not finally decided any question, and the points raised by the petitioner can still be urged before the lower Court, it would be undesirable to interfere in revision even if the High Court had the power to interfere. 21 Pat. L.T. 629=187 I.C. 838. Proceedings relating to question of stay can be treated as a "case". 132 I.C. 222=1931 L. 503. See



## NOTES.

also 1937 All. 658. An application under S. 10 for the stay of a suit is not a "case" and an order for stay passed on that application is not the decision of a case within S. 115. 58 I.C. 90=42 A. 409. See also 144 I.C. 107=1933 L. 50; 27 M.L.J. 494; 15 C.W.N. 666; 42 C. 926; 4 Lah.L.J. 425; 141 I.C. 177 (1)=1933 L. 191. An order refusing stay under S. 19, Arbitration Act, is a case decided and revision lies against that order. 132 I.C. 850=1931 L. 644; 1938 All. 6 (Dismissal of application for stay under U.P. Enc. Est. Act). See also 1940 A.L.J. 351=1940 All. 387; 1940 O.W.N. 610=1940 Oudh 342; 1940 O.A. 468 (F.B.); 1939 A.L.J. 675=1939 All. 668; 1937 A.L.J. 1139; 1941 O.W.N. 1160; 15 Luck. 641; 1941 O.W.N. 948; 1941 A.L.J. 85 (F.B.). As to application for stay of execution proceedings by stranger to suit being taken up in revision. 1937 A.L.J. 877=1937 All. 658. Where on the objection of the defendant that the Court has no jurisdiction to entertain the suit, the Court decides it has jurisdiction, the order of the Court does not amount to a decision of a case and no revision lies against it. 5 L.L.J. 140=71 I.C. 487; 41 A. 43; 42 A. 564; 59 I.C. 680. "Case"—Refusal to issue interrogatories. 69 I.C. 417=1923 L. 282 (2). Case—Order directing verification of pleadings—Order as to costs. 64 I.C. 207. As to order allowing amendment of pleadings, see 55 A. 169; 1934 L. 974; 1933 A. 374; 1929 A.M.L.J. 104. Orders under S. 34 of the Guardians and Wards Act are open to examination by the High Court on revision side. 55 I.C. 587. The decree passed in a suit under S. 9, Specific Relief Act, is revisable. 53 A. 414=129 I.C. 559=1931 A. 205. Order refusing leave to file written statement to a partner is a case decided within S. 115. 1930 A.L.J. 1212=1930 A. 701 (2). Order dismissing an appeal summarily is a decree and is open to revision by High Court, if there is no second appeal provided for. 36 M. 128=21 M.L.J. 887. Appeal against order in application under O. 21, r. 90—Revision. 45 C.L.J. 557. Where the plaintiff dies during the pendency of a suit, and two parties apply to be brought on record as his legal representative, and the Court decides under O. 22, r. 5, in favour of one party, it amounts to a case decided. 1935 L. 934. Case decided—Proceedings under Legal Practitioners Act—No power to revise. 56 I.C. 433=21 Cr.L.J. 449. Where a Court allows or refuses to allow a suit to be withdrawn with liberty to bring a fresh suit, it "decides", and the High Court has jurisdiction to interfere. 61 I.C. 584; 103 I.C. 229. See also 10 O.W.N. 311=1933 O. 255. An order permitting the plaintiff to withdraw a suit as against certain defendants can be revised. 128 I.C. 827=1930 A. 863. Where the trial Court gives a considered decision and permits the plaintiff to withdraw the suit with liberty to file a fresh

suit, it cannot be challenged in revision. 13 L. 547=136 I.C. 1=1932 L. 360. By an order restoring a case which had been previously dismissed, a case is decided. 1933 A.L.J. 4=1933 A. 41. See also 141 I.C. 188=1933 L. 169. An order setting aside an order rejecting an appeal for failure of the appellant to give security for costs is not open to revision when it is made in the interests of justice. 42 A. 626=60 I.C. 81. An order of a Small Cause Court returning the plaint for presentation to proper Court is a "case decided". 1932 A.L.J. 1068=1933 A. 106. See also 42 P.L.R. 364 (Order returning appeal for presentation to proper Court); "case" includes interlocutory orders. I.L.R. 1940 Nag. 463. The refusal by a Court to adjourn the hearing of a suit in order to enable the applicant to pay the Court-fee is not an order which should be revised by the High Court. 45 A. 218=60 I.C. 921; 64 I.C. 211. Dismissal for default. See 53 C. 827. The High Court has power to interfere in revision with an order for the payment of deficit Court-fee, if it is convinced that the order is not supportable under the law and is passed in the illegal exercise of jurisdiction by the Court below. The fact that the plaintiff would have a right of appeal after the plaint has been rejected, on his non-compliance with the order, is no bar to revision. 60 C.L.J. 469=1935 C. 279=62 C. 417.

ILLUSTRATIVE CASES—(1) "CASE DECIDED"—WHAT IS.—No revision lies from an order merely refusing to allow an amendment of a pleading. Cases where the amendment comes under some other order of the Code, for example, the addition or substitution of parties, or striking off a pleading may amount to a case decided; but an order passed purely under O. 6, r. 17 is not. 165 I.C. 1=1936 A.L.J. 923=1936 A. 686 (F.B.). Where the effect of refusal of permission to amend a plaint is to shut out a part of the plaintiff's claim it is a "case decided" within the meaning of S. 115, and where the effect of allowing a revision in a matter in which an appeal might also lie will be a convenience to the parties and will save expense, the Court will interpret S. 115 liberally. A.I.R. 1940 N. 302=1940 N.L.J. 340. See also 1941 N. 289. Where the effect of an order of the Court is definitely to debar the plaintiff from proving a part of his claim by refusing an amendment which did not alter the nature of his suit, that is a final decision of the Court on that part of his case and is a "case decided". 55 A. 256=145 I.C. 859=1933 A.L.J. 268=1933 A. 374. A Court in framing issues or refusing to frame issues is deciding a case, if onus of proof is involved in the form of the issues. 163 I.C. 809=1936 M. 526. The dismissal of an application by the defendant to have the issue relating to the jurisdiction of the Court decided in the first instance amounts to a "case decided". 146 I.C. 792=1933 A.L.J. 707=1933 A. 753. An order of Court refusing to allow an



## NOTES.

amendment of the plaint amounts to "a case decided". 1934 A.L.J. 989; 157 I.C. 112 = 1935 A. 651; 1935 A.M.L.J. 100. Where an amendment comes under some provision other than O. 6, r. 17, *e.g.*, 'the addition or substitution of parties or striking off a pleading' the order may amount to a 'case decided.' Where an application is in fact and in substance one to elucidate the array of the parties as described in the plaint, it is not an application for amendment of a pleading and the rejection of such an application constitutes the decision of a case within the meaning of S. 115, and is revisable by the High Court. I.L.R. (1940) All. 564 = 1940 A.L.J. 445 = A.I.R. 1940 All. 448. An order returning the plaint for representation in another Court can be revised. 144 I.C. 828. *See also* 17 N.L.J. 169 = 1934 N. 259. Where the order sought to be revised marked the termination of a definite state of a proceeding in a suit a "case" should be deemed to have been decided so as to attract the application of S. 115. 147 I.C. 782 = 3 A.W.R. 119 = 1934 A.L.J. 126 = 1934 A. 25. The order of the trial Court directing the payment of additional Court-fees amounts to a "case decided". (Case-law discussed.) 55 A. 274 = 1933 A.L.J. 311 = 1933 A. 350; 154 I.C. 520 = 1935 A.L.J. 376 = 1935 A.W.R. 368 = 1935 A. 455. But *see contra* 158 I.C. 949 = 1935 O.W.N. 1158 (F.B.). An order to amend the decree is different from the amended decree and a revision lies from the former order. 147 I.C. 633 = 1934 A. 100 (2). *See also* 1941 O.W.N. 1136. The question whether an application to sue as a pauper dismissed for default is properly restored could not be raised in an appeal from a decree passed in the suit and therefore there is a 'case decided' within the meaning of S. 115 and an application in revision will lie in respect of it. 1941 O. 367 = 1941 O.W.N. 678. The proceedings on an application for permission to sue as a pauper are anterior to, and independent of, the suit and an order under O. 33, r. 7, whether it grants or rejects the application, terminates those proceedings and is a "case decided" within the meaning of S. 115, C.P. Code, and is open to revision on any of the grounds mentioned in that section. 43 P.L.R. 82. An application for pauperism may be treated as a case within S. 115, but a mere admission of the petition cannot be so treated. 150 I.C. 561 (1) = 1934 L. 401 (2). *See also* 1941 O.A. 427; 1937 O.W.N. 971 = 1937 Oudh 481. An order of the District Judge refusing to grant an absolute discharge to an insolvent cannot form the subject of second appeal. It can however be the subject of revision. 150 I.C. 80 = 35 P.L.R. 114 = 1934 L. 198. The proceedings for a temporary injunction are taken under O. 39 and must be deemed to be "a case" and therefore open to revision as they do not directly affect the ultimate decision of the suit one way or the other. 1933 L.

1046. The word 'case' used in S. 115 is wide enough to include an interlocutory order and the High Court will interfere even in the case of such orders provided they otherwise fulfil the requirements of S. 115. 175 I.C. 107 = I.L.R. 1940 Nag. 463 = A.I.R. 1938 Nag. 210. An order by Court holding the suit of a plaintiff time-barred in respect of certain reliefs claimed by him is a 'case decided' to that extent. A.I.R. 1938 Lah. 507. The dismissal of an application to treat a time-barred appeal as a cross-objection to the appeal by the opposite party is not a decree but only an order which is open to revision by the High Court. 15 L. 641 = 1934 L. 273. A revision against an order refusing a review is not incompetent. 151 I.C. 568 = 1934 A.L.J. 937 = 1934 A. 971. *See also* 148 I.C. 496 = 1934 A. 250. As to order holding *vakalatnama* liable for stamp duty, *see* 58 B. 597 = 36 Bom. L.R. 658 = 1934 B. 299. Where a partner of firm which was being sued against was not permitted to cross-examine the plaintiff's witnesses and to produce evidence for defence as any other defendant, the order passed by the lower Court was not in accordance with law and its decision that the defendant was not entitled to take part in the conduct of the case amounted to a "case decided" within the meaning of S. 115. 55 A. 719 = 1933 A.L.J. 1264 = 1933 A. 523.

"CASES DECIDED"—WHAT ARE NOT.—When a Court grants an application for a certain amendment it cannot be said that a case has been decided within the meaning of S. 115, C. P. Code. 152 I.C. 886 = 1934 A.L.J. 757 = 1934 A. 785. The decision of the Court below under S. 10 that it has jurisdiction amounts to a mere finding on a question of law which is the subject-matter of issue and cannot be treated as being in itself a "case decided". The mere fact that a separate application for a stay of the proceedings has also been dismissed would not confer jurisdiction on High Court. 149 I.C. 176 = 1934 A.L.J. 702 = 1934 A. 520. No application in revision will lie against an order of a Judge under S. 10 refusing to stay proceedings and directing a suit to proceed. Such an order is not a case decided within the meaning of S. 115. A.I.R. 1939 Sind 291. A mere decision as to the amount of the Court-fees payable does not amount to a "case decided" nor is it necessarily an irregularity in procedure or illegality or a refusal to exercise jurisdiction. 149 I.C. 1183 = 1934 A.L.J. 381 = 1934 A. 620 (F. B.). No revision lies from an order refusing to take up and decide an issue of law before the evidence is commenced. Such an order does not amount to a case having been decided. 1934 A.L.J. 1204 = 1934 A. 986. An order giving leave to defend conditionally under O. 37, r. 3, C.P. Code, is an interlocutory order and does not amount to a "case decided" within the purview of S. 115, C.P. Code. Even assuming the order not to be an interlocutory order, the Court cannot be said to act illegally or with mate-



## NOTES.

rial irregularity in the exercise of its jurisdiction in giving leave to defend conditionally, and the order is not, therefore, open to revision under S. 115. I.L.R. (1938) Lah. 289=40 P.L.R. 69=A.I.R. 1938 Lah. 548. Where an order is passed setting aside the award of the arbitrator and directing the parties to produce evidence, there is no case decided but only a case pending and no revision lies under S. 115, C.P. Code. But where the High Court has given certain directions to the lower Court as to how it should proceed in hearing the parties and considering the objections to the award and the lower Court has not carried out those directions and has purported to act in a different manner, the High Court has under the provisions of S. 107 of the Government of India Act power and jurisdiction to set aside the order of the lower Court setting aside the award and to direct it to carry out its orders already given. 154 I.C. 310=1935 A.L.J. 309=1935 A.W.R. 244=1935 A. 519. See also 1938 A.L.J. 813=1938 All. 557 (F.B.); 1939 Sind 241=183 I.C. 724 (F.B.); 1941 N.L.J. 333. The question whether the award is bad on the face of it or whether there is misconduct on the part of the arbitrators is entirely a question for the trial Judge. The order of the Judge that the award cannot stand is entirely within his jurisdiction. Besides, such order is not open to revision under S. 115, C.P. Code, because it is not a case which has been decided but is in the nature of an interlocutory order preceding the hearing of the case itself. 152 I.C. 309=15 Pat.L.T. 693=1934 P. 550. Orders allowing applications under O. 9, r. 9, C.P. Code, should only be sparingly interfered with. 152 I.C. 110=11 O.W.N. 1373=1934 O. 491. See also 151 I.C. 765=1934 M. 681=67 M.L.J. 485; 1938 Sind 76. The order of a Court dismissing the application of a party to be made a party to a suit under O. 34, r. 1, though interlocutory, has decided a case and a revision petition lies against such an order. 13 Luck. 625=1938 O. 10=1937 O.W.N. 1118. Whether a decision that an application is maintainable can be called "case decided" within the meaning of S. 115, is at least open to doubt. 1936 N. 280. Orders relating to an application for restoration of proceedings dismissed in default constitute a 'case' within the meaning of S. 115. 161 I.C. 212=1936 L. 618. Where an execution application is dismissed for default of a decree-holder and an application to restore the execution petition is also dismissed, revision from the order of dismissal of the execution petition does not lie. 1934 L. 349. See also 62 C. 417=1935 C. 279. As to rejection of plaint in part, see 1936 L. 1021. A decision in a pending suit that certain evidence is inadmissible does not amount to a "case" decided within the meaning of S. 115. 18 N.L.J. 132. So also order disallowing certain questions put to a witness.

156 I.C. 805=1935 A.L.J. 549=1935 A.W.R. 654=1935 A. 599 (F.B.). Nor an order remitting issues for decision under O. 41, r. 25, C. P. Code. 154 I.C. 676=1935 O.W.N. 352=1935 O. 333. See also 1937 Lah. 800 (Order that case cannot proceed against one of the defendants).

COURT-FEE AND VALUATION OF SUIT—CONFLICT OF RULINGS.—The general practice in all the High Courts is not to interfere with interlocutory orders unless when such order may result in irreparable injury to one or other of the parties. When a suit is allowed to proceed on an insufficient Court-fee it is not either of the litigant parties who suffers but the revenue. It is not the object of a fiscal statute to enable litigants to be defeated on technicalities. 15 P. 340=17 Pat. L. T. 9=1936 P. 85. See also 18 Pat. L. T. 864. The High Court has power to interfere and will interfere in revision against an erroneous decision of the trial Court adverse to the plaintiff in the matter of Court-fee. The question of Court-fee is not a matter which really concerns the defendant, though he may raise that question, and the Court in deciding a question of Court-fee is deciding an issue not as between the plaintiff and the defendant, but is deciding an issue as between the Crown and the plaintiff. If the decision be adverse to the plaintiff, it amounts to a refusal to exercise the jurisdiction to try the issues as between the plaintiff and the defendant, and is subject to the revisional jurisdiction of the High Court under S. 115. Where, however, the decision is in favour of the plaintiff, it is not open to the defendant to apply to the High Court in revision, because in the first place he is not a party to the dispute between the Crown and the plaintiff, and, secondly, he has a remedy, should the decision on the merits be against him, in bringing the matter of the Court-fee duty to the notice of the appellate Court under S. 12 of the Court-Fees Act; and, thirdly and most important, as between the plaintiff and the defendant the trial Court has not refused to exercise its jurisdiction to decide the case on the merits. 16 Pat. 766=18 Pat.L.T. 977=A.I.R. 1938 Pat. 22 (F.B.). See also 40 P.L.R. 1039=1938 Lah. 80; 1938 N.L.J. 1=1938 Nag. 122 (F.B.). An order of a trial Court determining the proper Court-fee payable on a plaint and holding that it is insufficiently stamped is not revisable by the High Court; and such an order, which by itself does not fall under S. 115, cannot be revised by the High Court merely because it is bound to be followed by some other order which may be without jurisdiction. 49 L.W. 270=A. I. R. 1939 Mad. 380=(1939) 1 M. L. J. 317. The High Court has jurisdiction to interfere in revision with the decision of the lower Court on the question of the classification of the suit for purposes of Court-fee, where such decision has been adverse to the plaintiff. 18 Pat. 267=1939 P.W.N. 197=A.I.R. 1939 Pat. 274; 20 Pat. 780. The



## NOTES.

High Court, no doubt, generally does not interfere with a decision in a matter of Court-fee which is favourable to the plaintiff, when there is only a simple question involved as to how much Court-fee the plaintiff shall pay. But where a question of jurisdiction is raised and that expressly depends on a decision as to the proper Court-fee, the High Court can and will interfere in revision to prevent the trial of a case by a Court which has no jurisdiction, when an appellate Court has wrongly directed that Court to assume a jurisdiction which it has not got. 52 L.W. 146=A.I.R. 1940 Mad. 821=(1940) 2 M.L.J. 176. Where a preliminary issue, as regards Court-fee, has been fully decided, the order is an order deciding a case and is open to revision. (55 A. 274, Foll.) 148 I.C. 908 (1)=11 O.W.N. 617=1934 O. 212 (2). See also 42 C.W.N. 192. In a case where there is a mere matter of valuation and the Judge applies his mind and comes to a decision, the Judge having exercised his jurisdiction no appeal will lie against the quantum of stamp duty which he directs shall be payable. But where the question is as to the particular category into which the suit falls, i.e., whether duty is payable upon the suit as belonging to a particular class or whether another duty is payable as belonging to another class and the Court decides that the case falls into a class other than that contended for by the applicant and therefore is liable to payment of an amount which is larger than that which the plaintiff contends for, and refuses to entertain the suit until the higher duty is paid, it amounts to a refusal to exercise jurisdiction under legal grounds and therefore it is a matter proper for revision. 152 I.C. 1003=1934 P. 641. An order made by the lower appellate Court, before it dismisses the appeal for default, directing the appellant to make good deficient Court-fee is not open to revision because it cannot be said that the order was passed without jurisdiction, or that the Court acted illegally or with material irregularity or exercised a jurisdiction not vested in it by law. 151 I.C. 292=11 O.W.N. 1040=1934 O. 396. Where a favourable decision has been given as regards Court-fee to the plaintiff, the High Court has no power of revision either under S. 115, C. P. Code, or under S. 107, Government of India Act. It is immaterial whether the applicant is the defendant or the Government. 56 M. 744=65 M.L.J. 25=144 I.C. 516. *Quære*.—Where Government is not a party to the suit, it is doubtful whether a petition for revising the order as to Court-fee favourable to the plaintiff can be presented by Government. 56 M. 744=65 M.L.J. 25. Questions of Court-fee if they involve questions of jurisdiction are revisable. 134 I.C. 816=34 L.W. 252=1931 M. 716. Also where they bear upon the value of suit for purposes of jurisdiction. 1936 M. 411=70 M.L.J. 398. Also where the

decision is wrong, and results in a refusal to exercise jurisdiction vested in it. 163 I.C. 462=1936 Pesh. 140. A revision petition is competent and lies against an order directing payment of additional Court-fees. 1937 A.M.L.J. 28. An order to pay additional Court-fee is an interlocutory order and cannot be the subject of a revision. 39 P.L.R. 819=18 Lah. 430. When it is a question of principle to be applied to the levying of Court-fees, the High Court may interfere in revision. 142 I.C. 195 (1)=1933 M. 367. An order under S. 149 requiring the plaintiffs to pay the additional Court-fee is not open to revision. 51 I.C. 581; 104 I.C. 145=1927 M. 1021 (2)=53 M. 452; 102 I.C. 877. See also 11 O.W.N. 1555; 158 I.C. 949=1935 O.W.N. 1158 (F.B.); 73 C.L.J. 240; 1941 O. W. N. 516 (Order refusing time for payment of deficit Court-fee). As to when orders relating to Court-fees are open to revision, see 29 C.W.N. 627=86 I.C. 853; 87 I.C. 660=48 M.L.J. 688; 27 L.W. 286=1928 M. 416. Where a Court has come to a reasonable decision on the points of law involved and holds that the Court-fee paid is insufficient, it should not be interfered with in revision on the ground that it takes a different view on such points. 22 N.L.R. 125=1933 N. 107=143 I.C. 84 (F. B.). Court-fee—Order as to—Revision against—Maintainability—Order favourable to plaintiff—Order unfavourable to him—Distinction. 56 M.L.J. 302. Court-fee and jurisdiction—Order favourable to plaintiff as to—Revision against—Interference in—Jurisdiction—Suits Valuation Act, S. 11—Scope and effect of. 56 M.L.J. 394. The order of the lower Court holding that the Court-fee paid is correct is not revisable. 32 L.W. 694=59 M.L.J. 953. A decision of a sub-Court on a question of valuation determining the amount of Court-fee, is subject to revision. 10 B. 610. But not an order directing to pay additional Court-fees. 12 C.L.R. 141. Revision lies to the High Court from an erroneous order for payment of additional Court-fee, and the plaintiff need not wait for the dismissal of the suit by disobeying the order and then move the High Court in appeal or revision. 36 I.C. 381. See also 15 I.C. 46=17 C.W.N. 160; 103 I.C. 268 (2)=1927 N. 256; 62 C. 417=39 C.W.N. 248=1935 C. 279. The Patna High Court has held that the High Court will not revise an interlocutory order demanding *ad valorem* Court-fee on a plaint, as the order of rejection on the plaint is appealable. 5 Pat.L.J. 400=56 I.C. 649=1932 P. 319; 155 I.C. 617=16 Pat.L.T. 158=1935 P. 186. See also 51 I.C. 581. The High Court has power to interfere in revision with interlocutory orders of lower Courts, e.g., direction to pay Court-fee. 50 I.C. 470=4 Pat.L.J. 195. See also 55 I.C. 786=1 Pat.L.T. 5. An order rejecting the memorandum of appeal for deficient Court-fee is not a decree or final order and the Court has jurisdiction, on the re-presenta-



## NOTES.

tion of the appeal with the proper Court-fee, to admit the appeal and have it registered. 59 C. 388=138 I.C. 643=1932 C. 482.

COMMISSION.—Order issuing commission for examination of plaintiff may be interfered with in revision. 3 P. 863=6 P.L.T. 520; 1927 M. 524. The Court has jurisdiction to dispose of the application for *examination of witnesses on commission*. An order rejecting the application cannot be said to be without jurisdiction nor can the Judge be considered to have exercised it illegally or with material irregularity only because he took an erroneous view on a question arising in the case. An interlocutory order like the one in question cannot be said to amount to a "decision" of the case within the meaning of S. 115. 1934 A. 37 (2). See also (1938) 1 M.L.J. 769. Jurisdiction—Irregular exercise of—Application for commission—Pardanishin lady living beyond jurisdiction—Order refusing application and insisting on examination at place of Court—Revision lies. A.I.R. 1937 Pat. 21. An order refusing to issue without sufficient reason, a commission for the further cross-examination of a witness partly cross-examined and who happened to live more than 200 miles away, is also subject to revision, the ground being that much harm may accrue to a party from such a refusal. 1938 A.M.L.J. 123. Where a witness cited by a party to the suit is a public servant in Government employ and serving at a place more than 200 miles from the Court where the suit is pending, O. 16, R. 19 is a bar to the Court obtaining the presence of the witness by summoning. In such a case, the Court should exercise its discretion by issuing a commission to examine that witness especially when the witness is an important witness though he may be the husband of a party to the suit. If the Court in such a case refuses a commission, it acts with material irregularity and the High Court will interfere in revision under S. 115. 21 Pat.L.T. 197=A.I.R. 1940 Pat. 437. Where a defendant who has made a counter-claim applies to be examined on commission the mere advantage of observing the defendant's demeanour in the box is not a sufficient reason for refusing a commission. The failure to distinguish between applications of the plaintiff and of the defendant in such a matter is an irregular exercise of jurisdiction in which the High Court can interfere in revision. 57 M. 705=67 M.L.J. 95.

CONSTRUCTION OF DOCUMENT.—If there is a misinterpretation of the document the concurrent findings of the lower Courts are open to revision by the High Court. 146 I.C. 363=1933 Pesh. 67. The High Court will be reluctant to interfere in revision with a finding on the interpretation of a document unless the lower Court was very clearly wrong. 1935 M. 160=1934 M. W. N. 854=154 I. C. 582. Where a document cannot possibly bear the construction that has been placed by the lower Court on

it, the High Court has jurisdiction to revise its decree. 164 I.C. 888=38 P.L.R. 348=1936 L. 801. The High Court will interfere in revision with the decree of the lower Court where it has misunderstood the case and has not considered the effect of a clause in a bond on which the plaintiff relied. 41 P. L.R. 909.

CONSTRUCTION OF STATUTE.—The interpretation of S. 23 of the Madras Agriculturists' Relief Act is an important matter coming within the scope of S. 115, and in an appeal from the decision passed by the lower Court in an incompetent first appeal, the High Court will deal with the matter in revision and revise the decision of the first Court. 52 L.W. 646=(1940) 2 M. L. J. 709. See also 52 L.W. 301=1940 Mad. 808=(1940) 2 M.L.J. 291.

COSTS.—The question of costs is principally within the discretion of the Court below and unless the High Court is satisfied that this discretion has been exercised arbitrarily it will not interfere in revision with that discretion. 144 I.C. 76=1933 A. 311. When the Code expressly gives a party a right to perform a certain act through a recognised agent and the Court has not directed him to perform it in person, the Court cannot arbitrarily reject that act and mulct the party in costs because he has chosen to do that which the Code expressly allows him to do. That is a material irregularity on a question of procedure and justifies interference in revision. 193 I.C. 707=A.I.R. 1941 N. 205.

CRIMINAL PROSECUTION.—An order punishing a person for contempt of Court can be revised. 27 A. 380. Also an order granting sanction under S. 195 of the Criminal Procedure Code. 17 M.L.J. 123. But see also 3 A. 508. An order of a Judge passed under S. 195 or S. 476, Cr. P. Code, is open to revision under this section and not under S. 439, Cr. P. Code. 23 Cr.L.J. 291=1922 A. 438. See also 1923 A. 490 (1); 48 I. C. 499; I. L. R. (1941) Kar. 422; 12 Pat. L. T. 671=1931 P. 411; 1935 Oudh 59; 35 C. W. N. 775=134 I.C. 1063=1931 C. 604; 1931 L. 105. Prosecution order of a Collector under S. 476, Cr. P. Code, while acting under S. 70, C. P. Code, cannot be revised by High Court. 38 I.C. 419=14 A.L.J. 1077. A civil Court does not cease to be a civil Court when it is considering an application made to it under S. 476, Cr. P. Code, in respect of offences, alleged to have been committed in relation to a proceeding in that Court, and if for the purpose of that application it remains a civil Court, it must be governed by the provisions of the C. P. Code. An application for revision arising out of proceedings in a civil suit must therefore be dealt with as a civil revision petition and a similar application arising out of a criminal proceeding must be dealt with as a criminal revision petition. I.L.R. (1940) Mad. 762=A.I.R. 1940 Mad. 465=(1940) 1 M.L.J. 719 (F.B.). S. 476 confers the power to prosecute. That power is con-



## NOTES.

ferred on the Court in which, or in relation to a proceeding in which the offence appears to have been committed, and if that Court refuses to prosecute, then the power is transferred to the appellate Court under S. 476-B. Excepting these two Courts, no other Court, not even the High Court, unless it happens to be the appellate Court contemplated by S. 476-B has power to prosecute. Before a prosecution can be launched, the Court must be of opinion both that an offence appears to have been committed and that it is expedient to prosecute. If the lower Courts consider the matter under Ss. 476 and 476-B and deal with them judicially and come to the conclusion that it is not, in their opinion, expedient in the interests of justice to prosecute, the High Court has no power to compel them to do so. The discretion is theirs and theirs alone. The High Court has no jurisdiction whatever to interfere in revision under S. 115, C. P. Code, however wrong or erroneous the High Court may consider the conclusion to be. The High Court can, it is possible, interfere in revision, if the lower Courts do not consider the matter under these sections or if they direct their minds to matters which are foreign to those sections or if they act arbitrarily or capriciously. 1941 N.L.J. 91=A.I.R. 1941 N. 155. The High Court can revise an order under S. 476, Cr. P. Code, passed by a Civil Court if it fails to specify the charges. 38 A. 695=36 I.C. 836. See also 11 O.W.N. 1469. A petition to revise proceedings under S. 195, Cr. P. Code, of a Civil Court should not be under S. 439, Cr. P. Code. 17 Cr.L.J. 184=33 I. C. 824; *contra* 19 I.C. 197=40 C. 477. See also 28 I.C. 334=19 C.W.N. 447; 40 C. 477=17 C.L.J. 245=33 I.C. 824; 32 I.C. 330=18 M.L.T. 591. Where the trial Court after an enquiry comes to the conclusion that a defendant in a civil suit ought to be prosecuted under Ss. 193, 465 and 471, I. P. Code, and sends a complaint but on appeal the appellate Court comes to a finding that the materials on the record do not justify the hope that the prosecution would end in conviction and set aside the order of the trial Court the former Court does not act without jurisdiction or irregularity in the exercise of its jurisdiction and the High Court will not interfere with its order under S. 115, C. P. Code. 152 I.C. 34=1934 A.L.J. 870=1934 A. 1065. Where an order withdrawing the complaint is made by the District Judge, the application in revision against that order is governed by S. 115. 147 I.C. 535=35 Cr.L.J. 432 (2)=1934 P. 55 (1).

**DELAY.**—Revision is a privilege and not a right and it corresponds to the remedies in England known as *Certiorari* and *Mandamus*. The invariable rule in these cases is that a party aggrieved must come to the High Court for relief at the earliest possible moment and also must come with no ulterior purpose. 39 I.C. 570; 43 I.C. 470;

19 C.L.J. 9; 1923 M.W.N. 159=72 I.C. 137. As a general rule the High Court does not entertain revision petitions after three months, but the High Court may, in a proper case, excuse the delay in the exercise of its discretion. 16 L.W. 760=65 I. C. 732. See also 1937 A.L.J. 1181=1938 A. 98=I.L.R. 1938 A. 148; 98 I.C. 723 (1); 1933 L. 175 (Delay of over a year). It is not the usual practice of the High Court to interfere in revision after great delay, *e.g.*, when the application is made more than one year from the date of the order. 142 I.C. 687=33 P.L.R. 1070=1933 L. 175. But where the applicant was not a party to the order which he seeks to revise and the order was passed behind his back and without notice to him, the delay is excusable and should be condoned. 1936 O.W.N. 262=1936 O. 185. A Court is not competent to refuse the issue of a commission for examination of a witness on the ground that the application is made at a late stage and that consequently it might entail an adjournment of the trial. Such refusal amounts to a misdirection and justifies the High Court in interfering with the order in revision. 67 M.L.J. 878=58 M. 400=1935 M. 21. The conclusion of the Court that there has been an unnecessary delay for the claim would not be open to revision by the High Court. But, if without any opportunity having been given to the objectors or their counsel to explain the delay, the Court has dismissed the objections summarily, the Court has acted with material irregularity and the order of dismissal can be set aside in revision. 1933 A.L.J. 1177=1933 A. 751 (1). Considerable delay in filing a petition is not in itself a sufficient ground for rejecting the petition where once it has been admitted to hearing. 1935 L. 120. As to delay of over three years, see 86 I.C. 329. See also 1929 O. 383.

**DISCRETION.**—It is not open to the High Court in revision to question the discretion exercised by the lower Court, unless it is apparent on the face of the record that the discretion has been arbitrarily and erroneously exercised. 36 P.L.R. 5=150 I.C. 305=1934 L. 807; 19 Pat.L.T. 309; 48 L. W. 517=1938 Mad. 979=(1938) 2 M.L.J. 642; 1939 A.M.L.J. 17; 43 Bom.L.R. 719; 194 I.C. 21; 1937 Pat. 528 (Order exercising discretion under S. 5, Limitation Act). Where the lower Court has passed an order upon a careful consideration by exercising discretion vested in it and upon judicial principles the order cannot be interfered with in revision. 14 Pat.L.T. 252=1933 P. 239. See also 59 C.L.J. 389=1934 C. 780=37 C.W.N. 1093. Where discretion is given to a Court, it has to be exercised judicially and not arbitrarily, and it is open to the High Court to interfere in revision where such Court appears to have exercised this discretion without applying its mind to the case. 1933 A. 957. S. 115 does not apply to a case where the lower Court has considered the matter judicially and has re-



## NOTES.

fused to exercise its discretion under S. 151, C. P. Code. In such a case no question of jurisdiction arises at all. But there are circumstances in which the High Court would itself be justified in exercising its discretion under S. 151 and setting aside the lower Court's order. 1935 A. 49. The power to add the name of any person upon whom any interest has devolved as a party to the proceedings is one within the discretion of the Court, hence an order under O. 22, R. 10, adding or refusing to add a party is not subject to revision by the High Court. 43 Bom.L.R. 719. Failure to exercise discretion in excusing delay on insufficient grounds for filing application for review after time falls under this section. 100 I. C. 727=1927 A. 386. Late production of documents—Order excusing delay and admitting documents—Discretionary under O. 13, r. 2—Not revisable. 1930 P. 603. Where an appellate Court refused to admit additional evidence offered three days after the argument was closed, the High Court would not interfere with its order in revision. 67 I.C. 252. The High Court will not interfere in revision with a discretionary order permitting evidence to be adduced under O. 41, r. 27. 33 P.L.R. 330=137 I.C. 513. As to interference in revision with the discretion of lower Court, see 7 Lah.L.J. 290=90 I.C. 632; 85 I.C. 660; 1925 C. 293; 90 I.C. 243=48 A. 199; 83 I. C. 133=1922 A. 218; 1932 C. 831. The High Court will not interfere in revision with the lower Court's order directing the Commissioner to ascertain mesne profits. 16 L.W. 312=74 I.C. 812. Where a subordinate Court not only has made a mistake in law but has entirely misunderstood the nature of the judicial discretion it was called upon to exercise the High Court will interfere in revision under S. 115. 42 M. L. J. 97=45 M. 194; 9 L. W. 166=49 I.C. 268; 26 M.L.J. 467=23 I.C. 572. A High Court ought not to interfere with every exercise of discretion by the Court below, even if no appeal is allowed, but must do so only where there has been a wanton abuse of process. 23 I.C. 522; 31 C.W.N. 653; 32 C.W.N. 128. The issue or a refusal to issue by a subordinate Court, a commission to examine witnesses is not an abuse of process warranting an interference by the High Court. 23 I.C. 522. Where a Judge uses his discretion to grant or refuse leave to institute a suit he does not act illegally nor with material irregularity nor is any question of jurisdiction involved. 17 I.C. 400. As to order imposing condition of security in granting leave to defend under O. 37, r. 3, C. P. Code, see 71 M.L.J. 241=43 L. W. 298=1936 M. 246. The High Court will not interfere in revision with an order for payment of adjournment costs for not complying with a provision of law, when the amount awarded is neither excessive nor unreasonable. 57 I.C. 506. Nor with the lower Court's order to amend issues at a

late stage. 1928 M.W.N. 836=113 I.C. 313 (1). An order under O. 1, R. 10 can be revised under S. 115, when the Court fails to exercise a discretion vested in it and when its failure is due to error. 171 I.C. 798=A.I.R. 1937 Mad. 338. See also 1937 Pat. 38 (Order rejecting application to be added as intervener). Where a Court summarily rejects a prayer to try a preliminary issue on a point of law and in its summary jurisdiction has not even expressed any opinion as to whether the question of law would be sufficient to dispose of the case, to refuse to exercise the revisional jurisdiction in such case might give rise to the gravest hardship. 17 P.L.T. 253=1936 P. 250. The High Court's interference with the discretion of a Court is confined only to an ignorant or perverse exercise of it. 20 C.W.N. 1080=1 Pat.L.J. 465=37 I.C. 129; 1927 M.W.N. 838; 52 C.L.J. 23=1931 C. 319. Where trial Judge, in the exercise of discretion refuses to stay the suit under S. 19 of the Arbitration Act on the ground that complicated questions of law are likely to arise which can better be determined by the Court than by the arbitrators, the High Court will not interfere in revision with the discretion exercised by him. 163 I.C. 854=38 P.L.R. 846=1936 L. 904.

ILLUSTRATIVE CASES.—It cannot be laid down as an inflexible rule that a discretionary order cannot be interfered with in revision. Where *amendment of the plaint* was applied for before the trial began but the Court refused the same though plaintiff had good grounds, *held*, in revision that the amendment should be allowed subject to any order for costs that may be made by the lower Court. 1934 C. 102=37 C.W.N. 1093. See also 1935 C. 102=38 C.W.N. 1146. On an application under S. 152, the Court is not bound to *correct the decree*. The Court has a discretion to make the amendment or not. And in such cases the applicant has no right in revision proceedings to demand an adjudication upon any point; his right is merely to bring the matter to the notice of the High Court and to leave it to the discretion of the Court to interfere, if interference is necessary in the interests of justice. The High Court will not interfere unless the lower Court has exercised its discretion in such a manner that it was obviously wrong and unjust for it to make the order he did. 10 O.W.N. 958=1933 O. 425. See also 1937 Pat. 528. A long delay by the defendants in referring the matter to arbitration justifies the Court in refusing to enforce the clauses of arbitration. And this being a matter of discretion, if no sufficient reason is made out, the High Court will not interfere with it. 1933 L. 1007 (1). Where the Subordinate Judge refused to *issue a commission*, because it was made too late, the order cannot be revised on the ground that under R. 57 of the Civil Rules of Practice the Judge ought to have satisfied himself that there



## NOTES.

were sufficient reasons for not making it at the proper time, even though the High Court might have been taken a different view. (9 M. 256, Ref.) 1933 M.W.N. 648. It is for the trial Court to decide in what order it will decide the issues and the High Court will not interfere in revision in order to make a direction on this point. 1933 A. 749. The power to extend time under S. 5, Limitation Act, is discretionary. The High Court will not interfere in revision with an order refusing to grant extension based on certain reasons. 162 I.C. 416=1936 Pesh. 197. See also 19 Pat.L.T. 309. Where a Court refuses to extend the time fixed for payment of deficient Court-fee after expiry of time originally fixed, under an erroneous view that it had no power, its order is open to revision, as it has not exercised any discretion in the matter. 149 I.C. 96=1934 L. 537. Petitioners paid money to avoid attachment of their movables in execution of a decree. On their objections, the execution proceedings were set aside and they applied for refund of money paid under S. 151. The Court refused the application, but the lower appellate Court allowed it. In second appeal it was contended that the lower Court had no jurisdiction to entertain the appeal as the order of lower Court was passed under S. 151. Held, that even assuming that no appeal lay, the High Court was competent to revise the order of the execution Court and that it was equitable that the benefit received by the decree-holder under the execution proceedings should be restored to the petitioners when those proceedings were set aside. 149 I.C. 1105=1934 L. 108. Order granting extension under S. 43, Provincial Insolvency Act—No revision lies. 59 M.L.J. 710=1931 M. 10. Also an order under S. 41 of the same Act. 132 I.C. 525 (1)=1931 L. 672. An order appointing a person as a trustee of a public trust cannot be revised. 1931 A.L.J. 1071=1931 A. 765. Order under Charitable and Religious Trusts Act—Revision. See 40 L. W. 920=1935 M. 56=68 M.L.J. 55. There is nothing to prevent one Court from notifying to another a particular complicated situation and to suggest to it the advisability of staying proceedings before it. The Court in such a case must no doubt attach due weight to such communication and give reasons for refusing to comply with the request. But the Court has a discretion in the matter and such discretion shall not be interfered with unless there is some flagrant miscarriage of justice. 1935 Pesh. 182. On this point, see also 1941 P.W.N. 507; 43 Bom.L.R. 719.

**ELECTION MATTERS.**—As to interference in election disputes, see 90 I.C. 771=49 M.L.J. 381; 1925 M. 707=48 M.L.J. 451; 22 L.W. 24=90 I.C. 1055; 52 M.L.J. 392; 103 I.C. 821=1927 M. 935; 1927 M.W.N. 842; 106 I.C. 398=1928 M. 199 (1); 1929 N. 282; I.L.R. (1939) Kar. 131; 1929 Bom. 279; 1939 Rang. 143. Where a District Judge

passes an order which he had jurisdiction to make restraining a returning officer from holding an election, the fact that the order passed will result in great inconvenience to the public does not amount to an illegality or material irregularity in the exercise of his discretion. 1933 A.L.J. 759=1933 A. 343. In a suit in an election dispute the High Court cannot interfere in revision with the lower Court's order on grounds which involve nothing more nor less than appreciation of evidence, and decide for itself on the question of fact whether the votes were valid or not valid. The High Court has to confine itself to the question of jurisdiction. 1930 M. 225 (2). The District Judge acting under the Mandatory Election Rules and deciding an objection to an election acts as a *persona designata* and his decision is not revisable. 11 R. 1. So also a decision under section 15 of the Bombay City Municipal Act. 35 Bom.L.R. 89=1933 B. 105. Orders passed by the District Judge acting under section 79, Burma Penal Self-Government Act, could not be revised. 10 R. 517. Where a sub-judge passes an order on a certain petition in the capacity of an election commissioner, no revision lies against it. 138 I.C. 459=1932 M. 560. See also 1938 Sind 153. As to revision of order of District Judge under Bengal Municipal Act dismissing election petition, see 39 C.W.N. 971.

**EVIDENCE.**—See 1939 O.A. 425 (finding on un rebutted oral evidence). An application under section 115 to revise the order of refusal to receive documentary evidence by the lower Court does not lie as such order cannot be construed to be decision of a case nor is there any illegality in exercise of the jurisdiction which is vested by law. 145 I.C. 810 (1)=10 O.W.N. 637=1933 O. 345 (1). Where the lower Court had based its decision on the opinion of the hand-writing expert though he had not given sworn testimony in support of the report, held, that the objection to the evidence being received could not be taken for the first time in revision. 150 I.C. 357=1934 L. 230.

**EX PARTE DECREE.**—Order setting aside *ex parte* decree is open to revision. See 88 I.C. 46; 52 M.L.J. 477; 90 I.C. 329; 1931 A.L.J. 377=133 I.C. 129=1931 A. 294 (F.B.); 8 C. 832; 53 M.L.J. 110=1927 M. 722; 100 I.C. 836=1927 L. 342; 1940 M.W.N. 1179; 32 S. L.R. 703=1938 Sind 76. A defendant who suffers an *ex parte* decree to be passed against him and fails to appeal against an order refusing to set aside *ex parte* decree under O. 9, r. 13 cannot thereafter invoke the revisional powers of the High Court to get the order declining to restore the suit set aside in revision. 18 Pat.L.T. 374. Where the petitioners were declared *ex parte*, even if the order was wrong on the merits, the High Court has no jurisdiction under section 115, to interfere with such an order. Where a decree is passed after declaring certain persons as *ex parte* the proper procedure for those persons is to have preferred an appeal against the decree and not to come by way of revision under sec-



## NOTES.

tion 115 against the order declaring them *ex parte*. 176 I.C. 825=1938 M.W.N. 17=A.I.R. 1938 Mad. 217. The High Court will not entertain a revision application against a decree which could come before the High Court in second appeal. An *ex parte* decree passed by a Court which is subject to appeal and second appeal is not a decree which is subject to revision under section 115. Such a case cannot be said to be a case which has been decided by any Court subordinate to the High Court and in which no appeal lies. 1937 A.L.J. 831=A.I.R. 1937 All. 691. An order purporting to set aside an *ex parte* decree under O. 9, r. 13 is an order deciding a case within the meaning of section 115, C. P. Code, and revision therefore lies. The fact that an appeal lies against an order made under O. 9, r. 13 refusing to grant an application to set aside an *ex parte* decree and that no appeal lies against an order granting an application to set aside a decree does not exclude the remedy by revision in the latter case, much more restricted though the remedy by revision is. 32 S.L.R. 703=A.I.R. 1938 Sind 76.

**ERROR OF LAW.**—Error of law by itself is no ground for revision. 75 I.C. 472=1923 A. 465 (2); 106 I.C. 829=1928 L. 102; 107 I.C. 273 (1). *See also* 18 A.L.J. 373=58 I.C. 182; 83 I.C. 334=1924 R. 212; 90 I.C. 430; 1912 M.W.N. 993=1 L.W. 59; 38 M. 775; 21 M.L.J. 1013; 100 I.C. 76 (1)=1927 A. 573; 106 I.C. 851=46 C.L.J. 527; 1929 R. 187; 8 O.W.N. 1235=12 L. R. 380 (Rev.); 133 I.C. 404=1931 A.L.J. 995=1931 A. 667; 8 O.W.N. 999=134 I.C. 1090=1931 O. 408; 134 I.C. 463 (A.); 10 O.W.N. 259. *Per Rupchand, A. J. C.*—An erroneous decision on a question of fact or law does not fall within the purview of section 115. 146 I.C. 777=1933 S. 279 (F. B.). Section 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it. A mere error of law is not an illegality within the meaning of the section. 142 I.C. 616=10 O.W.N. 259=1933 O. 240. *See also* 40 P.L.R. 461; 1938 Lah. 357; 16 Pat. 729=1937 Pat. 647; I.L.R. (1938) Lah. 125; 41 P.L.R. 578=1939 Lah. 162; 41 P.L.R. 553=1939 Lah. 222; 1941 Cut.L.T. 58; 1937 Rang. 61; 1937 Pat. 25. The High Court will not entertain a revision petition directed against an alleged wrong conclusion of law, in which no question of jurisdiction is involved. 36 P.L.R. 177. Where a Court has jurisdiction to determine a question and it determines that question, it cannot be said that it has acted illegally or with material irregularity because it has come to an erroneous decision on a question of fact or even of law. 153 I.C. 996=1934 R. 233. An erroneous decision on a question of law does not amount to an assumption of jurisdiction or to irregular or illegal exercise of jurisdiction. The question whether the Court had wrongly admitted a deed of adoption in evidence without its being properly and duly stamped cannot be raised in revision as it amounts only to an erroneous conclusion on a question of law. 35 P.

L.R. 683. *See also* 152 I.C. 620=1934 L. 825; 1934 R. 233; 10 O.W.N. 1145=1933 O. 534. Where a lower Court having jurisdiction to decide the case wrongly applied a section of an Act whereby injustice was perpetrated, the High Court allowed the petition for revision. [11 C. 6 (P.C.); 13 C. 225 and 15 C. 47, Ref.] 34 P.L.R. 440=1933 L. 335. Error of law is no ground for interference under section 115 or section 107 of the Government of India Act. 35 M.L.J. 604; 16 C.W.N. 1015; 40 M.L.J. 497=44 M. 554 (F.B.). The High Court cannot interfere when the lower Court has fallen into an error of law. It can only interfere in case the lower Court has acted illegally. 30 C. 397; 16 C. 482 (486); 17 M. 410 (F.B.); 6 A. 125; 7 A. 345 (350); 24 M. 685; 11 M. 144; 11 M. 332; 12 B. 617; 17 M. 37; 28 C. 574; 1932 A.L.J. 418=1932 A. 379; 137 I. C. 513 (L.). *See also* 55 A. 216=1933 A.L. J. 110=1933 A. 295. Where the Court acted on certain decisions then in vogue, subsequent decisions taking a modified view would not make order revisable. 138 I.C. 146=1932 M. 472. An erroneous construction of the rules framed by the High Court as regards costs of proceedings in subordinate Courts is no ground for revision. 3 P.L. T. 314=65 I.C. 355. Mere decisions in matters of law and fact are not within the scope of section 115; Cls. (a) and (b) deal with the question of jurisdiction and Cl. (c) refers to illegal processual acts. 52 I.C. 767=23 C.W.N. 759; 1929 N. 317; 1929 P. 633; 1930 L. 468. *See also* 64 I.C. 563; 52 I.C. 4=30 C.L.J. 64; 54 I.C. 757; where in the exercise of its jurisdiction the lower Court commits an error of judgment this is not a matter upon which revision can lie. 66 I.C. 509=1922 A. 441. *See also* 145 I.C. 380=1933 M. 231. The High Court will not interfere in revision on the ground that the Court below has wrongly decided a question of limitation. 55 I.C. 871; 47 C.L. J. 62; 98 I.C. 892=1927 L. 43; 4 O.W.N. 1123; 26 L.W. 15=101 I.C. 514=1927 M. 660; 49 A. 454=25 A.L.J. 399=100 I.C. 638=1927 A. 358; 103 I.C. 113; 133 I.C. 439=32 P.L.R. 410. Erroneous decision on point of limitation may sometimes make interference proper. 21 A.L.J. 861=46 A. 1173; 24 I.C. 872. *See also* 50 L.W. 159=1939 Mad. 740=(1939) 2 M.L.J. 353; 35 I. C. 74=4 L.W. 411; 32 I.C. 3 (1)=3 L.W. 36; 30 I.C. 364=2 L.W. 609; 25 I.C. 592=1914 M.W.N. 738. It may not be a case merely of an erroneous opinion but a case where the Court has assumed jurisdiction to proceed with the suit which ought to have been put an end to. 27 N.L.R. 251=130 I. C. 145=1931 N. 17. Where the order of the lower Appellate Court overlooks the question of limitation entirely in deciding the appeal the High Court can interfere in revision. 1929 R. 304; 1933 P. 132. The High Court will interfere when a Subordinate Court issues an order which is erroneous in law, and as a result of that order the Court acts beyond or in derogation of its jurisdiction. 30 I. C. 38=21 O.L.J. 614. *See also* 41 I.C. 919



## NOTES.

=27 C.L.J. 294; 37 I.C. 19; 23 C.L.J. 557; 33 I.C. 346=22 C.L.J. 564; 32 I.C. 982; 23 I.C. 977=41 C. 323; 19 I.C. 594; 18 I.C. 715; 34 C.W.N. 733. After a superior Court has decided a question of law in one way, the subordinate Court cannot discuss the matter over again. 140 I.C. 325 (M.). An erroneous decision on a question of limitation or *res judicata* cannot be revised. 20 A. 78; 11 B. 488; 103 I.C. 68; 33 Bom.L.R. 1596=1932 B. 81; 32 P. L.R. 130 (1); 1933 M. 231=145 I.C. 380. See also 41 P.L.R. 176=1939 Lah. 48; 50 L.W. 159=1939 Mad. 740=(1939) 2 M.L.J. 353. Question whether grant was made to one not holding *kudivaram* is one of fact—Cannot be gone into either in revision or appeal though decision of the question is necessary to see whether suit lies in Civil Court. 1929 M. 259. The fact that the Court passes a wrong order is not sufficient to justify interference. But when the Court is under a complete misapprehension as to the facts before it, it is a proper case for revision. 132 I.C. 832=1931 R. 111 (2). The fact that a Court has misconstrued the effect of a document is no ground for revision. 16 A. 39. See also 107 I.C. 273 (1). Also the fact that document has been considered to be inadmissible in evidence. 23 B. 177 at 179. Refusal to amend a clerical error in the form of probate may be a ground for revision. 27 C. 5. An illegal order passed under O. 31, r. 93 can be revised. 9 M. 437. But not an order rejecting a memorandum of appeal. 7 A. 42. When a Court rejects an application to set aside a sale on the ground that the applicant had no *locus standi*, the case does not fall under this section. 32 C. 572. Where a Court reviews its prior order of dismissal for default of a petition under O. 21, r. 58, the order of review is not revisable. 50 A. 801=1928 A. 392. Where a subordinate Court rejects an application for leave to sue *in forma pauperis* for defective verification and does not offer a chance to the applicant to correct the defect, it amounts to a failure to exercise the jurisdiction vested in it under section 153 of the C. P. Code, and the High Court can interfere in revision. 55 A. 216=145 I.C. 436=1933 A.L.J. 110=1933 A. 295. Where a Judge has entertained the application for attachment before judgment, issued the preliminary notice, heard the mortgagor, who showed cause against the application, but based his order dismissing the application for attachment before judgment on the mistaken view that an application under O. 38, r. 5, cannot be made in a mortgage suit, until the mortgaged property has been actually sold, the sale proceeds have proved to be insufficient and the mortgagees apply for a decree over under O. 34, r. 6, there is no failure to exercise jurisdiction and no revision lies. [11 C. 6 (P.C.), Rel. on.] 146 I.C. 838=1933 A.L.J. 1269=1933 A. 557.

**ERRONEOUS DECISION.**—That the District Judge has given a wrong decision is no

ground for interference on revision. 1935 L. 602; 1935 L. 120. In a case under section 115 even an error of law is not a sufficient ground for interference by the High Court. (11 C. 6, Rel. on.) 1936 C. 706; 40 C.W.N. 698, unless it raises a question as to jurisdiction. (1928 L. 140, Rel. on.) 1935 L. 972; 156 I.C. 777=1935 P. 191; 1935 L. 951; 187 I.C. 350=1940 Rang. 75; 43 Bom.L.R. 480. Nor even an error on a mixed question of fact and law. 157 I.C. 474 (1)=1935 P. 448; 155 I.C. 419=1935 P. 267. The fact that the High Court, if it had been the trial Court, might have come to a different conclusion, is not sufficient to justify interference under section 115. 1936 S. 205. The High Court will not ordinarily exercise its revisional powers even though the lower Court has decided a question of fact or law erroneously; but its hands are not tied when it finds that the order of the Court below is entirely and absolutely unjustifiable and is almost perverse. 1939 P.W.N. 229=A.I.R. 1939 Pat. 430. The High Court will not interfere in revision with a decision on the merits even if it be erroneous both in law and in fact, if the lower Court had jurisdiction to entertain the dispute between the parties. But if that Court had no jurisdiction whatever in the matter, the High Court, if it finds that the lower Court has made a mistake as to the extent of its jurisdiction, may then interfere. 14 P. 488=155 I.C. 976=16 Pat.L.T. 311=1935 P. 385. If a Judge assumes jurisdiction of the matter and proceeds to decide a question of law, however erroneous this decision may be, the High Court cannot interfere in revision. But if before assuming jurisdiction he determines a question of law or fact to determine the question of jurisdiction, a wrong decision in a case of this kind is certainly revisable by the High Court. 161 I.C. 26=1936 P. 119. See also 39 C.W.N. 915. Breach of provision of law—*Ex parte* decree against father and son—Order setting aside against latter and refusing to set aside against former—Revision. 155 I.C. 837. Where a decision disallowing a claim based on the prerogative right of the Crown to be paid its debt in priority to other creditors is fundamentally wrong, a revision petition lies to the High Court and is justified. 69 M.L.J. 832=1936 M. 132=59 M. 428.

**ILLEGALITY.**—Obvious misreading of law will justify revision. 13 Lah.L.T. 34. Where the Judge omits to apply an obvious principle of law he acts illegally in the exercise of his jurisdiction and therefore revision lies. 1936 Lah. 746. But misconstruction of a section of a statute by the lower Court in deciding a matter which it has jurisdiction to decide does not amount to illegality or material irregularity. 39 C.W.N. 910=62 C.L.J. 349. Clause (c) of section 115, means, that a High Court may interfere in a case where a Court subordinate to it has performed some action, even though while correctly exercising its jurisdiction, contrary to the law or in such a manner as to import a material irregularity into the proceedings.



## NOTES.

The High Court will not necessarily interfere in every case of illegality or irregularity and ordinarily it will make any order as it thinks fit only where the illegality or irregularity is serious or where material injustice has been caused thereby. 1938 A.M.L.J. 115. An order passed under section 151 is capable of being revised by the High Court under section 115. A.I.R. 1940 Pat. 475. See also 1939 All. 668=1939 A.L.J. 675. Where a Court has proceeded on a wrong view of the law as regards the scope and object of O. 21, r. 88, it must be deemed to have failed to exercise jurisdiction vested in it by law and must be interfered with in revision. 1940 N.L.J. 453=A.I.R. 1940 Nag. 337. Where the order of the lower Court is passed following certain reported rulings of the High Court, such an order should not be interfered with by the High Court in revision. 1940 A.W.R. (H.C.) 62. A Judge acts illegally and with material irregularity in exercise of the jurisdiction vested in him when in defiance of the order of his predecessor he disallows *rateable distribution*. 147 L.C. 1071=11 O.W.N. 161=1934 O. 110. So also where a Court which rejects an appeal for non-payment of deficient Court-fee, without really giving the appellant an opportunity to make good the deficiency. 153 L.C. 503=11 O.W.N. 1555=1935 O. 119. Also order sanctioning compromise by guardian injurious to minor's interests. 1935 O.W.N. 333=1935 O. 287. Order refusing to receive plaint insufficiently stamped on last day of limitation—When stamps of required denomination not available. 71 M.L.J. 804. Where the lower Court entirely disregards the most important piece of evidence in the case, namely, the original grant in favour of a charity, and bases its order on documents which are either irrelevant or could not have been referred to for interpreting the original grant, the procedure amounts to an illegality or material irregularity which would justify the High Court in interfering in revision under section 115. The fact that there may be other remedies open is not ground for refusing to exercise the powers under section 115. 58 B. 623=36 Bom.L.R. 687=1934 B. 343; 1935 M. 56 (1)=68 M.L.J. 55. See also I.L.R. 1938 M.988=1938 M. 634=(1938) 2 M.L.J. 100; 60 C.L.J. 19; 13 L. 761=1933 L. 99. Where the lower Court has taken into account the patent facts which are very material in deciding whether the story of a party, on whom the burden of proof lies is true or not, the High Court has no power to revise a decision of the lower Court, although taking the probabilities of the case as the guiding factor the High Court may disagree with it. But if the lower Court has manifestly failed to take into account material and patent facts appearing in the evidence, there is gross and palpable error in the decision and it can be set aside in revision. 1934 R. 356. Where two different suits for rent are hit at by O. 2, r. 2 the High Court will interfere in revision to declare their invalidity though the trial of the suits has not resulted in

injustice. 146 L.C. 351=37 C.W.N. 730=1933 C. 831. To allow a party against whom no proceedings can be taken in execution to be proceeded against, merely because the plaintiffs, who represent a temple knowing the exact rights of the parties and of everyone concerned, made a mistake in exonerating her in the suit, cannot be permitted on any ground of alleged moral right of the temple property, and the order in execution should be interfered in revision. 144 L.C. 30=1933 M. 508. Merely that a leave under section 20 (b) is granted without first issuing notice to opposite party does not amount to acting in the exercise of jurisdiction illegally or with material irregularity so as to justify an interference in revision under section 115; nor can such an order contemplate any grave or irreparable injustice so as to invoke the provisions of section 107, Government of India Act. 1933 L. 266. Where a Court has jurisdiction to decide a question before it and in fact decides the question, it cannot be regarded as acting in the exercise of its jurisdiction illegally or with material irregularity merely because its decision is erroneous. [11 C. 6 (P.C.), Foll.] 151 L.C. 668=1934 R. 230. See also 1935 L. 120. Where a lower Court has applied its mind to the case before it and duly considered the facts and the law applicable, then, although its decision may be erroneous, that error cannot be corrected on revision. (7 R. 339, Foll.) 150 L.C. 1055=1934 R. 306. An order passed under O. 9, r. 9 even though made without jurisdiction is not subject to interference by the High Court in revision. 143 L.C. 222=1933 O. 331. A Court had appointed a Receiver of suit properties. It passed an order of ejectment against an occupant of the premises though neither party had a present right to remove him. It was advisable in the circumstances of the case not to eject him. *Held*, that the order of ejectment having been passed with jurisdiction, though wrongly, was not open to revision under section 115, but could be interfered with under section 107, Government of India Act. 146 L.C. 258=1933 L. 327. Where the appellate Court has simply come to an erroneous decision on a question which was raised by an appeal properly preferred to it, it cannot be said that the appellate Court has exercised a discretion not vested in it by law and the circumstance that the question related to the jurisdiction of the Court of first instance in no way affects the jurisdiction of the appellate Court. *Held*, that no revision lay against an appellate order confirming the order returning the plaint for presentation to proper Court. 151 L.C. 416=1934 L. 536. On this point, see also 38 C.W.N. 1001=1934 C. 861.

**INHERENT POWERS, EXERCISE OF.**—See 1940 Pat. 475; 1939 All. 668; 1937 Mad. 948=(1937) 2 M.L.J. 429; 16 Pat. 729.

**ISSUES, FRAMING OF.**—It is by law the duty of the trial Court to frame issues in a suit. It is not any part of the legitimate duties of the High Court to help lower Courts to frame issues. They alone have jurisdiction



## NOTES.

to frame the issues in the suits which come before them for trial, and they have jurisdiction to decide wrongly as well as rightly. The fact that a wrong decision is made is never a ground for interference in revision under section 115. 50 L.W. 459=A.I.R. 1939 Mad. 733=(1939) 2 M.L.J. 44. See also 69 M.L.J. 239=1935 Mad. 784.

**JURISDICTION.**—Points of jurisdiction, even though not taken in the lower Court, can be argued in the High Court. 154 I.C. 705=41 L.W. 20=1935 M. 89. Where a Court makes an order which it has no jurisdiction to make, the order is revisable by the Court in revision. 181 I.C. 896=A.I.R. 1939 Pat. 518. The High Court under section 115 ought not obviously to interfere in revision so as to restore an order which itself is without jurisdiction or founded on irregularity in the exercise of jurisdiction, although the order under revision is one without jurisdiction. 1938 P.W.N. 313=19 Pat.L.T. 111=A.I.R. 1938 Pat. 447. The High Court will not generally interfere with a decision on a question of law, as the lower Court has jurisdiction to decide a question of law either rightly or wrongly. But the decision on a question of law can be interfered with if in fact a question of jurisdiction does arise. Where a lower Court makes an order under S. 151, which it has no jurisdiction to make, the order will be set aside in revision. 16 Pat. 729=18 Pat.L.T. 826=A.I.R. 1937 Pat. 647. See also 1939 Sind 137; 1940 Nag. 337. The High Court will not exercise revisional powers on a point of jurisdiction whether the suit lies in the Small Cause Side or the Original Side of the Court when such interference will be bringing about an injustice. 154 I.C. 705=41 L.W. 20=1935 M. 89. Where the lower Court has jurisdiction to decide the question and there has been no illegality or material irregularity in its decision, the application for revision must fail. 156 I.C. 1098 (R.); 1936 N. 280. "When a decision is come to in a matter in which the Court has jurisdiction a question of jurisdiction is not involved", Expl. 156 I.C. 777=1935 P. 191. Where a Court entertains and decides an appeal which in law does not lie and is incompetent, the High Court will interfere in revision and set aside the decree and judgment passed by such Court. 62 C.L.J. 530; 157 I.C. 900 (L.). Where a regular suit entertains a suit of small cause nature which it has no jurisdiction to entertain or try, and tries it to the exclusion of the Small Cause Court, its decision must be set aside in revision. 18 N.L.J. 123. Jurisdiction is entirely independent of the manner of its exercise. The former involves the power to act at all, and is independent of the decision reached in the exercise of that power. The latter is confined to the authority to act in the particular way in which the Court does not. Where, therefore, what the Court has done is only to decide the starting point of limitation, it has every power to do so and such an order is not revisable. I.L.

R. 1936 N. 73=164 I.C. 848=1936 N. 157.

**CASES OF ABSENCE OF JURISDICTION.**—

See also 40 Bom.L.R. 104=1938 Bom. 159; 1938 N.L.J. 54. Where the lower Court by a misunderstanding of the legal position and by a wrong interpretation of law fails to exercise its proper jurisdiction, the High Court will interfere in revision. 1939 P.W.N. 50=A.I.R. 1939 Pat. 263. It is the duty of an Appellate Court to properly dispose of an appeal and this necessarily involves dealing with the points raised by the appellant and looking into the record, so far as may be necessary, after making an effort to understand and appreciate the appellant's case. Where the Appellate Court fails to do so, its failure in these respects means either that there was no more than a colourable exercise of jurisdiction by it or that it acted with material irregularity and in either event the High Court has power to interfere in revision. 182 I.C. 708=A.I.R. 1939 Pat. 216. Where the Court of a Munsif returns a plaint for presentation to the Revenue Court holding that it has no jurisdiction to try the suit, and on appeal the District Judge also holds the same view and dismisses an appeal, the aggrieved party is entitled to come up to the High Court in revision. The question involved, namely, whether the Munsif's Court had jurisdiction to entertain and try the suit filed in his Court, is directly one relating to the jurisdiction of his Court, and the High Court in such a case has power to interfere in revision under section 115. I.L.R. (1938) All. 40=1937 A.L.J. 905=A.I.R. 1938 All. 17. Order remitting award passed by arbitrator under Co-operative Societies Act. 40 C.W.N. 89. Order allowing objections by third party before attachment. 1935 A.L.J. 344=1935 A. 343. Executing Court—Decision that decree is collusive. 16 P.L.T. 220=1935 P. 230. Addition of party financing litigation—Interference. See C.P.Code, O. 1, R. 10. 68 M.L.J. 236=1935 M. 394. A Court granting a right of way for the future in absence of any finding that one had existed in the past, and in absence of a plea that a right of way should be granted as an easement of necessity, acts without jurisdiction. 158 I.C. 924=1935 Pesh. 157. Application for leave to appeal in *forma pauperis*—Rejection—Order for payment of court-fee and rejection of appeal for default in payment. 1936 Pesh. 69. Application to continue suit in *forma pauperis*—Dismissal of suit—Court treating application as for leave to sue as pauper and allowing it—Interference in revision. See C.P.Code, section 11. 60 C.L.J. 587. Order of reference to arbitration in pending suit—Order in anticipation that if award is not filed by fixed date, trial must go on that day—Award not filed—Suit decreed *ex parte*—Jurisdiction—Refusal to set aside



## NOTES.

*ex parte* decree—Revision—Interference. See C.P.Code, Sch. II, para. 8. 1937 M. 9 = 71 M.L.J. 648. Order allowing suit to be withdrawn in contravention of O. 23, R. 1 (2)—Revision. See C.P.Code, O. 23, R. 1 (2). 155 I.C. 210 = 1935 P. 251. Under section 115, C.P.Code, in cases where a Court below has failed to exercise jurisdiction vested in it, the High Court may pass such order as it thinks fit, and it is not incumbent upon the High Court to remand the case for exercise of that jurisdiction by the Court below. 154 I.C. 921 = 1935 Pesh. 21. See also 1937 Pat. 647 = 16 Pat. 729; 40 P.L.R. 461.

CASES OF FAILURE TO EXERCISE JURISDICTION.—Application to set aside sale under O. 21, R. 90, by attaching creditor—Rejection on the ground of non-compliance with O. 21, R. 54 (2). 63 C.L.J. 560; 167 I.C. 672; 17 Pat. 107; 1938 A.M.L.J. 23 (Refusal to enquire in claim petition under O. 21, R. 58). See also 1938 Rang. 319; 177 I.C. 799 (Order refusing consolidation of suits). An order rejecting an auction purchaser's application for confirmation of the sale is not an appealable matter, nor can it be revised. 47 L.W. 51 = A.I.R. 1938 Mad. 307. An order of a Court rejecting an application under the Madras Agriculturists' Relief Act on the ground that the applicant is not competent to apply for the benefits of the Act is in effect a refusal to exercise the jurisdiction invoked by the applicant, and the High Court will interfere in such a case under section 115. 52 L.W. 301 = A.I.R. 1940 Mad. 808 = (1940) 2 M.L.J. 291. Order as to rateable distribution. 1935 P. 201 (2). See also 177 I.C. 269. The Court executing the decree has jurisdiction to decide the question of rateable distribution as between rival decree-holders; and the High Court will not therefore interfere in revision with an order allowing rateable distribution, as no question of jurisdiction is involved in the matter. 18 Pat.L.T. 817 = A.I.R. 1937 Pat. 651. Award in reference not agreed to by all parties. 1935 Sind 212. Where the lower Court did not consider the only question that it had to consider in the case, it must be deemed to have not exercised its jurisdiction, and the High Court will interfere in revision. 157 I.C. 432 = 1935 P. 454. Where the lower Court on a misconstruction of the order passed by an executing Court on a claim petition refuses to go into the merits of the case. 58 M. 936 = 1935 M. 547 = 68 M.L.J. 518. Application under section 174 (3), proviso (b), B.T.Act—Order requiring deposit before consideration on erroneous construction of section—Revision. See 39 C.W.N. 1176. Where a Court acts without jurisdiction, e.g., when it receives a deposit made by a party beyond the time fixed in a case where

time is of the essence of the contract or compromise in pursuance of which it is made, the High Court must interfere in revision, though no real miscarriage of justice has occurred, because the acceptance of the deposit is clearly an act without jurisdiction. 5 Cut.L.T. 27. See also 1940 P. 87; 18 Pat.L.T. 833 (Order refusing delivery and O. 21, R. 99); 1938 A.L.J. 864 = 1938 All. 635 (Order under section 9, Specific Relief Act—Revision lies); 1938 All. 456 (Order under section 5, U. P. Agriculturists' Relief Act). An order refusing permission to a minor defendant attaining majority to file an additional written statement is not one with which the High Court will interfere in revision, because there is no refusal to exercise a jurisdiction vested in the lower Court which it was bound to exercise. 41 L.W. 640 = 68 M.L.J. 155. Where the plaintiff asks for an alternative relief, "in case of failure" (*ba surat digar*) of the primary relief and the alternative relief is granted by the trial Court, primary relief being refused, and the appellate Court dismisses the appeal by the plaintiff without going into the question whether the plaintiff is entitled to the primary relief on the ground that it is not necessary as the alternative relief is granted. 1936 Pesh. 38 = 162 I.C. 658.

LAND ACQUISITION PROCEEDINGS.—See 1938 N.L.J. 54; 1937 Mad. 948 = (1937) 2 M.L.J. 429. A Land Acquisition Collector, assuming that he is a Court while dealing with applications under section 18 of the Land Acquisition Act, is not a Court subordinate to the High Court, and the High Court has, therefore, no jurisdiction to interfere with his order under that section in revision under section 115. 42 C.W.N. 212 = A.I.R. 1938 Cal. 250. An order of a District Judge rejecting a reference made under section 18 of the Land Acquisition Act in the erroneous view that the party at whose instance the reference was made was not entitled to demand a reference, is open to revision under section 115. 43 C.W.N. 973 = I.L.R. (1939) 2 Cal. 401 = A.I.R. 1939 Cal. 669.

LEAVE TO SUE IN FORMA PAUPERIS.—Where an application for leave to sue as pauper is dismissed for non-production of a Succession Certificate, the High Court will interfere. 16 M. 454. A Court has jurisdiction to consider the merits of a case on an application for leave to sue *in forma pauperis*; the fact that the Court placed reliance on evidence which might not be relevant to a transfer application is not an irregularity affecting its jurisdiction and no revision lies. 142 I.C. 379 = 1933 Sind 82. In an application for leave to sue *in forma pauperis* a Court acts without jurisdiction in going into the evidence elaborately and trying the question of title in order to see if he has a good cause of action; so



## NOTES.

also failure to take evidence on the question of pauperism amounts to not exercising jurisdiction vested in it by law and the order can be interfered with in revision. 45 A. 548=73 I.C. 538. See also 1938 Nag. 210; 1938 O.W.N. 561=1938 Oudh 146; (1941) 1 M.L.J. 31. According to the practice of the High Court of Patna a revision petition does lie under section 115, against an order granting leave to a pauper plaintiff to sue *in forma pauperis*. The fact that the order is an interlocutory order or that the government have not moved in the matter is no bar to the High Court exercising its discretion in revision. 19 Pat.L.T. 101=A.I.R. 1938 Pat. 209. No application in revision lies against an order admitting an application for leave to sue *in forma pauperis*. 67 I.C. 641=1922 A. 208; 1933 A. 295=145 I.C. 436=55 A. 216. But see (where it is admitted without notice). 104 I.C. 364=8 P.L.T. 794. On receipt of an application to appeal as a pauper, the Court has first to consider whether *prima facie* there is any ground for its rejection. If it is rejected, the matter ends. But if it is not rejected a notice though not compulsorily should be issued to the Government Pleader and the respondent and on hearing them, the Court has to decide whether the applicant is in a position to pay the court-fees and further whether the decree is one which is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. Refusal to hear Government Pleader is revisable. 1934 A.L.J. 827=148 I.C. 624=1934 A. 424. An order rejecting an application for leave to sue *in forma pauperis* is not open to revision. 44 A. 248=65 I.C. 255; 125 I.C. 578 (2). See *contra* 104 I.C. 198. See also 1939 Oudh 129; 1940 O. 353; 1940 Oudh 148; 1941 N.L.J. 473; 1938 O.W.N. 561; 1937 Oudh 481; 1940 Pat. 263. Where the Court to which an application under O. 33, R. 1 for leave to sue *in forma pauperis* is presented, dismisses the application although satisfied that the applicants are paupers, holding that the suit is not maintainable in view of the provisions of section 47, and where in coming to this conclusion, it not only refers to certain proceedings mentioned in the proposed plaint but makes use of the information obtained therefrom, the use of such information is irregular and it amounts to a material irregularity in the conduct of the proceedings in the lower Court which vitiates the order passed therein. A.I.R. 1938 Rang. 453. Where on an application for leave to appear *in forma pauperis* the District Judge directs the Munsif to make an enquiry and on his report that the applicant is not a pauper rejects the application without hearing the applicant, he acts in the exercise of his jurisdiction with material

irregularity and the order passed by him cannot, therefore, be supported. Although the applicant has appeared before the Munsif, he is entitled to show to the Judge that the report of the Munsiff is wrong. 186 I.C. 170=A.I.R. 1940 Pat. 263; 145 I.C. 436=55 A. 436=1933 A. 245. An order rejecting an application for leave to sue *in forma pauperis* is a complete decision of the case so far as the Court rejecting it is considered, and is open to revision under section 115, C.P. Code, and a finding by the lower Court on evidence that the petitioner is a pauper, is one of fact and final in revision. 152 I.C. 417=11 O.W.N. 1356. The High Court has no authority to interfere in revision with an order of a Court declaring a party to be a pauper for purposes of O. 33, R. 1, C.P. Code. The fact that the lower Court wrongly holds that the ornaments worn by a female applicant are her necessary wearing apparel cannot be a ground for holding that it has acted illegally or with material irregularity in adopting that view. 19 Pat.L.T. 844=1939 P. 95. On this point, see also 1935 M. 230=41 L. W. 135; 105 I.C. 30; 1929 L. 498 (1); 1930 A.L.J. 901; 1937 M.W.N. 415; 1939 Oudh 129=1939 O.W.N. 193; 142 I.C. 379=1933 S. 82 following 32 A. 623 and 48 M. 700; 1933 A. 295=55 A. 216=1933 A.L.J. 110=145 I.C. 436; 9 R. 86=1931 R. 129; 1931 R. 318. No difference between an order rejecting an application and an order granting it); 34 Bom. L.R. 1273=140 I.C. 381=1932 B. 584. Where a Court rejected an application under O. 44, R. 1 on erroneous grounds, it amounted to material irregularity and the High Court can interfere in revision. 54 A. 394. As to order dismissing application to sue *in forma pauperis* involving decision on a doubtful point of law, see 69 M.L.J. 816. Application for leave to sue as pauper—Death of applicant—Application by heir to continue—Refusal—Revision. 1936 P. 591.

LEGAL PRACTITIONERS ACT, ORDER UNDER.—Section 36 of the Legal Practitioners Act confers a special jurisdiction on Subordinate Courts, and inasmuch as the attendance in Court is an important valuable civil right of a citizen, it cannot be taken away from him by a Court if its jurisdiction has been exercised either illegally or with material irregularity. Consequently an order of a District Judge under section 36 declaring a person to be a tout is capable of being revised by the High Court under section 115, C.P. Code. The District Judge in making the order under section 36 of the Legal Practitioners Act is acting as a Court and not in an administrative capacity, and his order therefore falls within the scope of section 115, C.P. Code. This revisional jurisdiction of the High Court is, however, necessarily of an exceptional character, and can-



## NOTES.

not be invoked except in furtherance of justice. Section 439 of the Cr. P. Code has no application to the case, and the order cannot be revised under that section. Nor can the order be revised under the Government of India Act of 1935, by reason of sub-cl. (2) to section 224 of the Government of India Act of 1935. I.L.R. 1938 Mad. 988 = 1938 Mad. 634 = (1938) 2 M.L.J. 100. Section 115—Material irregularity—Objection that pleader engaged by opposite party should not be allowed to appear—Objection accepted in lower Court—No interference in revision. A. I. R. 1938 Rang. 241. Where a Judge orders that an advocate could not with propriety appear on behalf of a party by reason of the fact of his having been interested on behalf of the other side in matters which were collateral to the suit in question and there was upon the record proof of ample material before him upon which he could make such an order and there was no suggestion that whether he was right or wrong he did not do so *bona fide*, then it is not a case for the High Court to intervene. 1939 Rang. 183. Per *Mosely, J.*—The order is admittedly a "judgment" as defined in section 2 (9) of the Code, and therefore the powers of the Court are restricted as laid down in section 85, Government of Burma Act and the question cannot be agitated in addition as one of general superintendence over the Courts as provided in section 85 (1) of that Act. 1939 Rang.L.R. 514 = 182 I. C. 77 = A.I.R. 1939 Rang. 183 (S.B.).

LIMITATION.—High Court can interfere in revision under section 115 where the lower Court allowed an application barred by limitation without at all applying its mind to the question of limitation and deciding that question. There is a distinction between cases in which the lower Court decided the question of limitation and cases in which the lower Court did not apply its mind to that question at all. 144 I.C. 147 = 1933 P. 132. A wrong decision on a question of limitation is not a material irregularity in the exercise of jurisdiction. 1934 Pesh. 103. Although it is not a matter of law, but it is a matter of uniform practice that civil revisions are entertained only if they are filed within three months of the date of the order sought to be revised. 1933 P. 582. Limitation—Legal revision is not governed by any law of limitation. 144 I.C. 482 = 1933 Pesh. 51. High Court can interfere in revision in a case which is on the face of it time-barred and where the lower Court has made an order without adjudicating on the question of limitation. (A.I.R. 1916 Cal. 651, Rel. on.) 176 I.C. 134 = A.I.R. 1938 Rang. 87. While ordinarily it is the practice of Courts not to entertain revision applications preferred more than three months after the order appealed against, in suitable cases this practice should not be rigorously enforced. 1937 A.M.L.J. 107. Where a

Court dismisses a suit or an application on the ground of limitation it does not refuse to exercise jurisdiction. On the contrary it takes cognizance of the suit and exercises jurisdiction by holding that on a point of law the suit fails. To ignore the plain terms of section 4 of the Limitation Act is to deprive a litigant of the statutory privilege given to him by that section; and a refusal to apply the section in a case in which it does apply amounts to exercising jurisdiction illegally and with material irregularity, justifying interference in revision under section 115, C.P. Code. 175 I.C. 221 = 40 Bom.L.R. 152 = A.I.R. 1938 Bom. 209. It is a rule of practice in Rangoon High Court that revisions may be filed at any time within 90 days of the date of the decree sought to be revised, and the applicant is entitled to utilize that rule of practice to the full. 1940 Rang.L.R. 237 = A.I.R. 1940 Rang. 91.

NEW PLEA.—It is not the practice to interfere in revision on a point not raised or argued in the lower Court. 1940 N.L.J. 340 = A.I.R. 1940 Nag. 302. A question of jurisdiction can be raised even on revision. 162 I.C. 416 = 1936 Pesh. 97. But if it is dependent on the investigation of facts it cannot for the first time be dealt with by the High Court in revision. 24 I.C. 862. See also 6 P.L.T. 295 = 87 I.C. 381 = 1925 P. 461; 100 I.C. 37; 103 I.C. 68. Where the appellate Court sets up a new case for defendant it acts with material irregularity. 98 I.C. 867 (2) = 1927 L. 73. Where the legal representative of a deceased plaintiff was allowed to set up a claim not open to original plaintiff, the High Court will interfere in revision and set aside the order. 42 M.L.J. 43 = 68 I.C. 703. A party is not entitled to raise the *question of registration* in revision simply because it is apparent on the face of it, though it has not been raised in the Courts below. It is the duty of the plaintiff to have raised this issue. 151 I. C. 105 = 1934 Pesh. 50. Where in revision the petitioner urged that a new issue which was already covered by the issues under consideration should be framed, he could not be granted a further opportunity of doing that which with common care and attention he must have known he had to do from the start. 164 I.C. 189 = 1936 Pesh. 157. Where in an application for execution of an instalment decree filed beyond three years from the date of the first default, the decree-holder bases his cause of action on the default clause in the decree and wants to save limitation by certain payments made by the judgment-debtor which he fails to prove he cannot set up in revision a new case that his application is for realisation of the unpaid instalments within three years from the date of his application. 42 C.W.N. 437.

REMAND.—The inherent power under section 115 to remand a case may be exercised when the trial Court has not tried the case properly. Where the appellate Court ought



## NOTES.

not to give facilities to the parties for adducing further evidence, the fact that the Court desires to do so cannot give it jurisdiction to set aside the decree of the Court below and remand the case for re-trial. 148 I.C. 962=15 P.L.T. 142=1934 P. 284. See also 1933 Pesh. 48; 146 I.C. 777=1932 Sind 297 (F.B.). Where the appellate Court set aside the order of the trial Court and remanded the suit for retrial and further re-framed an issue and directed the lower Court to take additional evidence on the issue: *Held*, the order was illegal and was not appealable as it was not one under O. 41, R. 23; but that the High Court could set it aside in exercise of its powers under section 115. 158 I.C. 86=1935 L. 161. See also 42 P.L.R. 201=1940 Lah. 290. An appellate Court acts with material irregularity in the exercise of its jurisdiction in going beyond the pleadings and the grounds of appeal and in remanding a suit for the trial of issues which do not arise in the case. 152 I.C. 133=35 P.L.R. 684=1934 L. 708; 1935 L. 111. The trial Court *held* that it had no jurisdiction to try a case and returned the plaint. The District Court on appeal, *held*, that the trial Court had jurisdiction and remanded the case. *Held*, that the order of remand, even if erroneous, was within the jurisdiction of the District Court and that it could not be interfered with in revision. 34 P.L.R. 771=1933 L. 940. See also 1935 L. 161.

REVIEW.—An order of Court rejecting an application under O. 47, R. 1 after considering the grounds of review is not open to revision. 40 P.L.R.J. & K. 31. Where a Court grants a review when there is no sufficient reason for granting a review under O. 47, R. 1 it is certainly a case in which a question of jurisdiction is incidentally involved, which would entitle the High Court to interfere in revision under section 115, if the question of jurisdiction involved is not covered by O. 47, R. 7. 50 L.W. 903=A.I.R. 1940 Mad. 203. Both O. 47 and section 151 are to be construed strictly, and are not intended to be used, and are not to be used, to allow one Judge to sit in appeal on orders of his predecessor exercising an equal jurisdiction with his own. Where a Judge sets aside an order passed by his predecessor dismissing suit as against one of the defendants in a suit, his order is one without jurisdiction, inasmuch as he usurps an appellate jurisdiction which he does not possess. Such order, although alleged to be passed under section 151, is in substance one reviewing the judgment of his predecessor. Although an appeal against such order is not strictly maintainable, such an appeal, treated as revision application, is competent. The order sought to be set aside is not an interlocutory order so as to bar an application in revision, inasmuch as it sets aside an order which is not an interlocutory order. In any case, it is an order deciding a case within

the meaning of section 115, and a revision application against it is maintainable. I.L.R. (1939) Kar. 330=A.I.R. 1939 Sind 137.

SCHEME SUIT.—Where on an application filed under a scheme framed under section 92, the District Judge does not give his decision on all the points raised by the parties, and an appeal is incompetent from his order, the High Court can interfere in revision under section 115 (c), not only to the extent of supplying those omissions in the District Judge's order by giving their directions on those points but can consider and reopen in revision the points on which the District Judge has given his decision, when the consideration of the former would necessarily involve a reconsideration of the latter. 73 C.L.J. 532. If a Court on an interpretation of a scheme framed under section 92, holds that it authorized the appointment of a trustee in place of a deceased trustee, no question of jurisdiction arises in the case. Even if it be assumed that it has not put a correct construction on its terms, it cannot be regarded as anything more than a mistake of law, but that cannot be a ground for interference with the order under section 115. 1937 O.W.N. 39=A.I.R. 1937 Oudh 193.

SECURITY FOR COSTS, ORDER AS TO.—See 41 L.W. 135. Where in a suit *in forma pauperis*, the defendant put in a petition under O. 25, R. 1 (3); C.P. Code, for security for costs at the earliest possible opportunity, and had been diligent throughout in his prosecution and the Court after several adjournments finally dismissed the petition on the ground that the suit itself was ready for trial, that the defendant had already incurred the costs and that no useful purpose could be served by directing the plaintiff to furnish security at that stage. *Held*, that although generally an order requiring security under O. 25, R. 1 (3) is entirely a matter of discretion with which the High Court would not interfere, the circumstances of the above case were very peculiar as the Court, instead of disposing of the petition at once on its merits, adopted the wholly unjustifiable course of adjourning it together with the suit, thereby defeating the very object of the petition, and finally dealt with it not on its merits, but dismissed it for something which, if true, was not the fault of the petitioner but was entirely due to the position created by the action of the Court itself and that thereby the Court committed an irregularity in the exercise of its jurisdiction. 41 L.W. 135=1935 M. 230=69 M.L.J. 38. Accepting or refusing to accept security furnished by a person appointed as a guardian of property of a minor is a matter within the discretion of the Court. Where the Court in exercise of its discretion has accepted the security and it is not shown that the Court has acted with material irregularity in the exercise of its jurisdiction, no revision lies against the order accepting the security. 41 P.L.R.



## PART IX.

## SPECIAL PROVISIONS RELATING TO THE CHARTERED HIGH COURTS.

Part to apply only to certain High Courts.

116. This part applies only to High Courts which are, or may hereafter be, <sup>1</sup>[constituted by His Majesty by Letters Patent].

Application of Code to High Courts.

117. Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts.

## LEG. REF.

<sup>1</sup> Substituted for "established under the Indian High Courts Act, 1861, or the Government India Act, 1915" by A.O., 1937.

## NOTES.

592=A.I.R. 1939 Lah. 170. Order rejecting appeal under O. 41, R. 10 on failure to furnish security ordered. 161 I.C. 233=1936 R. 109.

TECHNICAL DEFECTS.—The High Court will not be justified in interfering in revision with an order granting permission to the plaintiff to sue *in forma pauperis* on the ground that the power of attorney granted by the plaintiff to the Mukhtar who filed the application was technically defective, when the plaintiff has been in fact found to be a pauper. 42 P.L.R. 227. See also 1941 N.L.J. 324.

WITHDRAWAL OF SUIT.—Where the Court allowed the plaintiff to withdraw his suit with liberty to bring a fresh suit, and the order was supported by good reason, *held*, that the order could not be interfered with in revision. 145 I.C. 222=10 O.W.N. 311=1933 O. 255. Where a Court gives leave to withdraw a suit with liberty to bring a fresh suit under O. 23, R. 1, in a case in which it has no power to grant leave to file a fresh suit, it acts without jurisdiction. Where the Court does not at all purport to consider whether it has jurisdiction or not, and does not indicate any ground for granting permission and gives no finding that there was a defect in the plaint, the High Court can interfere in revision. 1940 M.W.N. 806=(1940) 2 M.L.J. 398. When the Court has applied its mind to the question of permitting the withdrawal of a suit under O. 23, R. 1 (2) and has exercised its discretion the order cannot be interfered with in revision even if it is shown that the discretion has not been exercised properly. 147 I.C. 441=1934 A.L.J. 821=1934 A. 214. See also 103 I.C. 229; 105 I.C. 372; 43 Bom.L.R. 143 (F.B.); 1941 Mad. 46; 1941 O. A. 343. Where a Court permits a plaintiff to withdraw his suit and to bring a fresh suit under O. 23, R. 1, it is unnecessary for the High Court in revision to enquire into the sufficiency of the ground. All that it has to do is to see whether the Court below has or has not applied its mind to the matter

before it and if it is apparent that it did apply its mind, even if it has exercised a wrong discretion, the case would not come under section 115, C.P.Code. 1935 A.L.J. 277=1935 A. 284. See also 157 I.C. 673=1935 A.L.J. 983=1935 A. 740; 159 I.C. 147=1935 A.L.J. 330=1935 A. 381. In the absence of any grounds such as are contemplated by O. 23, R. 1, C.P.Code, the Court has no jurisdiction to allow a suit to be withdrawn with liberty to bring a fresh suit. In any case there can be no doubt that the Court acts with material irregularity in the exercise of its jurisdiction in allowing the suit to be withdrawn. 158 I.C. 280=1935 O.W.N. 1066=1935 O. 495. See also (1940) 2 M.L.J. 398.

PRACTICE.—Contents and frame of application for revision. See 68 M.L.J. 218. As to conversion of incompetent appeal into a revision application, see 1937 Oudh 244. Appellate order in proceedings under section 476, Criminal Procedure Code—Revision—Procedure. 11 O.W.N. 1469=1935 O. 59. In revision application against order confirming an award and ordering a decree to be drawn up, ordinarily a copy of decree should be annexed to the application. But failure to do so is not fatal to the application and it should not be rejected on that ground alone. 30 S.L.R. 271=1936 S. 172. Where a trial Court is informed that a revision petition has been filed against an interlocutory order refusing an amendment asked for, it is the duty of that Court to postpone the dismissal of the suit until the decision of the revision petition. 1940 A. M.L.J. 45.

L. P. APPEAL.—No appeal lies against an order made by a single Judge of the High Court under this section.

SEC. 116.—Code applies to the Vice-Admiralty jurisdiction of High Court. 17 C. 66; 17 C. 337. See also (1938) 1 M.L.J. 769=1938 M. 646.

SEC. 117.—Section applies the provisions of the Code to Chartered High Courts in the exercise of their appellate civil jurisdiction including their jurisdiction in Letters Patent appeals. 53 A. 535=1931 A.L.J. 187=1931 A. 244 (F.B.) [48 C. 481 (P.C.), Rel. on; 1 A.L.J. 509 and 16 A.L.J. 964, not good law after 48 C. 481 (P.C.)].



118. Where any such High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs ;

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

119. Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorised him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys.

Provisions not applicable to High Court in original civil jurisdiction.

120. (1) The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20.

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## PART X.

### RULES.

Effect of rules in First Schedule.

121. The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part.

122. High Courts <sup>2</sup>[constituted by His Majesty by Letters Patent] <sup>3</sup>[and the Chief Court of Oudh] <sup>4</sup>[\* \* \* \*], may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.

### LEG. REF.

<sup>1</sup> Sub-section (2) repealed by S. 127 and Sch. III of Act III of 1909.

<sup>2</sup> Substituted for the original words by A.O., 1937.

<sup>3</sup> Inserted by S. 2 and Sch. of the Oudh Courts (Supplementary) Act, 1925 (XXXII of 1925); the words "Courts of Oudh and Sindh" are to be substituted for the words "Court of Oudh" by S. 2 and Sch. of the Sindh Courts (Supplementary) Act, 1926 (XXXIV of 1926), when that Act comes into force.

<sup>4</sup> The words "Chief Court of Lower Burma" substituted by S. 2 and Act XVIII of 1919, and the words "and the Chief Court of Lower Burma" were subsequently repealed by Act XI of 1923.

### NOTES.

SEO. 119.—A rule of Court authorizing one legal practitioner to appoint another to hold his brief and appear for him is valid. 9 A. 613. An Advocate may perform all the duties that may be performed by a pleader. 9 A. 617. A vakil cannot practise on the Original Side of Calcutta High Court. 30 C. 986. Section 119 is not restricted to the admission of advocates, vakils and attorneys and to their professional conduct. 109 I.C. 206=1928 M. 472.

SEO. 122:POWERS OF HIGH COURT—RULES.

—Under section 122 High Court has power to amend, alter or add to any of the rules in the 1st Schedule to the Code. If a new rule that has been made is to some extent in conflict with the previous existing rule it must, by implication, be deemed to have annulled or altered the old rule. 134 I.C. 836=1931 A.L.J. 865=1931 A. 567 (F. B.). Object of the section is to provide for elasticity in procedure and to enable defects in the Code to be remedied without the dilatory process of legislation. There is nothing in the Code to say that those rules should not be inconsistent with the Code. 57 C. 676=129 I.C. 181=1930 C. 685. But see also 128 I.C. 238=1930 A.L.J. 1126=1930 A. 558. High Court has power to alter, amend and add to rules of procedure laid down in the Code, but it has no power to alter the period of limitation provided by the Limitation Act. 68 I. C. 777=1923 L. 96; 1930 R. 228=8 R. 380 (F. B.). Section 5 of the Limitation Act, as it stands, does not extend to application to set aside *ex parte* decrees, but High Court acting under section 122 can frame a rule making it applicable to the periods of limitation prescribed in that Act. 32 I.C. 975. In order to have the effect of varying the rules



123. (1) A Committee, to be called the Rule Committee, shall be constituted at <sup>1</sup>[the town which is the usual place of sitting of each of the High Courts <sup>2</sup>[and of the Chief Court] <sup>3</sup>[\* \* \*] referred to in section 122].

(2) Each such Committee shall consist of the following persons, namely :—  
 (a) three Judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or <sup>4</sup>[\* \* \*] a Divisional Judge for three years,  
 (b) a barrister practising in that Court,  
 (c) an advocate (not being a barrister) or vakil or pleader enrolled in that Court,

(d) a Judge of a Civil Court subordinate to the High Court, and  
 (e) in the towns of Calcutta, Madras and Bombay, an attorney.

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their number to be president;

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice or Chief Judge shall be the President of the Committee.

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf; and whenever any member retires, resigns, dies or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead.

(5) There shall be a secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf <sup>5</sup>[by the Provincial Government].

124. Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration.

#### LEG. REF.

<sup>1</sup> Substituted for "each of the towns of Calcutta, Madras, Bombay, Allahabad, Lahore and Rangoon" by Act XIII of 1916.

<sup>2</sup> Inserted by Act XXXII of 1925, the words "Chief Courts" are to be substituted for the words "of the Chief Court" by Act XXXIV of 1926, when that Act comes into force.

<sup>3</sup> The words "and of the Chief Court" were substituted for the words "Chief Courts" by Act XVIII of 1919 and subsequently repealed by Act XI of 1923.

<sup>4</sup> The words "(in Burma)" were substituted for the original words "(in the Punjab or Burma)" by S. 2 and Sch. I of the Repealing and Amending Act, 1919 (XVIII of 1919) and the words "(in Burma)" were subsequently repealed by S. 3 and Sch. II of the Repealing and Amending Act, 1923 (XI of 1923).

<sup>5</sup> Substituted for "by the Governor-General in Council or by the Local Government, as the case may be" by A.O., 1937.

#### NOTES.

in the first Schedule to the Code, the rules under section 122 must first have been consi-

dered and submitted by a Rule Committee appointed under section 123. 74 I.C. 330=1923 P. 19. Under the rules of Lahore High Court framed under section 122, the memo. in the case of second appeal shall be accompanied by a copy of the first Court's judgment. 2 L. 227.

RULE ULTRA VIRES.—Under section 122 Chief Court framed a new rule in place of R. 2, O. 34, which allowed interest at Court rate and not at mortgage rate as stipulated. The new rule was held to be *ultra vires* as it limited the substantive right of the mortgagee to the stipulated rate. 12 I.C. 18=4 Bur.L.T. 207. Rule made by High Court in conflict with the sections of C.P.Code is void. 28 O.C. 169=85 I.C. 455=1925 O. 492; 1930 A. 558.

Sec. 123.—Sections 122 and 123 do not apply to Patna High Court, and Rules are made under the power conferred by Clause 29 of the Letters Patent. 2 Pat.L.T. 112=5 Pat.L.J. 719.



125. High Courts, other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such conditions <sup>1</sup>[as, <sup>2</sup>[the Provincial Government], may determine] :

Power of other High Courts to make rules.

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court.

<sup>3</sup>[126. Rules made under the foregoing provisions shall be subject to the previous approval of the Government of the Province in which the Court whose procedure the rules regulate is situate or, if that Court is not situate in any Province, to the previous approval of the Governor-General.]

Rules to be subject to approval.

127. Rules so made and <sup>4</sup>[approved] shall be published in the <sup>5</sup>[official Gazette \* \* \* ], and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.

Publication of rules.

128. (1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

Matters for which rules may provide.

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for all or any of the following matters, namely :—

(a) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service ;

(b) the maintenance and custody, while under attachment, of live-stock and other movable property, the fees payable for such maintenance and custody, the sale of such live-stock and property, and the proceeds of such sale ;

(c) procedure in suits by way of counterclaim, and the valuation of such suits for the purposes of jurisdiction ;

(d) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts ;

(e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not ;

(f) summary procedure—

(i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—

on a contract express or implied ; or

on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty ; or

on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only ; or

on a trust ; or

(ii) in suits for the recovery of immovable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant ;

#### LEG. REF.

<sup>1</sup> Substituted for the words " as the Governor-General in Council may determine " by Devolution Act, 1920.

<sup>2</sup> Substituted for " in the case of the Court of the Judicial Commissioner of Coorg, the Governor-General in Council, and, in other cases the Local Government," by A.O., 1937.

<sup>3</sup> Substituted by A.O., 1937.

<sup>4</sup> Substituted for " sanctioned " by Act XXIV of 1917.

<sup>5</sup> Substituted for " Gazette of India or in the local official Gazette as the case may be " by

A.O., 1937.

#### NOTES.

SEC. 128.—Whether section 128 (i) which allows delegation of judicial duties validates rules which were in existence prior to the Code of 1908 when such delegation was *ultra vires*, see 42 I.C. 623=21 C.W. N. 1052.

SEC. 128 (2) (a).—A village headman is not entitled to notice before personal service of warrant on him. 1930 M.W.N. 1215.



- (g) procedure by way of originating summons ;
- (h) consolidation of suits, appeals and other proceedings ;
- (i) delegation to any Registrar, Prothonotary or master or other official of the Court of any judicial, quasi-judicial and non-judicial duties ; and
- (j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts.

129. Notwithstanding anything in this Code, any High Court <sup>1</sup>[constituted by His Majesty by Letters Patent] may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

<sup>2</sup>[130. A High Court not constituted by His Majesty by Letters Patent may, with the previous approval of the Provincial Government, make with respect to any matter other than procedure any rule which a High Court so constituted might under section 224 of the Government of India Act, 1935, make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town.]

131. Rules made in accordance with section 129 or section 130 shall be published in the <sup>3</sup>[official Gazette, \* \* \*], and shall from the date of publication or from such other date as may be specified have the force of law.

## PART XI.

### MISCELLANEOUS.

132. (1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

### LEG. REF.

<sup>1</sup>Substituted for "established under the Indian High Courts Act, 1861, or the Government of India Act, 1915" by A.O., 1937.

<sup>2</sup>Substituted for the original section by A.O., 1937.

<sup>3</sup>Substituted for "Gazette of India or the local official Gazette as the case may be" by A.O., 1937.

### NOTES.

SEC. 129.—Rules made by High Court are valid only if they are consistent with the Letters Patent. 34 C. 619, 624. Object of the section is to provide for elasticity in procedure and to enable defects in the Code to be remedied without the dilatory process of legislation. There is nothing in the Code to say that those rules should not be inconsistent with the Code. 57 C. 676=129 I.C. 181=1930 C. 685. But see also 128 I.C. 238=1930 A. L.J. 1126=1930 A. 558. Rule 725 of Rules of Bombay High Court is the governing rule for appeals from the Original Side and not O. 41, R. 10. 37 B. 572. Section

129 expressly authorizes Bombay High Court to make rules to regulate its own procedure in the exercise of its original civil jurisdiction. A payment order under R. 874 in favour of a solicitor when validly made can be executed as a decree. 162 I. C. 489=1936 L. 369.

SEC. 131.—Rules framed under this section come into force from date of publication or from such other date as may be specified. 50 A. 865.

SEC. 132: SCOPE AND APPLICATION OF SECTION.—Section 132 applies not merely to witnesses but also to the examination of parties to a suit or proceeding. 11 I.C. 668. The words "personal appearance" mean "personal attendance." (56 Cal. 865, Diss.; 1925 M. 905, Rel. on.) 55 A. 666=146 I.C. 885=1933 A.L.J. 1384=1933 A. 551; 159 I.C. 153=1935 S. 208; I.L. R. (1941) 2 Cal. 155. Section 132 is not confined to *purdanashin* woman strictly so called. An old Hindu lady belonging to a high family but not belonging to the *purdanashin* class ought not to be compelled having regard to her social position and the



133. (1) The Provincial Government may, by notification in the official Gazette, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption.

(2) The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court by the Provincial Government and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court.

(3) Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs.

134. The provisions of sections 55, 57 and 59 shall apply, so far as may be, to all persons arrested under this Code.

Arrest other than in execution of decree.

135. (1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court.

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto,

#### NOTES.

feeling of her class, to appear in the witness-box, but must be examined on commission; the costs of the commission being costs in the cause. 45 C. 492=22 C.W.N. 147. Court has no power to insist that a *pardanashin* lady must attend and give evidence in Court. She may refuse to attend and say that her statement should be taken on commission. It is immaterial whether she is a party or a witness. (56 C. 865, Diss.) 55 A. 666=146 I.C. 885=1933 A.L.J. 1384=1933 A. 551. See also 1928 C. 814. A *pardanashin* lady may be included in the statutory description of "women who according to the customs and manners of the country ought not to be compelled to appear in public". When a transformation of customs has taken place, she can no longer claim, as of right, the statutory exemption. 45 C. 697. A *pardanashin* lady is entitled to be examined on commission although she has previously appeared in public, and has been examined in Court in a *palki*. 45 C. 697; 26 C. 650. Section exempts from appearance and not from attendance in Court. Ladies can be compelled to come to the Court in a *palki* secluded from public gaze. If their examination is made in a room, the public being excluded and they being concealed from the gaze of the officer, it is a perfectly legal manner of examining them. 56 C. 865=1929 C. 528. But see 55 A. 666=1933 A. 551; 159 I.C. 153=1935 S. 205. An unmarried girl of 12 who belongs to a class, the female members of which never go out in public, is entitled to the privilege afforded by this section. 24 W.R. 375. In the case of a woman who was in mourning, and therefore according to custom, was not to leave her

house for two or three years, a commission was refused in 14 B. 584. Proof of custom regarding seclusion of recently widowed ladies necessary before issue of commission. 1927 M. W.N. 218. As regards criminal cases, there has, perhaps, been a slight divergence of judicial opinion on the question of the examination of *pardanashin* ladies on commission. 45 C. 697=22 C.W.N. 197. This is a right which the Court has no power to deny. 1928 C. 814. Where the allegation that a *pardanashin* lady examined on commission was being tutored by somebody behind the *pardah* is established, the Court has the discretion to exclude the evidence. But there is no justification for the judge to insist on the attendance of the *pardanashin* lady in Court. 55 A. 666=146 I.C. 885=1933 A.L.J. 1384=1933 A. 551.

SEC. 134.—Arrest is made by the duly authorised officer touching the person. Placing the arrest warrant in the hands of person sought to be arrested does not constitute arrest. 7 R. 599.

SEC. 135 (2): CONSTRUCTION.—Reasonably wide construction must be given to section 135 (2). It is not the intention of legislature that a person holding an arrest warrant should be able to pounce upon a person the moment the Court which he has been attending rises for the day. 36 C.W.N. 1071. See also 55 B. 612; 39 C.W.N. 318. The plain interpretation of section 135 (2) is that the exemption from arrest under civil process is limited in point of time taken by a party, witness, etc., in going to or attending or in returning from the tribunal mentioned in the clause. As to what is a reasonable time, it is a question of fact and must depend on the circumstances of each case. Section 135 has been enacted in pub-



their pleaders, mukhtars, revenue-agents, and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

(3) Nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree.

Exemption of members of legislative bodies from arrest and detention under civil process.

<sup>1</sup>[135-A. (1) No person shall be liable to arrest or detention in prison under civil process—

<sup>2</sup>[(a) if he is a member of a unicameral Legislature or of either Chamber of a bicameral Legislature constituted under the Government of India Act, 1935, during the continuance of any meeting of such Legislature or Chamber ;]

(b) if he is a member of any committee of such <sup>3</sup>[Legislature or Chamber], during the continuance of any meeting of such committee ;

<sup>4</sup>[(c) if he is a member of either Chamber of such a bicameral Legislature,

#### LEG. REF.

<sup>1</sup> Inserted by Act XXIII of 1925.

<sup>2</sup> Substituted by A.O., 1937.

<sup>3</sup> Substituted for "Chamber or Council" by A.O., 1937.

<sup>4</sup> This clause was substituted by A.O., 1937.

#### NOTES.

lie interest with a view to ensure smooth and speedy administration of justice and so cannot be given a wide interpretation to help a judgment-debtor who has deliberately managed to avoid execution of the decree. 175 I.C. 781=1938 A.L.J. 500=A.I.R. 1938 All. 356. An Income-tax Officer is a "tribunal" within the meaning of section 135 (2) and a party is exempt from arrest while on his way to appear before that Officer in compliance with a notice issued to him under section 23 (2) of the Income-tax Act. 144 I.C. 463=1933 L. 214. In order to obtain exemption under this section, party must first satisfy the Court that his attendance in Court is *bona fide* in relation to the matter pending before it, that the Court which he attends has jurisdiction in the matter, or the party believes in good faith that it has such jurisdiction. The exemption enures during such period as is reasonably required in going to the tribunal from his ordinary place of residence, in attending that tribunal, and in returning from it to the ordinary place of residence whence he came. What period is reasonable is a question of fact. The exemption is forfeited if in going to or in returning from the Court there is an unnecessary or excessive deviation sufficient in the opinion of the Court to forfeit the privilege. No party or witness can claim to return to his ordinary place of residence by any route he likes. (5 H.L.C. 671; 4 M.H.C.R. 145; 32 A. 3; 11 East 439 and 46 A. 663, Foll.) 55 B. 612=33 Bom.L.R. 44=1931 B. 175. See also 36 C.W.N. 1071. The principle which would apply to a person living in the place in which the Court is situate must be applied to the

person who takes up temporary lodgings in that place, i.e., the protection extends only from his temporary lodgings to the Court or from the Court to his temporary lodgings. Hence an arrest effected when he has left his temporary lodgings and is taking a walk is legal. 1935 P. 6=14 P. 242=154 I.C. 610=16 P.L.T. 560. The privilege of exemption from arrest granted under the provisions of section 135 (2) enures for the benefit of a party while he is going to or attending a Court and lasts till he returns from the Court to his ordinary place of residence. (A.I.R. 1931 B. 175, Foll.; A.I.R. 1935 P. 6, Not Foll.) 158 I.C. 507=1935 N. 216. The word "tribunal" in section 135 (2) is used to cover tribunal both of British India as well as of Native State. 1935 N. 216.

SEC. 135 (3).—Sub-section (3) is new and supersedes the decision in 4 M.H.C.R. 145. See also 14 Ben.L.R. App. 13; 5 C. 106; 4 M. 317; 5 C.L.R. 170. Words "other than a process issued for contempt of Court" give effect to the ruling in 4 Beng.L.R.O.C. 90. Judgment-debtor is protected from arrest in the circumstances mentioned in the section, and a person who causes arrest and Officer arresting are guilty of an offence under section 342, Penal Code. 36 I.C. 493=121 P.L.R. 1916 (Cr.). Defendant who appears in Court to defend his suit is exempt from arrest under section 135. 37 M.L.J. 435=43 M. 272. Judgment-debtor reaching station in connection with criminal case—Arrest in execution of decree is illegal. 6 O.W.N. 809=1929 O. 426 (F.B.). A surety for the appearance of the defendant cannot initiate proceedings under O. 38, r. 3 with a view to obtain his discharge when the defendant appears in Court to defend his suit. Appearance of the defendant on that occasion does not amount to a "voluntary surrender". 37 M.L.J. 435=43 M. 272. It is not open to the Court to issue a warrant of arrest against a bankrupt who is in attendance in Court as witness, but the proceedings need not be set aside for this reason alone. 24



during the continuance of a joint sitting, meeting, conference or joint committee of the Chambers of that Legislature ;] and during the fourteen days before and after such meeting or sitting.

(2) A person released from detention under sub-section (1) shall, subject to the provisions of the said sub-section, be liable to re-arrest and to the further detention to which he would have been liable if he had not been released under the provisions of sub-section (1).]

136. (1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision

Procedure where person to be arrested or property to be attached is outside district.

of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in

its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

#### NOTES.

I.C. 513. Wrongful arrest in contravention of section 135 will not give rise to an action in tort for damages unless it has been procured maliciously and without reasonable and probable cause. 7 R. 598. Allegation by judgment-debtor that he should not be arrested as protected by this section—Process server, if bound to inquire into allegation—Arrest in spite of protest, if offence. See 39 C.W.N. 318=1935 C. 551.

SEC. 136.—Section does not apply to a case in which defendant resides within same district in which Court issuing a warrant is situate. 2 B. 560; 8 M. 205. See also 57 C. 1280=130 I.C. 252; 50 M.L.J. 401=1926 M. 574. When a Court exercises the extraordinary powers conferred on it by section 136 (1), the provisions of that section must be strictly observed; the warrant of arrest must be endorsed to the District Court outside the jurisdiction of the issuing Court, in which the warrant is to be executed. If such a warrant is endorsed not to the District Judge, but to a Munsiff in that district, it is defective warrant, and the persons arrested in execution of such a warrant cannot be treated as being in lawful custody for purposes of section 225-B, I. P. Code. 18 Pat.L.T. 760=A.I.R. 1937 Pat. 603. Under section 136 the order of attachment is to be sent to the District Court within the local limits of whose jurisdiction the property is situate. No District Court or a Court with the powers of a District Court under the Civil Procedure Code has been established in the Shan States to which the order of attachment before judgment in question can be sent. Where therefore the Court of Mandalay sent an order of attachment before judgment to the Court of Assistant Superintendent at Kalaw. Held, that such Court was not a District Court and hence the issue of order was wrong. 1937 Rang.L. R. 249=A.I.R. 1937 Rang. 367. It applies only to cases in which decree passed in one district has to be executed in another district. 4 C. 823. Section 136 (1) enables a party to enforce an order of injunction against a person outside the local limits of the juris-

diction of the Court passing the order. 57 C. 1280=130 I.C. 252=1931 C. 279. Section 136 directs that where property is situated outside the local limits of the Court to which an application for attachment before judgment is made and the Court passes an order for attachment, it has to send the order of attachment to the District Court and the District Court on receipt of the order, has to cause the attachment to be made by its own officers or by a Court subordinate to the District Court and after making the attachment the District Court has to inform the Court which had ordered the attachment, of its compliance. It is not open to the Court ordering such attachment to send its order for compliance directly to any other Court except the District Court and an attachment made by any Court except the District Court and without the intervention of the District Court, would be unauthorised and invalid. Section 46, C. P. Code, could have no application to such a case, for it only applies to matters which arise after a decree has been made. 1941 A.L.J. 225=1941 A. 212. High Court in its original jurisdiction has power to make an order of injunction and when that is disobeyed, to order the arrest of the person disobeying though he might reside beyond the limits of its ordinary original jurisdiction, and also to transfer the same for execution to a District Judge within whose jurisdiction such person resides. Such orders are not *ultra vires* or without jurisdiction. District Judge who arrests the party in execution of the writ sent to him acts in the lawful exercise of his powers. 61 C. 971=38 C.W.N. 799=1934 C. 818. Court can order attachment before judgment of property outside local limits of its jurisdiction; it can also order removal of such attachment. 9 R. 561=1931 R. 279 (10 I.C. 794, Foll.) If Court which actually effects attachment before judgment has power to remove it, see 9 R. 561. Applicability of section—Appointment of receiver—Disobedience of Court's orders—Contempt—Arrest outside jurisdiction. See 32 C.W.N. 114.



(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or movable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or at Bombay, <sup>1</sup>[\* \* \* \*] the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras <sup>2</sup>[or Bombay], as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court.

137. (1) The language which, on the commencement of this Code, is the language of any Court subordinate to a High Court shall continue to be the language of such subordinate Court until the Provincial Government otherwise directs.

(2) The Provincial Government may declare what shall be the language of any such Court and in what character applications to and proceedings in such Courts shall be written.

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English; but if any party or his pleader is unacquainted with English a translation into the language of the Court shall, at his request, be supplied to him; and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation.

138. (1) The <sup>3</sup>[High Court] may, by notification in the official Gazette, direct with respect to any Judge specified in the notification, or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed.

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

Oath on affidavit by whom to be administered. 139. In the case of any affidavit under this Code—

(a) any Court or Magistrate, or

(b) any officer or other person whom a High Court may appoint in this behalf, or

(c) any officer appointed by any other Court which the Provincial Government has generally or specially empowered in this behalf, may administer the oath to the deponent.

#### LEG. REF.

<sup>1</sup> The words "or of the Chief Court of Lower Burma" omitted by A.O., 1937.

<sup>2</sup> Substituted for the words "Bombay or Rangoon" by A.O., 1937.

<sup>3</sup> Substituted for "Local Government" by

#### Act XIV of 1914.

#### NOTES.

SEC. 139 (c).—District Judges have power to appoint commissioners to administer oath on affidavit generally and without restriction to a particular area or class. If a Sherista-



140. (1) In any Admiralty or Vice-Admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original jurisdiction, or its appellate jurisdiction, may, if it thinks fit, and shall upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed.

141. The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings, Miscellaneous proceedings. in any Court of civil jurisdiction.

#### NOTES.

dar of a Munsiff Court receives the affidavit in exercise of the powers conferred on him *ex officio*, then no doubt his jurisdiction is limited to matters arising within and subject to the jurisdiction of that Munsiff. But the issue of process of the District Judge's Court through the Nazarat of the Munsiff is a matter arising within the Munsiff's jurisdiction and Sberistadar can receive an affidavit in such a matter. 14 P.L.T. 635=1933 P. 713.

SEC. 141: SCOPE OF SECTION.—Procedure prescribed by the Code is applicable as widely as possible to miscellaneous proceedings. 21 C. 479. Section does not apply to applications for execution of a decree which are proceedings in the suit. It applies only to original matters in the nature of suits, i.e., to such matters as applications for appointment of guardians, and for custody of infants, and to proceedings under the Divorce Act, and to recording of evidence in probate cases, and many other similar matters other than suits and appeals. 9 A. 36 (41); I. L.R. 1937 B. 144=167 I.C. 750=38 Bom. L.R. 1303=1937 B. 111. See also 1941 Rang. L.R. 246; 18 C. 635 at 638; 15 I.C. 559=116 P.R. 1912; 29 C.W.N. 521=1925 C. 391 (applicability of section to proceedings before Rent Collector); 106 I.C. 808 (proceedings under the Indian Companies Act). Section 141 applies only to original matters in the nature of suits, such as proceedings in probate, guardianship, and so forth. The expression "original matters" means matters which originate in themselves and not those which spring up from a suit or from some other proceeding or arise in connexion therewith. Thus it does not apply to O. 9, r. 9 for restoration of a suit dismissed for default. 54 C. 405=31 C.W.N. 576=1927 C. 534. See also 148 I.C. 595=1934 M. 496=66 M.L.J. 310. O. 9 of Code cannot be applied to dismissal of an application under O. 21, r. 90. But it is open to Court to invoke its inherent jurisdiction under section 151 to restore such application. 1931 A.L.J. 622=1931 A. 594. Power conferred by this section should not be exercised without sufficient cause. 8 M. 548 (550) (F.B.). Section deals with law of procedure alone and does not touch substantive law of arbitration. 5 R. 563=1928 R. 137. Where after the passing of a preliminary mortgage decree the decree-holder dies and his legal re-

presentative applies to be brought on record and also applies for a final decree and they are dismissed for default, he is not bound under section 141 to apply to set aside the dismissal under O. 9, r. 9. A fresh application by him to be brought on as the legal representative is quite in order. 1941 Rang. L.R. 246. It cannot be held that section 141 makes want of notice for passing of a final decree in a mortgage suit an illegality. It is doubtful if section applies to a matter where a clear procedure is laid down. 30 L.W. 551=1929 M.W.N. 867. See also notes under section 151.

MEANING OF TERMS.—Term "suit" applies to suits in the strict sense, and is not intended to cover proceedings for enforcement of rights decreed in suit. 12 A. 392 (F.B.). "Suit" includes appeal. 110 I.C. 374=1928 L. 488.

PROCEEDINGS TO WHICH SECTION IS APPLICABLE.—Applicable to proceedings in original suit. 4 P.L.T. 735=1924 P. 346. Section 141 is wide enough to make the provisions of section 10 apply to arbitration proceedings. 66 I.C. 796=1922 S. 6. Where application to sue *in forma pauperis* is dismissed for default, O. 9, r. 9 read with section 141 enables the Court to restore the application for proper reasons. 1933 M. 5=140 I.C. 226=36 L.W. 586. No appeal lies from order rejecting application for restoration of suit dismissed for default. 28 N.L.R. 83=139 I.C. 296=1932 N. 101. Procedure prescribed by section 98 applies to miscellaneous proceedings. 3 B. 204. Appeal lies under this section against an order of the District Court under section 5 of the Religious Endowments Act. 4 M. 295. Section is not applicable to a Judge acting under section 10, Religious Endowments Act. See 29 M.L.J. 671. See also 40 M. 793=44 I.A. 261=33 M.L.J. 69 (P.C.); 37 M.L.J. 162=53 I.C. 56; 38 C.L.J. 358=1924 C. 327. Also to decisions of the Additional Judge appointed to hear cases under the Land Acquisition Act. 16 C. 31. The Court under Companies Act is governed by general provisions of the Code as made applicable by section 141. 1 L. 187=55 I.C. 820. This section empowers High Court to transfer to its own file proceedings for winding up of a Company under Companies Act. 9 A. 180. Under section 141 its provisions are applicable to proceedings under the Lunacy Act. 22 C. W.N. 547=27 C.L.J. 205. A procedure



Orders and notices to be in writing. 142. All orders and notices served on or given to any person under the provisions of this Code shall be in writing.

143. Postage, where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made :

Provided that the Provincial Government <sup>1</sup>[\* \* \*] may remit such postage, or fee, or both, or may prescribe a scale of court-fees to be levied in lieu thereof.

144. (1) Where and in so far as a decree is varied or reversed, the Court of

#### LEG. REF.

<sup>1</sup> The words "with the previous sanction of the Governor-General in Council" omitted by the Devolution Act, 1920.

#### NOTES.

to compel registration under the Registration Act is governed by the procedure laid down in the Code. 2 C. 131 (P.C.). A receiver may be appointed in original proceedings as in suits according to O. 40, r. 1 read with section 141. 43 C. 986=20 C.W.N. 1009. Under this section an executor can apply for probate *in forma pauperis*. 18 B. 237. Probate proceeding against minor—O. 32 is made applicable. 59 I.C. 664=24 C.W.N. 541. When an application under O. 21, r. 5 is struck off for default, this section enables the claimant to apply under O. 9, r. 9. 10 A. 119. Proceedings under section 144 are not proceedings in execution. Consequently section 141 applies to them. 20 A.L.J. 226=44 A. 407. Where application under O. 9, r. 4 is itself dismissed for default, fresh application to restore such application is maintainable. 50 I.C. 401=1 P.L.R. 1919. See also 56 I.C. 25; 1 L. 339=58 I.C. 748; 47 A. 878. Applicability to proceedings under O. 9, r. 9—Appeal. 36 C.L.J. 184=69 I.C. 1003; 47 A. 878=1925 A. 773. *Quære*.—Whether section 141 and O. 9, r. 9 apply to an application to set aside an order of dismissal for default of an application to set aside an *ex parte* decree. 1933 R. 406. See also 56 A. 390=147 I.C. 721=1934 A. 86=1934 A.L.J. 331. Under section 141 application for re-admission can be made if an application to set aside an order dismissing a suit for default. 10 I.C. 705=7 N.L.R. 32. See also 74 I.C. 380=1923 O. 146; 47 A. 878=1925 A. 773. Order returning memorandum of appeal for presentation to proper Court is not appealable though order by Appellate Court returning plaint for return to proper Court is appealable. 32 C.W.N. 693=117 I.C. 849. Sale proceeds of sale found insufficient—Application for personal decree against mortgagor dismissed for default—Second application does not lie—Proper remedy is to set aside the order dismissing the application for default. 8 R. 316=1930 R. 257. Court has power to pass order by way of injunction for the protection of a female minor against an unsuitable marriage. Such an order should issue under O. 39, r. 2 (1) read with section 141 and disobedience of such order is punishable under O. 39, r. 2 (3). 28 N.L.R. 332.

PROCEEDINGS TO WHICH SECTION IS NOT APPLICABLE.—This section does not apply to appeals under the Letters Patent. 26 M. 123. Nor to proceedings under section 195 of the Cr. P. Code. 30 M. 311. Non-applicability of section to proceedings under section 105 of the Bengal Tenancy Act. 3 P. 67=1924 P. 104. And to proceedings under the Mamlatdar Courts Act. 16 I.C. 675=6 S. L.R. 67. This section does not render an order under section 5 of the Court-Fees Act appealable as a decree. 12 A. 129. Section 141 does not apply to proceedings under the Guardian and Wards Act. 15 I.C. 559=116 P.R. 1912. See also 9 A. 36; 18 C. 635. Legal Practitioners Act, S. 14—Proceedings under. See 50 I.C. 806=23 C.W.N. 560. See also 1 P.L.T. 576=37 I.C. 484. Where a surety bond is executed by a guardian and his sureties the proper remedy to proceed against the sureties on the bond is to assign the bond to enable the assignee to sue on the bond and not by issuing execution on the strength of this section. 103 I.C. 493.

EXECUTION PROCEEDINGS.—Section 141 does not apply to applications for execution. 29 I. C. 395=19 C.W.N. 758. See also 45 A. 148=1923 A. 460; 18 C. 635; 44 A. 407=66 I.C. 144=1922 A. 223; 89 I.C. 360; 52 C. 559; 83 I.C. 749; 48 M.L.J. 89=1925 M. 145; 41 C.L.J. 286=1925 C. 510. Section 141 does not apply to execution proceedings, and they cannot be restored under O. 9, 2 P. 372=71 I.C. 484; 4 P.L.J. 135 (F.B.); 4 P.L.J. 330; 35 I.C. 337. See also 1933 A.L.J. 1032=1933 A. 783 (F.B.); (1939) 1 M.L.J. 724=1939 M. 578. The dismissal of an execution application for default is no bar to a subsequent application. 11 I.C. 385=13 C.L.J. 532. Application to set aside *ex parte* decree—Dismissal for default—Application for restoration—Order rejecting—If appealable. 41 L.W. 811=1935 M. 609=69 M.L.J. 99.

SEC. 144: "COURT OF FIRST INSTANCE," MEANING OF.—See 61 I.C. 962=13 L.W. 67; 1931 R. 21. The words "Court of first instance" as used in section 144 are used in contradistinction to a "Court of appeal" and mean the Court which passed the decree, or if that Court has ceased to exist, the Court to which the proceedings are transferred in substitution for the Court which passed the decree. 1937 A.L.J. 588=I.L.R. (1937) All. 670=1937 All. 515.



Application for restitution. first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

## NOTES.

"PARTY", MEANING OF.—*See* 44 A. 555; 38 Bom.L.R. 1326=1937 Bom. 101; 98 I.C. 1042=1927 A. 182; 1940 Pesh. 44; (1940) 2 M.L.J. 47; (1940) 2 M.L.J. 877.

PRINCIPLE OF RESTITUTION.—The power of a Court to direct restitution is inherent in the Court itself. It rests on the principle that a Court of justice is under a duty to repair the injury done to a party by its act. The right of a party to have restitution and the duty of the Court to give him restitution do not rest on the provisions of section 144 of the Code, which defines the procedure only in one class of cases requiring restitution by enacting that the application for restitution is to be made in the Court of first instance. The other part of the section gives the measure of restitution and empowers that Court to determine the form and amount of restitution. I.L.R. (1940) 1 Cal. 486=44 C.W.N. 438=1940 Cal. 260. Even if a decree is varied by the appellate Court not after contest but by a compromise between the parties, the Court can allow compensation on the principle of section 144 in the exercise of inherent jurisdiction. The measure of compensation will be the profit which the party in possession actually derived or could have derived by exercise of due diligence from the date on which he should have surrendered possession under the compromise. 42 P.L.R. 429. Restitution in a case not strictly falling within the terms of section 144 should be made upon the equitable principle underlying section 144 and in exercise of the inherent power of the Court to prevent abuse of its process. I.L.R. (1939) Nag. 492=1939 N.L.J. 193=1939 Nag. 101. The prejudice to be removed by restitution must be the result of the erroneous terms of the original decree. Once it is found that the erroneous character of the original decree has made no difference to what has taken place, there is manifestly no case for restitution; whether the modification of the decree is slight or substantial will be irrelevant. 21 Pat.L.T. 973=1941 Pat. 130. Where money due to a party under a decree is paid to his vakil whose vakalat implies a power to receive money out of Court on his client's behalf that is sufficient to support an application by the opposite party on reversal of the decree to apply for restitution against the party to whose vakil the money was paid. Section 144 is sufficiently wide to cover such a case. The fact that payment to the vakil is not certified to the Court will not defeat the application for restitution. 179 I.C. 994=48 L.W. 945=A.I.R. 1939 Mad.

176.

SCOPE AND APPLICATION OF SECTION.—Section 144 applies where a decree has been reversed or varied appeal, revision or by a review, but not where the consequence of a decree has been affected by a subsequent decree passed in another suit. 1937 A.L.J. 34=1937 A.W.R. 34=1937 A. 232. *See also* 39 Bom.L.R. 112=1937 B. 173. Section 144 is confined to cases in which the decree of a trial Court is varied or reversed by some superior Court or by reason of some order passed by a superior Court. 1 P.L.J. 43=34 I.C. 747. *See also* 157 I.C. 677=1935 A. 126. An application under section 144, being in substance one made for seeking the aid of the Court in working out the final decree should be regarded as an application for execution of the decree passed in appeal. (7 O. W.N. 1153, Foll.) 160 I.C. 814=1936 O.W.N. 262=1936 O. 185. Section 144 contemplates restitution, where, and in so far as, a decree has been varied or reversed. An order of the executing Court confirming a sale which is afterwards set aside does not amount to a decree and therefore the application for mesne profits payable in consequence of that order cannot be made under section 144. A. I.R. 1939 Lah. 508. No application for restitution can properly lie where a party, taking advantage of an order of injunction, unlawfully takes possession of properties to which he is not entitled. The proper remedy of the persons aggrieved by such unlawful act is by way of suit and not by way of restitution. No question of restitution arises when there has been no delivery of property through Court. 45 L.W. 398=168 I.C. 926=A.I.R. 1937 Mad. 315. *See also* 1936 R.D. 563. The right of the auction-purchaser to a refund of the money paid by him arises both under section 144, and also on principles of equity and justice and if the case does not come under section 144, the Court can exercise its inherent jurisdiction to direct a refund of the money to the auction-purchaser. 1936 L. 497. *See also* 1940 Lah. 59 (Application by auction purchaser for compensation for improvements on sale being set aside). *See also* 19 Pat.L.T. 111=1938 Pat. 447; 40 P.L.R. 692=1938 Lah. 456; 1938 Cal. 554; 1937 Pat. 647=16 Pat. 729. *See also* 1937 M.W. N. 342=1937 Mad. 694 (Mesne profits by way of restitution). The expression "any party" in section 144 is not confined to parties in the appeal in which the decree has been reversed or modified. It includes every person against whom the decree appealed from was passed, though he was not a party to the appeal, provided the appeal is in effect and substance in favour of such person. The



## NOTES.

conditions on which restitution can be granted under section 144 are: (1) that the applicant must be a party to the litigation which has terminated according to law; (2) that he has lost, or been deprived of, something by reason of the decree or order which has been subsequently varied or reversed; and (3) that on the final pronouncement of his rights, the party applying is entitled to the benefit of restitution. The section does not in terms state or require that the applicant must be a party to the proceeding which has resulted in the original decree being reversed or varied; nor does it require that the final decree should provide for a right in him to apply for restitution. All that is necessary is that the final decree must be such that it would be inequitable to allow his opponent to retain what he has obtained from the former on the strength of a decree which ultimately is held to be erroneous or wrong. A party to the suit from whom costs have been recovered, is therefore entitled to apply for restitution on the reversal of the decree finally in appeal, though he himself has not been a party to the subsequent stages of the litigation in appeal. I.L.R. 1937 B. 150=38 Bom.L.R. 1326=1937 B. 101. *See also* 1937 Bom. 173; 1941 R.D. 670; 1941 R.D. 429; 1939 O.W.N. 765=1939 Oudh 273. A party taking possession of any thing under colour of his decree is bound to make restitution of everything that he takes possession under colour of the decree on reversal of that decree. Where a party entitled under his decree to hold charge of an institution, also takes possession of the building in which the institution is located under colour of the decree, such possession naturally and necessarily following the taking of charge, he is under an obligation to restore possession of the building, on reversal of the decree, to the persons who were admittedly in possession at the time the suit was instituted. He cannot be allowed to plead that he took possession only of the institution under the decree, and that he took possession of the building by force or otherwise and thus resist restitution. The object and purpose of section 144, C. P. Code, is that the parties shall be restored to the position which they originally occupied. 1937 A.L.J. 1107=A.I.R. 1937 All. 728. Section 144 applies where a decree has been reversed or varied upon appeal, revision or by a review. Where the consequence of a decree has been affected by a subsequent decree passed in another suit, there is no variation or reversal of the earlier decree within the meaning of this section, and it has, therefore, no application. 1937 A.L.J. 34=A.I.R. 1937 All. 232; 39 Bom.L.R. 112=1937 B. 173. Section 144 does not apply to cases in which the decree is held to be wholly or partially null and void as the result of a decree in some other suit or of other independent proceedings initiated for the purpose. But section 144 is not exhaustive of the powers of restitution and it is not only permissible, but is imperative, to grant restitution by exercising the inherent powers vested in the Court

by section 151, provided the exercise of those powers is necessary for the purpose of preventing injustice and does not contravene any statutory provision. 55 A. 221=1933 A. L.J. 60=1933 A. 218. One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors. This statement of the law is general enough to cover a case where the executing Court has been made to take a wrong step by an erroneous decision passed by another Court. The non-applicability of section 144 would not prevent a Court from granting restitution in the exercise of its inherent powers. Where a Court has wrongly paid the money to a person not entitled thereto, it has not only the power but it is also its duty to recover it from him. 167 I.C. 67=1937 Mad. 95; 103 I.C. 657=1927 L. 635; 118 I.C. 389=1929 L. 657; 34 C.W.N. 746=1931 C. 42; 33 L.W. 259=1931 M. 81=60 M.L.J. 219; 21 Bom.L.R. 157=43 B. 433 (F.B.); 39 I.C. 763=2 P.L.J. 361; 37 I.C. 863; 84 I.C. 75=1924 A. 713 (decree against minor); 1929 R. 157; 43 L.W. 773=1936 M. 636; 60 C.L.J. 44. *See also* 150 I.C. 924=1934 L. 322; 36 P.L.R. 119=1934 L. 1023; 1935 M. 5 (1)=67 M.L.J. 787; 57 M. 849=1934 M. 330=67 M.L.J. 49 (Power of Court to rectify mistaken payment and call back money paid). Thus where the decree is admittedly a nullity, the suit having been instituted against a dead man and the Court having levied execution when there was no decree has inherent power to rectify its own mistake under section 151, and to allow restitution of money paid in execution. 146 I.C. 564=38 L.W. 874=1933 M. 888(1). *See also* 146 I.C. 1079=1933 Pesh. 76; 1933 P. 564. (Court can exercise its inherent power to order restitution although the aggrieved party may have another remedy by way of suit). Though section 144 may not be strictly applicable to a case the Court under section 151 would be entitled to make such orders as are just and proper for the disposal of the profits enjoyed by the plaintiff under the orders of the Court during the suit and the appeal. 1936 M.W.N. 503=43 L.W. 773=1936 M. 636; 1936 L. 497. Section 144 is not exhaustive of the power of the Court to order restitution. Section 151 saves the inherent power of the Court to act right and fairly according to the circumstances towards all parties involved. 42 L.W. 444=1935 M. 783=69 M.L.J. 84; 1936 L. 497; 1936 M. 636. One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors. This statement of the law is general enough to cover a case where the executing Court has been made to take a wrong step by an erroneous decision passed by another Court. The non-applicability of section 144 would not prevent a Court from granting restitution in the exercise of its inherent powers. Where a Court has wrongly paid the money to a person not entitled thereto, it has not only the power but it is also its duty to recover it from him. 167 I. C. 67=1937 M. 95. Power of Court to grant



## NOTES.

the decree itself providing for a certain titution is set aside by virtue of a provision in the decree itself providing for a certain contingency which has occurred. 149 I.C. 365=14 P.L.T. 753=1934 P. 150. Section does not contemplate variation or reversal of a decree under a *private compromise* entered into by the parties whether out of Court or in the course of an execution proceeding. 1933 A.L.J. 724=1933 A. 743. But see 1933 M.W.N. 641 (*contra*); see also 148 I.C. 569=1934 L. 604. Rules as to arbitration do not apply to restitution proceedings. 1941 A.L.J. 596. Where by an *ex parte* decree, a defendant is ejected but the suit is ultimately restored by the appellate Court and the defendant regains possession under a compromise during the rehearing of the suit, a claim by him for compensation does not come within the provisions of section 144. There is no doubt that an application under section 144 can lie when the original order has been varied or reversed by a superior Court the proper remedy is by a regular suit. 1940 O.W.N. 506=1940 A.W.R. (B.R.) 150. Section applies not only to restitution brought about in consequence of a decree passed on contest but also to compromise decrees passed on appeal. Section requires only a variation or reversal of the decree of the Court of first instance, however that may be effected. 68 M.L.J. 332=41 L.W. 705=1935 M. 476. The words 'or otherwise' are inserted only to provide for cases where it is not possible to make restitution in the sense of restoring the very property that was lost to the petitioner and when the Court proceeds to do the next best thing that it could do in the circumstances. For example, where in execution of the decree of the first Court, the suit property is sold in Court-auction and purchased by a stranger, restitution is possible only of the proceeds and not of the property. 1930 M.W.N. 1245. See also 130 I.C. 353=1931 R. 21; 1937 R.D. 509. Application under section whether application for execution of the decree. 1 Luck. 40=13 O.L.J. 731; 7 O.W.N. 1153. Right to restitution not restricted to reversal on appeal only. 30 M.L.J. 366=33 I.C. 739; 65 I.C. 797=1922 M. 70. Section applies also to appellate decrees. 38 M. 1120=27 M.L.J. 112. In the matter of restitution power of Court not confined to section. 103 I.C. 657=1927 L. 635; 1929 L. 657; 34 C.W.N. 746. Section does not lay down that where a decree has been varied or reversed the parties are to be placed in the same position in which they were before the suit was brought nor does it direct that other proceedings such as suits are to be ignored. 118 I.C. 519=1929 A. 527. The object of section 144 is to provide a speedy and simple remedy for any party who has suffered by reason of an erroneous decree made by a Court of first instance and it does not apply to a case where the Court has decided questions of conflicting rights under different decrees which may be very complicated. Section refers only to cases where a decree

of the Court of first instance is revoked on appeal for revision. 33 C.W.N. 908=1929 C. 814. Section prescribes a remedy which is separate from and independent of that which is open to a person under O. 21, R. 90. Where an application under O. 21, R. 90 is dismissed and the sale confirmed the aggrieved party can apply under the section. 1931 A. 655. Section is meant to apply ordinarily to the class of cases where a person having obtained a decree executes it and recovers some money or property from the judgment-debtor and then the decree is reversed which necessitates restitution of property or money which the judgment-debtor had to part with at the instance of the Court on the ground that the decree is no longer in force. Where the plaintiff was never in possession of the property and it could not be said that as a result of the decree of the first Court the property was taken out of his possession this section does not apply. 140 I.C. 482=1932 P. 317=11 P. 553. It does not apply to decrees passed before the passing of this Code. 29 I.C. 380. Object of the section is to shorten litigation and afford speedy relief. 17 I.C. 121=16 C. L.J. 135; and to restore the *status quo ante* of the parties. 55 I.C. 356. See also 129 I.C. 326. Application for restitution to be made to Court which passed the decree—Separate suit, if lies. 44 A. 283=20 A.L.J. 13. The power of restitution expressed in section 144 is inherent in all Courts, Civil or Revenue. 46 I.C. 475=11 Bur.L.T. 3. Section is imperative and mandatory and no discretion is given to the Court. 42 I.C. 523=6 L.W. 568; 1928 R. 293. A special direction as to restitution is unnecessary when the final decree is in favour of the applicant. 29 I.C. 380. Restitution may be granted even when the decree is set aside on review. 28 A. 665. Although a Court goes beyond the terms of a decree and gives possession, it can order restitution. 9 C.W.N. 381. Even if the section does not apply to possession taken on the strength of a declaratory decree which is upset in appeal, the Court can grant restitution. 6 C.W.N. 710. Execution sale—Setting aside—Re-payment of purchase money—Payment of encumbrances by purchaser. 2 P. 10=44 M.L.J. 735=49 I.A. 351 (P.C.). Damages—Wrongful attachment—Sale by Court—Deposit under O. 21, R. 89—Loss from private sale. 1927 M. 353. An order for refund of money deposited under O. 21, R. 89 is not justified by section 144, at any rate it is not an order which can be made on an application in restitution and probably not one which can be made even in a suit. 1941 O.A. (Supp.) 771=1941 A.L.W. 910=1941 A.W.R. (H.C.) 278. If a judgment-debtor or any other person bound by a decree makes a deposit under O. 21, R. 89 to have a sale of his property held in execution set aside, it cannot be held that his claim for restitution made either under section 144, or under the general law, after the decree has been reversed in appeal or set aside in a suit brought for the purpose is unsustainable.



## NOTES.

There can be no pretence for saying that the payment made by him was voluntary. It would be a clear case for awarding relief to him under section 72 of the Contract Act. 52 L.W. 226=A.I.R. 1940 Mad. 725=(1940) 1 M.L.J. 340. If a judgment-debtor against whom an *ex parte* decree was passed chooses to set aside the sale held in execution of that decree by making the necessary deposit under O. 21, R. 82, and afterwards the *ex parte* decree also is set aside, the judgment-debtor would not be entitled to claim a refund of the amount which he had deposited. Such a deposit is not made by him directly in connection with the decree which has been passed against him but is made in order that he may obtain a special privilege which the law provides. This being the case, he is not entitled to a refund of such compensation money as a benefit by way of restitution within the meaning of section 144. 43 C.W.N. 104. As to restitution of money paid to a surety, *see* 38 M. 1120=27 M.L.J. 112. *See also* 1938 A.M.L.J. 127. Inherent power of restitution exists—Order for re-payment of money mistakenly paid out can be made. 26 C.W.N. 408=64 I.C. 864=35 C.L.J. 53. Section 144 was not intended to apply to sureties but only to the parties to the suit or their representatives. The surety only undertakes to return the property, namely, the material object and not the liability for safeguarding the rights of the owner in respect of the property. If any loss is caused to the owner by reason of the property not being returned in the condition in which it was when it was taken, or if for any other reason the owner suffers damage, that has nothing to do with the execution of the decree as such. I.L.R. (1938) Nag. 354=1938 Nag. 101. *See also* 40 P.L.R. 289=1938 Lah. 833. Execution under mistake—Court can set right the wrong. 72 I.C. 879=1923 O. 16. *See also* 18 N.L.R. 15=67 I.C. 225=1922 N. 62. Excessive execution—Claim to recover over-payment—Remedy. 33 Bom.L.R. 1557. When a man is arrested illegally and in order to save himself from the consequences of illegal arrest he pays up a sum of money he should be put in the same position as though that arrest had not taken place and if it be possible should obtain restitution. 6 O.W.N. 809=119 I.C. 367=1929 O. 426 (F.B.). Suit for restitution can be converted into an application. 67 I.C. 319=1922 N. 198. Payment under decree subsequently declared in a separate suit to be null and void—Failure to ask for payment. 53 I.C. 552=13 S.L.R. 153. On this section, *see also* 67 I.C. 546=42 M.L.J. 473 (Restitution of money paid under rateable distribution); 42 M.L.J. 308=1922 M. 228 (Distribution of proceeds among several decree-holders—Sale subsequently set aside—Right to refund of purchase-money); 42 M.L.J. 315=1922 M. 96 (Reduction of decree amount subsequent to execution sale—Right to refund); 47 I.C. 628=41 M. 467 (Auction-purchaser not a party to suit); 55 I.C. 356 (What evidence has to be taken in proceedings under this section);

1925 L. 177 (Pre-emption decree). Landlord and tenant—Ejectment decree reversed—Tenancy revived. 8 L.R. 319 (Rev.). Section is not confined only to cases where something has been taken from a party in execution of a decree varied or reversed. 34 C.W.N. 707. As to working equities in restitution, *see* 1934 L. 911; 1938 All. 364. Section not confined to matters in execution. It can be applied to interim orders passed pending the final disposal of a partition suit. 1930 M.W.N. 644=1930 M. 988=60 M.L.J. 79.

CONSTRUCTION OF SECTION.—S. 144, is worded in the most comprehensive terms and should be widely construed. Its object is to put right what was originally an error of the Court and to restore the parties to the position they would have occupied. The word "party" should be given a wide meaning so as to include persons who would become subsequently concerned. The fact that a party to a suit (a plaintiff) who has obtained a decree wrongly against another person prefers to get the immediate benefit of it by a sale or transfer, rather than by way of execution, in no way affects the right of the original party defendant to recover in restitution what he has paid over under pressure of the original erroneous decree. The fact that he paid it over to a nominee of the original plaintiff is wholly irrelevant to his right to recover against the person who caused him to make that payment, namely, the original plaintiff. I.L.R. 1941 M. 498=(1940) 2 M.L.J. 877. The words "place the parties in the position which they would have occupied but for such a decree," in S. 144, must be construed as meaning that the parties are to be put in the position which they would have occupied had it not been that a wrong decree had been passed. There is nothing in the section which would justify the Court in holding that the claimant to restitution as to be given any better position than that which he occupied at the time when the wrong decree was passed or that he must base his claim on the theory that he is entitled only to what he would have got had there been no decree at all and had the proceedings been pending right up to the time when the final decision set the matter at rest. 52 L.W. 214=A.I.R. 1940 Mad. 850=(1940) 2 M.L.J. 47. The word "parties" mentioned in S. 144, means persons claiming under them which obviously means persons who have succeeded to the position of the parties in the litigation either by contract or by operation of law or in other words who are their representatives. An assignee is obviously a representative of the original party and is therefore liable to restitution. Similarly, though it is by a legal fiction that the attaching creditor becomes a party, yet once he has been empowered to execute a decree under O. 21, R. 53 (3), C.P. Code, there is no reason why he should not be taken to be a party to the proceedings when he has done so. Hence he is also a representative for the purposes of S. 144. 191 I.C. 209=A.I.R. 1940



## NOTES.

Pesh. 44.

**JURISDICTION.**—By virtue of S. 5 of the Provincial Insolvency Act, the *Insolvency Court* has all the powers of a Civil Court. Where the Receiver had in pursuance of an order of Court paid off some of the assets to the creditors, the Court has the power under S. 144, on the reversal of that order by the High Court, to direct the creditors to refund the amount. 143 I.C. 330=1932 A.L.J. 1095=1933 A. 117; 1930 A. 415. See also 1937 A. 575=I.L.R. 1937 A. 670 (objection to jurisdiction; when to be raised).

**MEASURE OF DAMAGES OR COMPENSATION.**—A person who obtains possession of immovable property under and by virtue of orders passed in execution proceedings, based upon what at the time was a valid decree but has subsequently been set aside on appeal, can in no sense be regarded as a trespasser during such period. For that period he is liable to the real owner for compensation or damages and not for mesne profits in the strict sense. But on and after the reversal of the decree he becomes a trespasser if he does not vacate and hand over possession, as in duty bound, and remains liable for mesne profits as such so long as he remains in possession. But the measure of damages or compensation for the first period can on no principle be higher than during the second period. The principle to be followed in awarding compensation or damages by way of restitution under S. 144 is that the assessment must be on the basis of not what the party in possession could have made, but what he did in fact make or could with reasonable diligence have made. 38 C.W.N. 1197. See also 17 N.L.J. 281. 1935 A. 76.

**FOR WHOM RESTITUTION CAN BE ORDERED.**—Where execution sale is set aside as void the auction-purchaser can demand a refund from the decree-holder. 18 I.C. 381=15 Bom.L.R. 41. See also 43 B. 235. But see *contra* 3 R. 251=1925 R. 215. Where judgment-debtor is dispossessed under wrong order of Court subsequently set aside, it is the duty of Court to restore him to possession. 18 N.L.R. 24=1922 N. 82. Execution sale set aside—Purchaser paying revenue. 51 I.C. 706. Where preliminary decree has been reversed or varied by appellate Court it follows that final decree passed thereon and all execution proceedings in pursuance of final decree fall through and there is no necessity for filing an appeal from final decree. 133 I.C. 622 (2)=1931 A. 655. Where assignment takes place even after the appellate decree, which is the basis of the claim for restitution, the assignee is entitled to the benefits of S. 144. 1918 P. 243=46 I.C. 465. See also 53 L.W. 283=(1941) 1 M.L.J. 469; I.L.R. (1937) Bom. 150 (Right of party to restitution though not impleaded in appeal); 38 M. 36=23 M.L.J. 513; 30 C. 857. As to maintainability of an application for restitution between substitu-

ted parties, see 10 R. 480=1932 R. 148=138 I.C. 260. Where certain alienations were set aside but decree was reversed on appeal by alienor alone, the alienees could apply for restitution. 98 I.C. 1042=1927 A. 182.

**AGAINST WHOM RESTITUTION CAN BE ORDERED.**—A co-plaintiff in whose favour a decree is not passed is not a decree-holder and restitution cannot be ordered against him. 41 I.C. 23. A person who has obtained a merely declaratory decree (as *muttawali*) which is not capable of execution cannot claim restitution. 161 I.C. 444=1936 L. 48. Attaching decree-holder of original decree is liable for restitution on reversal of original decree by the appellate Court. 59 M.L.J. 225=53 M. 796. Restitution cannot be had against a *bona fide* purchaser for value at an auction-sale held by a competent Court even though the decree is set aside on appeal. 38 A. 240=14 A.L.J. 302; 30 M.L.J. 497 (auction-purchaser not a party to suit, see 41 M. 467); 1925 L. 176. S. 144, C.P. Code, only applies to parties to the erroneous decree but not to third parties. 16 O.C. 225=21 I.C. 570. But see 1929 L. 657; 164 I.C. 379=44 L.W. 265=1936 M. 634. Section 144 allows restitution to be made against the decree-holder who obtains any benefit under a decree which is afterwards reversed in appeal. It does not allow restitution against a third party such as a stranger auction-purchaser. 75 I.C. 238=1924 A. 273. See also 48 M. 767=49 M.L.J. 452. In proceedings relating to restitution only a summary inquiry is contemplated and complicated questions of a stranger's rights should not be gone into. 58 C. 1070=134 I.C. 906. See also 13 P. 108=1933 P. 109=15 P.L.T. 491. As to restitution against an assignee decree-holder, see 38 M. 36=23 M.L.J. 513; 42 I.C. 527. Restitution under S. 144 can be claimed not only against the opposite party, but also his representatives or persons deriving title from him. The party entitled to restitution is entitled to have his lands restored to him free from all encumbrances, including any tenancy that might have been created in the meantime by the party who was successful in the first Court but eventually was found to have no title to the land. Such tenants are not protected by S. 19 of the Agra Tenancy Act. 152 I.C. 663. The party sued for restitution on the reversal of a decree in appeal cannot plead his rights acquired during the pendency of the litigation in some other capacity by way of defence and his remedy to establish such rights is by independent suit. 5 O.W.N. 162=1928 O. 208. Where decree-holder himself is auction-purchaser, sale cannot stand, if decree be subsequently set aside or modified because the purchase is subject to the final result of litigation between the parties. Judgment-debtor seeking to get rid of sale should have relief only on condition that he paid up what was due under the ultimate decree and decree-holder would have a charge on the property for amount ulti-



## NOTES.

mate'y found due by appellate Court on payment of which judgment-debtor would be entitled under S. 144 to have the property restored to him on his depositing the decretal amount in Court. 7 R. 107=117 I.C. 252=1929 R. 157.

**INTEREST AND COSTS.**—The Court has power to award interest on costs which the judgment-debtor may be liable to refund to him. 20 O.C. 327=43 I.C. 337; 153 I.C. 654=68 M.L.J. 168=1935 P.C. 12 (P.C.). *See also* 1939 All. 66; 19 A.L.J. 771=63 I.C. 513. As to right to interest, *see also* 27 B.L.R. 485=1925 B. 313; 16 L.W. 587=1922 M. 70; 41 M. 316; 21 C.W.N. 564=24 C.L.J. 467; 37 M.L.J. 591; 139 I.C. 348=63 M.L.J. 383. Restitution ordinarily involves interest. The duty of the Court when awarding restitution under that section is imperative. It shall place the applicant in the position in which he would have been if the order had not been made, and for this purpose the Court is armed with powers (the word "may" is empowering, not discretionary) as to mesne profits, interest and so forth. 153 I.C. 654=1935 P.C. 12=68 M.L.J. 168 (P.C.); 50 L.W. 432=A.I.R. 1940 M. 15=(1939) 2 M.L.J. 509. The executing Court has a discretion under S. 144 to allow interest on a sum that is refunded under the provisions of that section. The fact that the refund was occasioned by a compromise between the parties in which no mention of interest was made does not operate to deprive the said Court of such a discretion. 48 I.C. 569 (1)=1934 L. 604 (1). *See also* (1939) 2 M.L.J. 509; 1934 A. 13. Where after execution, the amount due under a decree is reduced in appeal, the amount that the judgment-debtor can recover is not only the excess amount paid by him but also an additional amount by way of interest or an additional amount by way of damages which the Court is empowered by S. 144 to grant. As regards the rate of interest, the Court rate must always be taken as the rate that fairly compensates litigants in the absence of special reasons to the contrary. 1941 N.L.J. 94. Although ordinary interest is a part of the normal relief given in restitution, it would not be proper to allow interest when there is no direction for its payment in the order of the final Court of appeal. I.L.R. (1940) 1 Cal. 486=44 C.W.N. 438=1940 Cal. 260. *See also* 1940 Mad. 15=(1939) 2 M.L.J. 509. Where judgment-debtor deposits amount of costs decreed in Court and decree is subsequently reversed in appeal, he is entitled to a refund of amount deposited together with interest thereon from date on which the decree-holder withdrew the money from Court. 35 C.W.N. 1305. If money lies in Court and no person is benefited no interest is payable. 3 R. 251. But *see* 1929 P. 593. A party in whose favour an order has been made directing the repayment of costs paid

by him under a decree subsequently reversed is entitled to interest thereon. 131 I.C. 832=61 M.L.J. 34. A party realising costs awarded under a decree must refund the amount on reversal of the decree quite apart from the fact that property in suit was given to a charity or applied to another purpose. 54 I.C. 816. Where Court passes a joint decree for costs against several defendants and one of them deposits the decree amount for himself and on behalf of others, depositor is entitled to a refund of the amount when decree is reversed in appeal and no question of proportionate refund can arise under these circumstances. 35 C.W.N. 1305. *See also* 1935 A. 126. The fact that the principal only is secured by the bond given by the executing creditor who withdrew the money from Court does not affect his liability to pay interest under this section. 39 I.C. 22=2 P.L.J. 149; 31 L.W. 262. Order of His Majesty in Council—No express direction as to restitution and interest on costs—Executing Court can order the same. 50 A. 767=1928 A. 293. *See also* 44 C.W.N. 438=71 C.L.J. 127.

**INTEREST AND MESNE PROFITS.**—*See* 54 L.W. 594=(1941) 2 M.L.J. 768. Decree for possession of estate—Reversal on appeal—Execution—Subsequent restoration of decree of original Court on appeal to Privy Council—Right to restitution—Extent of right—Trial Court refusing to pass decree for future mesne profits—No bars claim to future mesne profits by way of restitution. 52 L.W. 214=1940 M. 850=(1940) 2 M.L.J. 47. As to the method of calculating mesne profits to be awarded by way of restitution, *see* 52 L.W. 214=(1940) 2 M.L.J. 47; 1941 Mad. 36=I.L.R. (1941) Mad. 212=(1940) 2 M.L.J. 984 (F.B.); 52 L.W. 876; 41 C.W.N. 1015=1937 C. The use of the words 'damages, compensation and mesne profits' in S. 144, C.P. Code, indicated that the possession obtained under an erroneous decree subsequently reversed is wrongful possession and hence on a reversal of the decree the judgment-debtor would be entitled not only to possession but also to mesne profits during the period he was kept out of possession. I.L.R. (1939) All. 103=1938 A.L.J. 1189. Mesne profits—Interest—Pre-emption decree—Execution of—Reversal on appeal. 19 I.C. 1. As to mesne profits and interest thereon, *see* 2 L.L.J. 207; 153 I.C. 654=1935 P.C. 12=68 M.L.J. 168 (P.C.); 53 I.C. 119; 45 M.L.J. 323=73 I.C. 1041=1924 M. 87; 3 L.W. 405=34 I.C. 2; 17 I.C. 121=16 C.L.J. 135. Mesne profits—Order to pay—Restitution—Power of Court. 38 A. 163=43 I.A. 43 (P.C.). *See also* 1934 L. 991 (Pre-emption suit, 1938 Oudh 169). Court cannot order mesne profits by way of restitution where it has not been claimed in plaint. 104 I.C. 768=1927 M. 898. Order of remand—Order for mesne profits is not a consequential one. 76 I.C. 255=18 N.L.R. 200=1923 N. 101. *See also*



## NOTES.

1940 Bom. 30=187 I.C. 354. Execution sale—Delivery of symbolical possession—Application for setting aside sale—Dismissal—Appeal—Compromise—Payment of decree amount by instalments—Restitution—Claim for mesne profits prior to delivery of possession—Sustainability. 56 C. 550. Ordinarily, upon reversal of a decree for possession, the judgment-debtor would be entitled to possession, if claimed. He would also be entitled to mesne profits during the period he was wrongfully kept out of possession. But it cannot always be said upon reversal of the decree unless it gives a clear indication of the fact that the possession taken under the decree is wrongful. S. 144 makes a distinction between restitution which is properly consequential on the variation or reversal of the decree and restitution which is not. Discretion is vested in the Court to make an order for mesne profits which are properly consequential on such variation or reversal. There may be a reversal which does not imprint on the possession taken a wrongful character within the meaning of the definition of "mesne profits" contained in S. 2 (12), C.P. Code. If in the order of reversal the character of that possession has been determined then the question ceases. But if it is not, and the Court remands the suit for the determination of that question afresh or further inquiry, then it would be premature for the Court of restitution to make an order for mesne profits in the application for restitution, as that would amount to determining a question which is *sub judice*. S. 144 does not enunciate the doctrine of restitution in an unqualified form and does not contemplate a complete and unqualified restitution with all consequential reliefs. The Court has to regard the nature of the claim, the relief granted, the variation introduced in appeal, and the manner in which the ultimate decision might affect the rights of the parties to the subject-matter in dispute. These considerations have to be borne in mind in exercising the discretion vested in the Court in determining the claim to ancillary relief by way of refund of costs, payment of interest, damages or compensation and mesne profits. 41 Bom.L.R. 1204. See also 1940 Bom. 30.

PEACEFUL POSSESSION NOT IN EXECUTION OF DECREE.—If a decree-holder instead of executing the decree gets possession of the property in question the owner of the property is entitled to restitution on the decree being set aside in appeal. 42 A. 568=57 I.C. 148; 8 L. 41=99 I.C. 952=1927 L. 37. See also 27 I.C. 813=21 C.L.J. 75; 26 I.C. 890=19 C.W.N. 1167. But see *contra* in 8 L. 356. Where a decree for ejectment is set aside in appeal and only formal possession had been given to the decree-holder in execution of the decree, inasmuch as that whatever possession of the holding was with the judgment-debtors prior to the decree for their ejectment, it continued throughout until the ejectment decree was upset in appeal, the

judgment-debtors are not entitled to any compensation under section 144. 1940 R.D. 330=1940 A.W.R. (B.R.) 176 (1). A pre-emptor obtained possession of the property on the deposit of amount mentioned in the decree. Vendees filed a suit for possession on the ground that the deposit was not made within the time allowed and the trial Court upholding that objection dispossessed the pre-emptor and gave possession to vendees. The pre-emptor succeeded in appeal. *Held*, that he was entitled to be restored to possession as it was incumbent on the Courts to restore the parties to the *status quo*. 144 I.C. 695=1933 L. 791.

NATURE OF PROCEEDINGS UNDER THE SECTION—EXECUTION PROCEEDINGS.—Proceedings under the section, if proceedings in execution—"Party", meaning of. 44 A. 555=20 A.L.J. 456; 1 Luck. 40=13 O.L.J. 731; 6 P. 252=102 I.C. 614=1927 P. 278; 1932 L. 527=138 I.C. 260. See also 65 C.L.J. 165=41 C.W.N. 157=1937 C. 152; 1937 R. D. 21; 3 P. 371=5 Pat.L.T. 145 (F.B.) (resembles execution only superficially). An application for restitution under section 144 is essentially a different thing from an application for execution. 150 I.C. 1096=1934 A.L.J. 503=1934 A. 696 (F.B.). But see 45 B. 1137=23 Bom.L.R. 480. "Party" includes representative of a party. 138 I.C. 260=1932 L. 527. The expression "any party" in S. 144 is not confined to parties in the appeal in which the decree has been reversed or modified. It includes every person against whom the decree appealed from was passed, though he was not a party to the appeal, provided the appeal is in effect and substance in favour of such person. 38 Bom.L.R. 1326=1937 Bom. 101. Proceedings under section 144 of the Code are proceedings in execution of decree. 28 C.W.N. 988. Section 141, C.P. Code, applies to restitution proceedings. 44 A. 407=1922 A. 223. See also L.R. 3 A. 443; 40 M. 780. An application for restitution under section 144 is neither a suit nor a proceeding in execution. It is a miscellaneous proceeding to which the rules applicable to execution proceedings do in substance apply. 47 I.C. 47=3 P.L. J. 367.

RECEIVER, APPOINTMENT OF.—Where all that could be given to an applicant for restitution is some sort of joint possession over the land in suit, and the previous relations between the parties do not hold out much hope that they are likely to arrive at an amicable working arrangement between themselves, more particularly while a further appeal is pending and one of the parties still claims the right to exclusive possession of the whole of the land, it is proper to make over the property to a receiver until the claims of the parties are finally decided. 43 P.L.R. 467. It is settled law that section 144, C.P. Code, does not apply only when execution has been taken out, but applies also when property has passed in consequence of the decree which has been reversed. The



## NOTES.

section will not apply if it can be found as a question of fact that the change of position does not result from the decree which is set aside. When property is being held by a receiver until one of the rival claimants succeeds in establishing his title and the property is then made over to one of the parties who has obtained a decree to this effect, treated as anything but the direct consequence of the decree, whether the decree is one for possession or not. 43 P.L.R. 467.

**LIMITATION—CONFLICT OF RULINGS.**—See 1936 M.W.N. 1119=44 L.W. 798=71 M.L.J. 795. An application for restitution under section 144, not being an application for execution, Art. 181 of the Limitation Act applies. 8 Bur.L.T. 165=30 I.C. 680; 3 Pat. 371 (F.B.). See also 44 C.W.N. 438=71 C.L.J. 127 (Limitation for restitution in consequence of order of Privy Council). Where on receipt of an order from the High Court staying all proceedings with reference to an application for restitution, the lower Court merely directed that it should be filed for the present in the record room, it is merely an administrative order and not a judicial one. It is in no sense a final disposal of the case. An application under S. 144 is a miscellaneous case and once initiated that miscellaneous case does not give rise to any application of the Limitation Act during the course of its disposal. As long as that remains pending, there is no question of the application of the Limitation Act to its proceeding. Attention of the Court that orders may be passed on the pending application, is all that is necessary and for that there can be no limitation. 177 I.C. 695=A. I. R. 1938 All. 552. The time is to be computed from the date of the final decree in favour of the party, *i.e.*, the date of the decree of the Court of first appeal or the second appeal as the case may be. Right to apply for ascertainment of mesne profits does not accrue until after delivery of possession to the successful party. 7 P. 794=10 P.L.T. 49=1928 P. 598. When a person who was dispossessed in execution of a decree subsequently sues for a declaration and obtains a decree in his favour, his right to recover mesne profits accrues on the day of his wrongful dispossession, *i.e.*, the decree in his suit (or appeal from it as the case may be) which declares him entitled to possession, and it ceases on the day he recovers possession in pursuance of the decree. Because he is entitled to mesne profits up to the date of recovery of possession, it does not follow that his right to mesne profits arises on his taking possession. An application filed by such a person more than three years after the date of the final decree is therefore barred under Art. 181 of the Limitation Act. 17 N.L.J. 281. See also 144 I.C. 150=1933 C. 422. Limitation for application for restitution. 19 A.L.J. 549=63 I.C. 184; 21 C.W.N. 564 (dependent judgment). As to

limitation in the case of an application for refund of purchase-money by the purchaser, see 1931 M.W.N. 1006. An application for restitution under section 144 is one for execution of decree of the Appellate Court and is thus governed by Art. 182, Limitation Act. 45 B. 1137=23 Bom.L.R. 480. See also 41 Bom.L.R. 1204; 13 P. 411=148 I.C. 1180=1934 P. 246 (F.B.); overruling 3 P. 371; 11 R. 275=1933 R. 180; 22 Bom.L.R. 403=44 B. 702; 2 P. 277=72 I.C. 912; 67 P.R. 1918; 33 M.L.J. 413=42 I.C. 530. See *contra* in 35 C.W.N. 1294. On this point see also 146 I.C. 462=14 P.L.T. 609=1933 P. 498.

**SUCCESSIVE APPLICATIONS.**—Limitation—Starting point—Limitation Act, Art. 181. 47 I.C. 47=3 P.L.J. 367; 44 C.W.N. 438; 1938 A. W. R. (B.R.) 113. See also 1931 O. 51=130 I.C. 78; 32 I.C. 46; 1937 Mad. 173=(1937) 2 M. L. J. 108=45 L. W. 522; 41 Bom. L. R. 1204; 35 C. W. N. 1294. An application under section 144 is not an application for execution and is governed for the purposes of limitation by Art. 181 of the Limitation Act; and time runs from the date of the decree of the appellate Court when the first Court's order was "reversed" and the right to apply for restitution accrued. 1937 R.D. 21. See also 1939 All. 66=I.L.R. 1939 A. 103.

**BAR TO SUIT.**—Section 144 exhausts the remedies which a litigant against whom a decree has been given, has, when his property is sold under the decree and the decree is subsequently varied, to have restored to him the property sold in excess of what should have been sold. So no action lies to obtain restitution by getting the sales declared void. He has no other right of action in cases where the sale is not void *ab initio*. 134 I.C. 1151=1931 M. 713. See also 158 I.C. 908=1935 A. 873. Where restitution cannot be obtained by application under section 144 (1), there is no bar to the institution of a suit. 44 A. 687=20 A.L.J. 636. See also 44 A. 283=20 A.L.J. 13; 101 I.C. 733. Where restitution can be enforced in execution, no separate suit lies. 13 I.C. 179=22 M.L.J. 146. Consequently a suit for recovery of damages by a successful defendant against an unsuccessful plaintiff for bringing a false suit which involved great injury to the defendant is maintainable. 44 A. 687=20 A.L.J. 636. Bar of suit—Restitution granted under inherent powers—Later suit for mesne profits—Bar. 58 C. 465=134 I.C. 572=1931 C. 517.

**PROCEDURE.**—Application for restitution may be made in such manner as the nature of each case might require and need not follow in every case the procedure in O. 21, r. 11. 45 L.W. 522=1937 M. 173=(1937) 2 M.L.J. 108. An application on the Original Side of the High Court under section 144 for restitution in execution proceedings made long after the suit has been determined and the rights of the parties fully settled by a final judgment is not an application in a



(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

#### NOTES.

suit at all nor is the order made on it a judgment. It is not a final judgment, such a judgment having been already delivered; it cannot be said to be either preliminary or interlocutory judgment. It is merely an order and not a judgment under the Letters Patent and is not appealable. Even if the order be regarded as a decree, there would be no right of appeal, the matter being governed by the Letters Patent and not by C.P. Code. A.I.R. 1938 Rang. 446.

**COURT-FEE.**—Restitution proceedings are not execution proceedings. They are miscellaneous proceedings in the nature of suits, where large amounts claimed as damages might be involved. A memorandum of appeal from an order refusing restitution must be stamped with *ad valorem* Court-fee under Sch. I, Art. 1 of the Court-Fees Act. Art. 11 of Sch. II has no application to the case. 65 C.L.J. 165=41 C.W.N. 157=1937 C. 152. See also 1941 N.L.J. 459. An appeal against an order made on an application under section 144 ought to bear an *ad valorem* court-fee. 42 C.W.N. 152. See also 1938 Rang.L.R. 635.

**APPEAL.**—An order passed under this section is a decree, see section 2, and an appeal lies against such order. 8 M.L.J. 276. But see 10 P.R. 1914 (order dismissing application for restitution is not appealable). 20 I.C. 203; 19 Pat.L.T. 111=1938 Pat. 447. See also 13 P. 108=146 I.C. 1045=1934 P. 109. Restitution to purchaser on sale being declared void. See 1938 Pat. 447=19 Pat. L.T. 111. An order under this section is a decree. As to the principle upon which the doctrine of restitution is based, see 23 M. 306 (310). Second appeal also lies. 86 I. C. 376=1925 C. 1074. Order of restitution as against assignee of decree-holder is one under O. 21, R. 97 and as such not appealable. 1930 A. 415. See also 42 Bom.L.R. 367 (Order under O. 21, r. 93). Where the Court orders restitution under its inherent powers applying the principle of section 144, the order is not appealable. 1930 N. 138. Where an application was made under section 144 and an order passed under section 144 read with section 151, it is appealable even though it is subsequently held that section 144 had no bearing on the case and the application thereunder was incompetent. 140 I.C. 482=1932 P. 317. See also 1939 O.W.N. 765. Where property is sold in execution of the decree but in appeal the decree is modified so as to reduce the amount to a lesser figure the judgment-debtor cannot, even though the purchaser be the decree-holder himself, recover the property sold on payment of the decree amount, unless he shows that the prior sale was in substance and truth a consequence of the error in the original decree. (Case-law discussed.) 54 C.L.J. 293; 32 P.L.R. 739.

**SECOND APPEAL.**—A second appeal from an order passed on an application for restitution under section 144 relating to a rent decree, is not barred either by section 102, C.P. Code or by section 153, B.T. Act. 43 C.W.N. 859=A.I.R. 1939 Cal. 612.

**SECTIONS 144 AND 145.**—Joint and several decree against two defendants—Appeal by both—Stay of execution—Deposit of decree amount by one—Amount drawn out by plaintiff on execution of surety bond by sureties—Bond reciting that "if the defendants succeeded in the appeal" they would be liable for the amount—Construction—Appeal successful as regards one defendant only. Held, (1) that the appellant was entitled to restitution of the money from the plaintiff; (2) that the surety bond must be construed as an undertaking by the obligors to the obligees jointly, and that the liability of the sureties was conditioned upon the "defendants", i.e., both of them, succeeding in the appeal, and that as only one of the defendants had succeeded the appellant was not entitled to restitution as against the sureties by enforcement of their bond against them, because the sureties could not, upon the language of the bond, be held to have undertaken a liability except upon the condition that the appeal of both the defendants succeeded. 44 L.W. 838=A.I.R. 1937 Mad. 229.

**SECTIONS 144 AND 151.**—Where a decree has not been varied or reversed, a Court has no power to grant restitution under section 144, or under its inherent powers under section 151. I.L.R. 1937 N. 153=1937 N. 151. See also 19 Pat.L.T. 111=1938 Pat. 447; 1936 R.D. 563. Money paid by a defendant in a pauper suit as court-fees due to Government under an order of Court which is reversed on appeal is not money liable to be dealt with by way of restitution under section 144 and therefore no interest can be awarded on such amount under section 144. Section 151 will, however, apply to such a case; but that section being discretionary the Court may refuse to award interest in view of the particular circumstances of the case. 44 L.W. 873=1937 M. 178=(1937) 1 M.L.J. 21. In a proceeding started under section 144, the Court held that section 144 did not apply but granted relief under section 144 read with section 151. Held, that the Court having decided the rights of the parties and in effect given a decree which was capable of execution, the order was appealable though it was styled as falling under section 144 or section 151 or under both sections 144 and 151. No application in revision lay against such order. 19 Pat.L.T. 118=1938 P.W.N. 31. Section 144 is confined to cases in which the decree of a trial Court has been varied or reversed by some superior Court or by reason of some order passed by a superior Court. In other cases the order for restitution would come



Enforcement of liability of surety. 145. Where any person has become liable as surety—

(a) for the performance of any decree or any part thereof, or

#### NOTES.

under section 151, and is not appealable unlike an order under section 144. 19 Pat. L.T. 111=1938 Pat. 447.

SECTION 145: SCOPE AND APPLICATION OF SECTION.—Section 145 must be read with section 128, Contract Act, which makes the liability of the surety co-extensive with that of the principal debtor. After judgment-debtor fails to pay decretal amount, decree-holder is entitled to proceed against surety as if he was his judgment-debtor. 1933 N. 287. See also 1933 L. 913. A bond given to the Judge of a Court in pursuance of an order of the Court under O. 32, R. 6, must be enforced by a suit upon the bond. Such a bond is not enforceable by execution in the manner provided by section 145. A suit is the proper means of enforcing it. 1936 M. W.N. 1127=44 L.W. 621=1936 M. 953=71 M.L.J. 675. But see 165 I.C. 453=1936 M.M.N. 443=1936 M. 589. A decree against judgment-debtor can be executed against his surety who has, by means of a statement made before the Court, undertaken to satisfy the liability of the judgment-debtor. It does not matter that the name of the surety is not mentioned in the decree. 164 I.C. 281=38 P.L.R. 623=1936 L. 463. An application for execution of a decree against a surety under section 145 is an application for the enforcement of the bond as such, and even if it is occasioned by and mentions only the breach of one condition, execution can be ordered by the Court if, in the course of the proceedings arising out of that application, it appears that a breach of any one or other of the conditions has occurred. 30 S.L.R. 177=1936 Sind 244. Section is not applicable to a suit by a surety for recovery of money forfeited owing to non-appearance of party. Section is merely procedural and does not in any way define a surety's liability. 5 R. 494=1927 R. 316. The "person" need not now have become liable as surety "before the passing of the decree", as was held in 30 B. 506. The words "for the fulfilment of any condition" will supersede the ruling in 8 M.L.J. 199. As to extent of surety's liability, see 1925 L. 170; 91 I.C. 772=1925 L. 552; 83 I.C. 870=1925. Sind 25. See also 150 I.C. 750=1934 L. 401. A surety under O. 21, R. 40 (3) for production of the judgment-debtor cannot be rendered liable under section 145 for the debt due. 18 R.D. 243=15 L.R. 285 (Rev.); 84 I.C. 998=1925 R. 135=2 R. 567 (Surety not to be made liable simply because judgment-debtor was produced somewhat late); 89 I.C. 342=19 S.L.R. 390 (Section not applicable to surety under Guardian and Wards Act). Section is applicable even to a person who is surety for himself. 131 I.C. 500=1931 R. 65. Section applies only where

surety has rendered himself personally liable for the decretal amount and such liability can only be enforced against him to the extent to which he has become personally liable. 29 I.C. 149=19 C.W.N. 961. See also 57 M. 688=1934 M. 186=66 M.L.J. 248; 22 C.W.N. 919; 19 C.W.N. 178; 17 C. L.J. 267 (F.B.). Section prescribes a summary remedy in execution for the realisation of the security in execution to the extent to which the surety has made himself personally liable. 34 I.C. 407=(1916) 2 M. W.N. 273; 21 I.C. 612. But see 1932 A. L.J. 1060. Where immovable property is given by a judgment-debtor as security for the due performance of decree the property can be realised by decree-holder in execution and no separate suit is either necessary or maintainable. 34 M.L.J. 84=41 M. 327; 7 R. 352=1929 R. 126; 8 P. 891. Per *Division Bench*.—Where security bond creating personal liability and hypothecation of property is executed by surety to the executing Court under O. 41, Rr. 5 and 6, decree-holder can move executing Court to enforce the bond as against surety. 15 L. 282=149 I.C. 300=1934 L. 138 (F.B.). See also 165 I.C. 453=1936 M. 589. But see 1934 O. 139; 66 M.L.J. 540, *infra*. Where sureties gave a security bond under O. 45, R. 7 undertaking personal liability and also charged the property as further security, it is only the personal liability and not the liability of hypothecated property which can be enforced under section 145, because the words "in the manner herein provided for the execution of decrees" refer to execution in O. 21 and not to cases of sales of mortgaged property. (39 A. 225, Ref.) 11 O.W. N. 376=148 I.C. 864=1934 O. 139. On an application to enforce a security bond executed by certain sureties hypothecating immovable properties in respect of a certain amount drawn by the next friend of the minor plaintiffs on their behalf. Held, that (i) section 145 was not applicable, as the sureties had not made themselves personally liable and the matter was not connected with the execution of a decree and was not a question between parties to the suit; (ii) as it was not executed in favour of any named person, it could not be assigned by Court and the only mode of enforcing it was by Court making an order in the suit upon an application to which the sureties are parties and by directing sale of the properties for the realisation of the amount due; (iii) no such direction could, however, be made, till the extent of the liability of next friend was determined in a separate suit. [46 I.A. 228=38 M.L.J. 302 (P.C.), App.] 57 M. 803=1934 M. 262=66 M.L.J. 540. Before proceedings are started under section 145 it must be established that the person against



(b) for the restitution of any property taken in execution of a decree, or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceedings consequent thereon,

#### NOTES.

whom execution is sought has become liable as surety in Court. 71 I.C. 46. *See also* 41 M. 40. S. 145 does not apply to proceedings for the enforcement of surety bonds taken by the decree-holder outside the Court. The bond has to be enforced by suit. 8 L. W. 507=48 I.C. 940. A condition precedent in a surety bond that the debtor should be produced if he failed to appear after notice is a benefit which the surety may waive. 34 I.C. 407=(1916) 2 M.W.N. 273. Liability of a judgment-debtor's surety should not ordinarily be enforced in execution against any property which he might have mortgaged under the surety bond without a suit for the purpose. 39 A. 225. Though surety bond does not specifically say that the decree should be executed against the surety, execution can be taken against him, if he rendered himself personally liable. 1930 L. 185. *See also* 38 A. 327; 54 C. 1. But *see* 1929 L. 393. *See also* I.L.R. (1937) 2 Cal. 698 (Procedure for enforcement of surety bond). Court has a discretion to refuse execution against the surety. 23 Bom.L.R. 1263=46 B. 702. Decretal amount due from the principal debtor and costs of an application against the surety himself may both be included in one tabular statement in the execution against the surety. 59 C. 1450=139 I.C. 815=36 C.W.N. 749=1932 C. 858.

**MEANING OF TERMS.**—The expression "any decree" is wide enough to cover a decree that has already been passed as well as a decree that may be passed after the person concerned has become liable as surety. 1935 L. 189.

**INHERENT POWERS OF COURT.**—Although the case may not fall under S. 145 Court has not inherent power to enforce the bond without recourse to a suit, the proper procedure being to get an order from Court, after notice to the sureties, that the bond is forfeited and then to proceed to execute that order. (42 A. 158 and 51 M.L.J. 239, relied on.) 145 I.C. 1004=1933 M. 722=65 M.L.J. 507. *See also* 57 M. 688=1934 M. 249=66 M.L.J. 248; 56 M. 939=1933 M. 691=65 M.L.J. 342; 166 I.C. 670=44 L.W. 717=A.I.R. 1936 M. 990.

**CONSTRUCTION OF SURETY BOND.**—The rule that a security bond must be strictly construed according to its own terms is certainly true where there is no ambiguity in the terms, but where there is a contradiction in terms, S. 95, Evidence Act, allows a reference to antecedent circumstances. Thus where there is any doubt about the true construction of the security bond, the bond must be considered in the light of the order directing security to be given. 61 C. 890=150 I.C. 985 (2)=1934 C. 569.

C. C. M.—89

Surety bond must be construed strictly. Surety cannot be held liable except to the extent to which he is clearly bound. 52 B. 72=30 Bom.L.R. 12=1928 B. 42. As to true construction of a surety bond, *see* 136 I.C. 629=36 C.W.N. 701=63 M.L.J. 85 (P.C.). *Ex parte* decree, setting aside of. 44 B. 34=21 Bom.L.R. 861. The expression "any decree" is wide enough to cover a decree that has already been passed as well as a decree that may be passed after the person concerned has become liable as surety. 159 I.C. 410=37 P.L.R. 372=1935 L. 189. *See also* 44 L.W. 838=1937 M. 229.

**EXTENT AND NATURE OF LIABILITY.**—Where property is given in security for due performance of decree in particular amount the effect of subsequent transfer of the property is that the decree-holder can enforce the security bond only to the extent of the amount secured thereunder by the sale of the property specified therein, and any sale for more than the amount specified in the bond will be without jurisdiction in the absence of the transferee and will not bind him, and such a sale can be set aside on the alienee depositing the amount due under the bond. 165 I.C. 453=1936 M.W.N. 443=1936 M. 589. Where, by the terms of a security bond, the surety undertook to be liable if the debtor "failed to pay", the words mean only voluntary non-payment by the debtor. Creditor is not bound to use coercive process by arrest or attachment against the judgment-debtor before proceeding against the surety. 1933 N. 287. Liability of the surety cannot be determined until the time for execution has arrived. Death of defendant for whom the opponent stood as surety does not discharge him. 19 Bom.L.R. 112=41 B. 402. Nor does his liability cease if the suit was at one time dismissed for default and then restored. 59 C. 1450=139 I.C. 815. Surety for decretal amount can be made liable for amount enhanced on appeal. 1935 L. 21=156 I.C. 903. A surety bond for performance of a decree or for restitution in case the decree is reversed is enforceable by a regular suit and the obligee need not enforce the bond by a proceeding in execution. 13 Bom.L.R. 909=36 B. 42. Forfeiture of security is to be applied in satisfaction of the decree. 59 I.C. 778=25 C.W.N. 36. Previous notice to surety is essential before attachment of his property. *See* 2 R. 567=89 I.C. 998=1925 R. 135; 1929 L. 205=127 I.C. 226; 1938 Lah. 593. But *see also* 1925 O. 152. Notice under section and warrant of arrest may both be issued simultaneously. 99 I. C. 518 (2)=1927 L. 131. Where sureties agreed to produce the judgment-debtor but did not produce without further notice they can be made liable on their bonds for their failure. 75 I.C. 830=1924 M. 241; 1925 O.



the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47 :

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

#### NOTES.

152. The liability of a surety for a debt ceases to exist when his principal's debt is extinguished by an act which causes the merger of the estate of the debtor and the creditor. 44 M.L.J. 171=1923 M. 340. The mere fact that he deposited the amount in Court does not exclude the personal liability which attaches to every surety. 136 I.C. 318=1932 M. 188. Decree-holder executing decree contrary to terms of agreement with surety—Surety is discharged. 119 I.C. 485=1929 L. 770. See also 1932 P. 313, where it was held that the surety was discharged by reason of compromise of the dispute. But see *contra* in 128 I.C. 903=1931 B. 55; 56 M. 625=1933 M. 309=66 M.L.J. 386 (Effect of compromise on the liability of surety is a question of fact in each case). See 1935 N. 258. Surety for performance of decree—Private arrangement between the decree-holder and judgment-debtor granting extension of time—Court may refuse to enforce the liability of the surety. 1930 L. 896. Where a judgment-debtor was, without the consent of the surety, given time after time to pay the decretal amount, the surety cannot be held liable for the decretal amount on the failure of the judgment-debtor to appear on a particular hearing. 41 P.L.R. 282=A.I.R. 1939 Lah. 368. There is nothing in S. 145 or in any other section to prevent the decree-holder from proceeding against a surety by reason of the dismissal of his execution application against the judgment-debtor, in respect of a liability incurred by the surety before the dismissal of the execution application. Such dismissal has no retrospective effect so as to excuse the surety from any liability incurred before the dismissal. I. L.R. (1939) Kar. 401=A.I.R. 1939 Sind 270. Surety—Discharge of—Execution barred against principal judgment-debtor—Effect of. See 40 C.W.N. 465. A third party who has given security for the performance of a decree cannot apply to the executing Court to cancel the bond on the ground that it was obtained by fraud. His remedy is only by way of suit. 43 M. 325=38 M.L.J. 65. See also 34 I.C. 247=10 Bur.L.T. 15; 28 Punj.L.R. 525. Where a person has become surety for release of a judgment-debtor arrested in execution of decree and the bond is filed in Court, it must be regarded as a matter of record in the Court as much as if it had been executed to the Court itself. The bond is consequently enforceable against the security in execution proceedings. 53 I.C. 673=10 L.W. 172. Under S. 145, a decree-holder cannot execute a decree against a surety under O. 21,

R. 43 as amended by High Court in respect of property entrusted to him. The proper mode of enforcing such a bond is by assigning it in favour of the decree-holder. 52 I.C. 410=9 L.W. 476. See also 12 L.W. 329=39 M.L.J. 472. A surety is one who takes upon himself, and guarantees the performance of an obligation which rests primarily upon another. His obligation is an accessory one. S. 145 has no application unless the person sought to be proceeded against has taken upon himself the liability of another. It need not be the liability of either the judgment-debtor or the decree-holder but it may be the liability of an officer of the Court charged with the conduct of the execution proceedings. It is however essential that he should have undertaken to discharge another's obligations. 1939 Cal. 316=182 I.C. 865. Where after attachment the goods are delivered to a custodian in pursuance of an order of Court for safe custody on his executing bond undertaking to produce the goods in Court when required or to deliver them to judgment-debtor if so ordered and binds himself to pay compensation on his failure to discharge the liability under the bond, such custodian is liable to pay compensation if without the orders of Court he delivers the goods of others although he *bona fide* believed such others to be entitled to the goods as their claims to such goods had been allowed in execution proceedings. 182 I.C. 865=A.I.R. 1939 Cal. 316. Court is not competent to pay the surety's money to the judgment-creditor, without finding that the conditions of the bond were not complied with and without issuing notice to the surety to show cause against the order. 30 I.C. 517. The law requires one notice to be served on the surety under S. 145, and if such a notice has been served, other execution proceedings are maintainable against the surety without fresh service of such a notice. 40 C.W.N. 465. A mere record in the order-sheet of the Court that a notice has been served on a particular person may not be evidence of service of such notice. But when the order in the order-sheet records that the party served has appeared in Court, the order is proof of his appearance, and the effect of the order is conclusive of the fact that the person has in fact been served with a notice. 40 C.W.N. 465. No order attaching the personal property of a sapurdar can be passed under S. 145 unless notice has been given to him. 132 I.C. 49. See also 1931 M. 828; 158 I.C. 373=1935 L. 145. A sapurdar who has given an undertaking to produce the goods when ordered by Court is a surety and becomes liable



## NOTES.

under S. 145. 1931 A. 567=134 I.C. 836 (F.B.). See also 1935 A.L.J. 1000=1935 A. 768. The sapurdars are not relieved of their responsibility about the property entrusted to their care by the Court when the attachment ceases nor have they authority to hand over the goods to the judgment-debtor at the request of the decree-holder. The sapurdars take the goods from the agent of the Court subject to certain conditions to wit that they shall produce the goods whenever the Court orders them to do so or pay its equivalent value to the Court. It follows from the contract itself that they cannot deal with the property without first obtaining the direction of the Court. 189 I.C. 810=A.I.R. 1940 Pesh. 29. Where a decree in a suit in which the property is attached and entrusted to a *sapurdar* prior to decree, is wholly satisfied and the property is returned to the judgment-debtor, the *sapurdar* cannot be made liable for its return on the application of persons not parties to the suit and in respect of attachment in a different suit, Courts can act in the interests of the parties or suitors in particular cases. 1941 N.L.J. 514. A *sapurdar* cannot exonerate himself from the liability imposed on him on the ground that he in good faith handed over the properties which had been given under his charge to a third person. It is his duty to obtain the instructions of the Court before handing them over. 1936 A. 555=1936 A.L.J. 736. See also 1935 A.L.J. 335=1935 A. 373. There must be notice to the surety of some kind before his property can be attached in execution of the decree, attachment of the surety's property without notice being *ultra vires*. It is immaterial however whether such notice is given by the Court which passed the decree or the Court to which it is sent for execution. 1938 Lah. 593. Notice may be given either by Court which passes the decree or by Court to which the decree is sent for execution. 29 B. 29 (34); 26 C. 224; 12 B. 76; 19 B. 578; 15 M. 203; 3 A. 806. But see 8 P. 801. S. 145 deals with procedure and not with the extent of the surety's liability. When there is a refusal to enforce liability interested parties other than the sureties may appear. 26 I.C. 76=1914 M.W.N. 714. Security given by a depositary for safe custody of live-stock attached under O. 21, r. 43 cannot be enforced in execution by summary process. 47 I.C. 956=16 N.L.R. 178. See also 28 Punj.L.R. 525; 156 I.C. 745=1935 A.L.J. 274=1935 A. 373. Extent of liability—Decree-holder not confined to properties given as security for stay of execution. 3 P.L.J. 176=43 I.C. 454. A property mortgaged by a surety under this section cannot be sold as mortgaged property. 38 I.C. 130. See also 2 P.L.J. 197=39 I.C. 648. Surety for production of judgment-debtor—Imprisonment of judgment-debtor—Failure to produce—Surety is liable. 19 A.

L.J. 968=44 A. 174. But see 1 Bur.L.J. 236; 41 C. 50. Under S. 145 a surety for a Receiver can be asked to pay the sum which he has bound himself to pay. 59 I.C. 844=13 Bur.L.T. 91. Mistake in Receiver's accounts—Surety's liability. 6 Bur.L.J. 15. A person who has executed a bond under S. 55 (4) is a party to a suit within the meaning of S. 47. 34 I.C. 247=10 Bur.L.T. 15. But see also 43 M. 325; 20 S.L.R. 362; 134 I.C. 718=1931 B. 444. A decree-holder is not bound to give the principal judgment-debtor an opportunity of paying before taking proceedings against the surety. 20 I.C. 540=7 S.L.R. 19; 1929 L. 205=117 I.C. 226. But see *contra* 102 I.C. 710 (1). Judgment-debtor's property attached—Price of property entered in *supurdnama* (surety bond) is not conclusive of the value of the property—If the property is lost judgment-debtor is not bound to recover the price entered in the *supurdnama* only. 1929 L. 386. The defendant who was put in charge of attached property misappropriated it. The plaintiff thereupon sued on the ground that he was a decree-holder and had suffered loss by the defendant's conduct. *Held*, that S. 145, C.P. Code, was a bar to the suit. *Held also*, that the plaintiff ought to have taken action against the defendant in execution of his decree. 27 A.L.J. 80=113 I.C. 751=1929 A. 266 (2).

DURATION OF SURETY'S LIABILITY.—The sureties executed a bond by which they gave security to the extent of Rs. 550 for mesne profits. It provided as follows:—"If in accordance therewith decree is passed in this suit in favour of the plaintiffs and the defendants have to pay mesne profits for the current year, the defendants shall pay that amount." Suit was dismissed by trial Court, but decreed on appeal. On application to execute the bond, *held*, that the bond became vacated on suit being dismissed by trial Court. (47 M.L.J. 523 and 5 R. 492, Foll.) 145 I.C. 285=38 L.W. 254. Where judgment-debtor under arrest was released on his furnishing security for appearance if his objection under S. 47 of the Code was dismissed and later on after the dismissal of the said petition he appeared in Court and paid the decretal dues in instalments and the decree-holder proceeded against surety for the balance, *held*, that S. 136, Contract Act, applied and that the liability of the surety ceased after judgment-debtor surrendered to the Court on the dismissal of his application. 143 I.C. 322=56 C.L.J. 586=1933 C. 337. See also 1935 L. 145. Where judgment-debtor is released on surety furnishing security for his appearance, but owing to the default of decree-holder to appear on due date, the execution petition is dismissed and surety is also discharged, the liability of surety is not automatically revived by the mere restoration of the execution petition. 1934 L. 349. If a creditor agrees to discharge the principal debtor but reserves his rights against surety, the agreement though enter-



## NOTES.

ed into behind the back of surety only operates as a covenant not to sue between the creditor and the debtor and does not operate to discharge surety, because surety's right of recourse against the debtor is not extinguished. 56 M. 625=1933 M. 309=64 M.L.J. 386. The effect of a compromise on the liability of surety is a question of fact in each case. Where surety undertook liability for the restoration of the property and payment of mesne profits in case the decree of trial Court was reversed on appeal and his liability was not in terms excluded in case of a compromise, the surety is bound by terms of a compromise between the parties although entered into without his knowledge. But if the compromise provides for postponed payment or for the amount being paid for instalments the surety is discharged from his obligations. 56 M. 625=1933 M. 309=64 M.L.J. 386. Where a suit under O. 21, R. 63 is compromised and the plaintiff defaults in making the payment undertaken by him, it is certainly open to the decree-holder to take out execution against such a plaintiff also; for his position is that of a surety who by virtue of the compromise became liable for the payment of the decree amount. 1939 A.L.J. 801=A.I.R. 1939 All. 517.

**LETTERS TO DECREE-HOLDER UNDERTAKING TO DISCHARGE DEBT—ENFORCEABILITY IN EXECUTION.**—It is not essential for the purpose of executing a decree against a surety under S. 145 (a), that a contract of suretyship should be in the form of a bond executed in favour of the Court. A letter addressed to the decree-holder undertaking to discharge the decree-debt is sufficient for the purpose, and the surety who so renders himself personally liable may be proceeded against under S. 145 (a). 58 M. 777=1935 M. 209=41 L.W. 144=68 M.L.J. 136.

**MISCELLANEOUS.**—Extent of surety's liability—Mode of enforcement—Decree-holder asked to furnish security—Mesne profits. 42 A. 158=46 I.A. 228 (P.C.). *See also* 145 I.C. 285=38 L.W. 254; 30 Bom.L.R. 19. Where the judgment-debtor was not told specially to be in attendance on a particular day on which he was absent, but his counsel who could have done all that was required was present, there is no default which renders the surety liable to pay the decretal amount. If his personal attendance is necessary on that day, the surety should be given notice to produce him. 41 P.L.R. 282=A.I.R. 1939 Lah. 368. The assignee-decree-holder can proceed in execution against the surety. It is not necessary for him to get assignment of the surety bond and institute suit. (1928 M.W.N. 681, Ref.) 1932 M.W.N. 1296. Forfeiture of bond—Personal attendance of party—Service of summons. 36 I.C. 73. Where security offered is found to be insufficient opportunity should be given to furnish additional or better security. 1930 A. 87.

Surety having once acquiesced by appearing and asking for time to settle with decree-holder when proceedings were started against him cannot afterwards dispute his liability. 1930 L. 80. Surety for appearance of judgment-debtor—Extent of liability. 56 C.L.J. 586=1933 C. 337. Surety for production of movables of judgment-debtor—Execution against—Procedure. 1933 M.W.N. 185. *See also* 1937 R.D. 518. S. 145 permits the execution of a decree (passed against a stranger) against the surety as though it were a decree passed against the surety. It may be that he is a party only for a limited purpose. Hence where a father has become liable as surety for a decree passed against a stranger, the interest of surety sons can be taken in execution of the decree. The fact that the decree-holder has power to sue the surety instead of taking recourse to execution under S. 145 does not preclude the decree-holder seeking a shorter and less expensive remedy of execution under S. 145. 173 I.C. 950=A.I.R. 1938 Nag. 148.

**APPEAL.**—Even under the old Act, the surety had a right to appeal. 12 B. 71. *See also* 56 M. 909=65 M.L.J. 407; 57 M. 803=66 M.L.J. 540. Where animals which were attached in execution of a decree were entrusted to the defendants as supurdars who did not produce them for sale before the amin when required to do so, S. 145 does not prevent decree-holder from bringing suit against the defendants for the value of the animals. 1935 A.L.J. 335; surety cannot by application be discharged of his bail bond and that an order refusing discharge cannot be appealed against. 1929 L. 435. But *see* 56 M. 909=65 M.L.J. 407. S. 145 provides that any person who has become liable as surety and against whom a decree may be executed shall be deemed for the purposes of appeal to be a party within the meaning of S. 47. Therefore a surety has a right of appeal against an order, directing execution against him. 152 I.C. 693=35 P.L.R. 466=1934 L. 538. *See also* 1931 L. 503. Where after notice to the surety for the judgment-debtor the creditor applied to the Court for an order under S. 55 (4) for realisation of the security and the Court, after hearing the surety, passed an order under S. 55 (4), the order is appealable. 135 I.C. 812=1932 B. 77.

**REVISION.**—An order under S. 145 passed by a Sub-Judge is open to revision by the High Court although an appeal lies to the District Court from such order and a further appeal from the order of the District Court lies to the High Court. 11 R. 134=144 I.C. 163=1933 R. 64.

**RIGHT OF SUIT.**—Suit by surety to cancel security on ground of fraud. *See* 26 Punj. L.R. 561=1925 L. 618. *See also* 55 A. 346=142 I.C. 510=1933 A. 269 (F.B.). Surety's property attached and sold in execution—Separate suit to set aside the sale, if lies. 51 A. 346=112 I.C. 534. S. 145



146. Save as otherwise provided by this Code or by any law the time for being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

## NOTES.

simply enables a party for whose benefit security has been given to enforce the surety bond against the surety by way of execution to the extent to which the surety has rendered himself personally liable, and no more. If an order for or in the course of execution is made against a surety who is within the ambit of S. 145, he is at liberty to appeal against that order as though he were a party to the suit within the meaning of S. 47; but in other respects he is not deemed to be a party within S. 47. Hence S. 145 does not bar a regular suit against surety. I.L.R. (1939) Lah. 470=A.I.R. 1939 Lah. 175.

**LIMITATION FOR EXECUTION AGAINST SURETY.**—See 1932 M.W.N. 1296. When an attachment before judgment in the movables of the debtor was made, the surety executed a bond to produce the items attached whenever called upon by the Court and to be bound by such orders as may be passed by the Court. It was dated 7—11—1921. A decree was passed on 7—9—1922. An application for execution was filed by assignee decree-holder on 7—11—1925. Held, that the application was barred under Art. 182; that Art. 65 was not applicable; that limitation on the bond began to run from the date of the decree itself and that the application was barred. 142 I.C. 363=37 L.W. 127=1933 M. 219.

**PRACTICE AND PROCEDURE.**—S. 145 does not lay down that the notice of attachment should be in writing. All that is necessary under the law is that before the attachment actually takes place, the surety should have notice of the order directing attachment, the object being that he may be able to raise objections, if any, to the validity of the order. If the objection of want of notice is not raised before the executing Court, it must be taken to have been waived. A.I.R. 1937 Lah. 772. Where a person has executed a bond as surety for a receiver and has become liable under the bond, the order of the Court to pay up the amount due on the bond falls within the scope of S. 145 and can be enforced by procedure prescribed in that section. 189 I.C. 177=A.I.R. 1940 Rang. 151. Where the movables of a judgment-debtor are attached and a surety bond is executed for the production of the articles, though a separate suit to enforce the bond is not necessary, action on the bond does not fall under S. 145. The proper procedure for enforcing the bond is to move the Court to make an order calling upon the surety to produce the articles or the money for which he has rendered himself liable. Without such an order under the bond, a petition for the arrest of the

surety is premature. 142 I.C. 581=1933 M. 342 (1). An order passed on an application by a next friend to draw out the money paid into Court by judgment-debtor and to have it invested in Government Promissory Notes is one made in "a proceeding consequent to a suit" and where a third party has bound himself as surety for the amount so withdrawn by the next friend, an order for execution can, under S. 145, be made against the surety. (41 M. 40, Dist.) 56 M. 687=1933 M. 678=65 M.L.J. 142 (F.B.). The assignee decree-holder can proceed in execution against the surety. It is not necessary for him to get an assignment of the surety bond and institute a suit. (1928 M.W.N. 681, Ref.) 142 I.C. 363=1933 M. 219.

**SECS. 145 AND 147.**—The right to enforce a surety bond in execution is conferred by S. 145. The surety must be regarded as a party to the suit as well as to the decree, by reading Ss. 145 and 147 together, and the same consideration which apply to the judgment-debtor should also apply to him as well in matters of execution. 1940 N.L.J. 244.

**SEC. 145 AND O. 38, R. 5.**—Order 38, Rule 5 no doubt contemplates security for the production in Court of property sought to be attached before judgment or its value at a future time when called upon and the amount of the security demanded should ordinarily be commensurate with the value of the property sought to be attached, and not the decretal amount. But the object of the legislature for providing for attachments before judgment was to secure the prospective decree-holder in matter of realisation of the money that might be eventually found by the Court to be due to him. Where, therefore, a Court makes a demand for and takes security for the prospective decretal amount, at most it is only an irregular manner of the exercise of its jurisdiction. But the surety who has executed the surety bond in that form cannot raise the objection to the bond in the course of execution proceedings started against him under the provisions of S. 145. 40 C.W.N. 657=1936 C. 143.

**SEC. 146.**—Under S. 146 transferee from an auction-purchaser is entitled to delivery of possession. 40 A. 216=42 I.C. 936. See also 84 I.C. 665=1924 M. 470. Executing Court cannot go behind the decree and by invoking S. 146, it cannot change a decree passed against R into a decree against his legal representatives. For purposes of rateable distribution the executing Court must take the decrees as they are. 159 I.C. 575=40 C.W.N. 26=1935 C. 738 (S. 146, if enlarges scope of S. 73, see *ibid.*). Legal



147. In all suits to which any person under disability is a party, any consent or agreement, as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person, were under no disability and had given such consent or made such agreement.

148. Where any period is fixed or granted by the Court for the doing of any Act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

#### NOTES.

representative not actually brought on record can apply under O. 9, R. 13. 27 O.C. 299=85 I.C. 529=1925 O. 370. Representative—Transferee of decree-holder's interest during pendency of suit. 17 I.C. 512=1935 L. 119. Expression 'claiming under' is wide enough to cover cases of devolution, etc., mentioned in O. 21, R. 10. 48 I.C. 840=41 M. 510. Execution application by one of several surviving coparceners though cannot be given effect to as being defective, is yet not altogether invalid 51 B. 143=100 I.C. 619=1927 B. 123. S. 146 is not intended to apply to a coparcener while the manager or *karta* in a joint Hindu family is alive so as to allow the coparcener to sue in his place. There is no devolution of interest in such a case as is contemplated by S. 146. 30 S.L.R. 467=1937 S. 94. S. 146 applies only when the person claiming to take or continue a proceeding can properly be regarded as claiming under the original party who brought the action or took the proceeding. Where pending a suit for ejectment by a lessor, a final partition is passed in another suit allotting the property, the subject of the ejectment suit to the son of the lessor, it cannot be said that the son gets the property by reason of any assignment from his father and the son cannot be regarded as a person claiming under the lessor within the meaning of S. 146, so as to entitle him to come on record in an appeal against his father alone by the defendant in the ejectment suit from the decree therein. 52 L.W. 357=A.I.R. 1940 Mad. 876=(1940) 2 M.L.J. 349. On death of the decree-holder, his legal representatives can continue an execution petition filed by him when he was alive. No fresh execution petition by them is necessary. 123 I.C. 303. See also 134 I.C. 720=1931 B. 423; 1931 M.W.N. 1209. Where merits are on the side of appellant he can be allowed to appeal even though he is a transferee from a party after the decree. 40 I.C. 846=1917 M.W.N. 306. A real owner can be allowed under S. 146 to file an appeal against the dismissal of a suit instituted by his benamidar who has released his right in the property claimed in the suit by a deed which recites that the appellant is the real purchaser of the property. The Court has ample powers under S. 146 to permit the person in whose favour the plaintiff has released his rights in the property to file an

appeal. 50 L.W. 429=1940 Mad. 16=(1939) 2 M.L.J. 759. Assignee after decree and before appeal ought to be allowed to join in the appeal under this section. 38 I.C. 511=20 O.C. 31. See also 53 L.W. 283=(1941) 1 M.L.J. 469. A transferee to whom a future decree (and nothing else) has been expressly assigned can execute the decree subsequently passed. The transferee can apply for execution under S. 146, though not under O. 21, R. 16, which cannot apply to a case where there is no decree in existence at the time of the assignment. O. 21, R. 16 does not, however, prohibit an application by a transferee who obtains an assignment of a decree before it is actually passed. The rule is not at all inclusive in this matter. 54 L.W. 429=(1941) 2 M.L.J. 631; 1935 L. 119; 69 I.C. 959=3 P.L.T. 625. See on this section 12 M.L.J. 435; 29 C. 33. Where on death of a pauper plaintiff *pendente lite* his heir is brought on record and he is not himself a pauper, application may be made to have him dispaupered. 131 I.C. 828=1931 M. 324.

SIMPLE MORTGAGEE SUBSEQUENT TO SUIT—RIGHT TO CONTINUE SUIT.—S. 146 is a general residuary provision. It cannot be invoked in a case of devolution of interest which is expressly provided for by O. 22, R. 10 and an application to be impleaded as a party and continue the suit can only be allowed to the extent to which O. 22, R. 10 allows and no more. A simple mortgagee subsequent to suit of the share of a partition suit cannot be allowed to be added as plaintiff and continue suit after original plaintiff has withdrawn the suit, under O. 22, R. 10 or under the residuary provisions of S. 146. He is not a person 'claiming under' a party; his is only a derivative interest. 38 L.W. 280. See also (1940) 2 M. L. J. 376.

SEC. 148.—[See also notes under S. 149.] SCOPE AND APPLICATION.—It is a general rule that where a party is required to do a thing under a decree and time limit is prescribed for doing it, the Court which passed the decree has no jurisdiction to extend the time limit, but it is subject to the qualification that where the decree or order which fixes the time is not intended to be final and the Court still retains control over the proceeding, the Court may extend time under S. 148. Whether the Court still retains control over the proceeding or not must be determined upon the nature of the proceeding



## NOTES.

and the order passed therein. 21 Pat.L.T. 849=1940 Pat. 50. See also 1940 Mad. 934=(1940) 2 M.L.J. 427; 42 C.W.N. 449. Where a Court has granted time within which a payment must be made and has declared that in default of payment within the time specified the proceedings will stand dismissed, there is no power under S. 148, after the date on which the proceedings would stand dismissed to extend the time in which the payment was to be made. But when the application for extension is not made under S. 148 but under S. 151, invoking the inherent powers of the Court, and the mistake which led to the failure to pay was not a mere mistaking of the party but the mistake of the Court's officer, the Court has inherent power to prevent the party from being damnified by the mistake of the Court's own officer and can extend the time for the ends of justice. (1941) 1 M.L.J. 638. A trial Court has power to grant extension of time under S. 148; the appellate Court is not the only Court which can pass an order extending time though the decree has been confirmed on appeal. 1935 R. 500. Section 148 does not authorise the Court to enlarge the period provided by O. 21, r. 58 for the payment of balance of purchase-money. 35 C.W.N. 877. Under O. 21, r. 89 the money to get the sale set aside has got to be deposited within thirty days of date to sale. S. 148 has no application because the period of days is not fixed or granted by Court; it is fixed by the Code and cannot be extended under Limitation Act. 1933 R. 8. See also 1935 A.L.J. 995=1935 A. 873. Court cannot extend period originally fixed by a decree. But when application for extension is made before the decree, Court is bound to consider it, and exercise the jurisdiction conferred on it by S. 148 one way or the other. If it fails to consider an application through a mistake of its own, it has inherent jurisdiction to rectify its mistake, even though it means the re-opening of a decree. No party should be allowed to suffer because of Court's negligence. 30 N.L.R. 258=149 I.C. 840=1934 N. 109. S. 148 does not apply to extension of time for deposit of printing charges under R. 13 of the Oudh Rules of Practice. 50 I.C. 789=22 O.C. 13. See also 61 C.L.J. 512 (Extension of time for payment of costs made condition precedent to allowing amendment of plaint); 156 I. C. 207=1935 O. W. N. 706; 1936 A.L.J. 566=1936 A. 477 (Conditional order for setting aside *ex parte* decree—Power to grant extension of time). Extension of time for doing acts under mortgage or other decrees does not fall within S. 148, C. P. Code. 39 M. 876=29 M.L.J. 708. See also 34 A. 388; 10 A.L.J. 520; 66 C.L.J. 275=1938 C. 13; 1 L.W. 882; 24 I.C. 825; 2 Luck. 425=101 I.C. 258. If on an application by the judgment-debtor for setting aside a sale, an order is passed that if the decretal amount is deposited within a certain time the sale would be set aside and on failure

to deposit that sum within the stipulated period, the application would stand dismissed, the Court ceases to have jurisdiction and has no power to grant the judgment-debtor an extension of time to put in the decretal amount, unless he files a properly constituted application for the review of the order. S. 148 can have no application in a case of this nature in which a final order has been passed in a judgment. The provisions of O. 20, R. 3 would apply. I.L.R. (1939) 1 Cal. 468=43 C.W.N. 417=A.I.R. 1939 Cal. 581. Time fixed by a decree, in a mortgage suit, cannot be extended under S. 148. 28 I.C. 862=18 O. C. 58. When a certain point decided by lower appellate Court was not appealed against by the party aggrieved in time, but the same point was allowed to be raised in appeal admitted after time, High Court was deemed to have impliedly extended time for appeal. 43 M. 550=47 I.A. 33=38 M.L.J. 444 (P.C.) (affirming 30 I.C. 286=29 M.L.J. 110); 4 P. 190=1925 P. 299. When time granted for any matter to be done by a party is exceeded and there is an application by the party to excuse the delay and enlarge the time and Court acted upon the matter as though it was in time it should be considered that Court had enlarged the time. 34 I.C. 625=20 C.W.N. 615. But see also 1936 A.M.L.J. 110. Time fixed by decree of first Court—Confirmation on appeal—Time runs from date of appellate decree. 70 I.C. 76=34 C.L.J. 415. But see 5 O.W.N. 890=1928 O. 492. Where time is given by the appellate Court by its order of remand for production of documents, the order is not final and so it can be extended by the Court under S. 148. 55 A. 326=142 I.C. 331=1933 A.L.J. 127=1933 A. 262 (F.B.). See also 144 I.C. 129=1933 A. 261. Section does not empower an executing Court to extend time fixed for payment of decretal amount. 49 I.C. 840=15 N.L.R. 39. Section applies to proceedings antecedent to passing of the decree but does not enable Court to extend time for doing acts allowed by a decree. 87 I.C. 12=21 N.L.R. 111; 44 I.C. 573; 28 I.C. 852=18 O.C. 58; 2 Luck. 425=101 I. C. 258; 27 A.L.J. 968=1929 A. 666. Section allows Insolvency Court to grant extension of time even when made after expiry of period for discharge fixed by the adjudication order. 86 I.C. 115=1925 L. 416. In a case where a judgment-debtor is to pay a certain amount of money, but there is a clause under which if he pays certain instalments promptly a certain concession would be made to him and a smaller sum would be accepted in full satisfaction of the debt, there is no case of penalty or forfeiture, and the party seeking to take advantage of the concession must carry out strictly the condition on which it is granted. This class of cases must be distinguished from the class of cases where there is an agreement to pay a sum of money by a particular date with a condition that if the money is not paid on



## NOTES.

that date, a larger sum should be made; this latter condition is in the nature of a penalty, while in the former class of cases, it is not a penal clause and hence the Court has no power to grant relief from the obligation to abide strictly by the condition which is in the nature of a concession. The principle is the same whether the sum involved is large or small, and the fact that the default is only in respect of small margin is no ground for the grant of relief. There is no general principle of equity that the Court can relieve a party in default in respect of money payments whenever the Court thinks just. I.L.R. (1941) Kar. 389.

CONSTRUCTION OF SECTION.—Per *King, J. (Obiter)*.—In order to avoid a conflict between O. 45, R. 7 and S. 148, it must be held that O. 45, R. 7 must prevail, both on the principle "*generalia specialibus non derogant*" and on the principle that the general discretion given by S. 148 is a judicial discretion which can only be exercised according to law and not in contravention of law. 55 A. 432=1933 A.L.J. 207=1933 A. 241 (F.B.). See also 1939 P. 667=19 P. 123 (F.B.).

ILLUSTRATIVE CASES: CASES WHERE COURT CAN EXTEND TIME.—Where the period of limitation is fixed by statute and not by Court, it cannot be extended under S. 148, or under S. 5, Limitation Act. 148 I. C. 1082=1934 Pesh. 25. Section 148 gives a Court power to enlarge the period of redemption if it thinks fit. 27 I.C. 706. See also 28 I.C. 458; 1933 A. 157; 27 I.C. 419; 35 A. 582; 18 I.C. 86; 64 I.C. 242; 73 I.C. 891; 1923 C. 612; 86 I.C. 397=1925 N. 258. Court can extend time for payment of deficit Court-fee. 21 Pat.L.T. 849=1940 Pat. 50. In a redemption suit Court could extend the time fixed in decree for payment of decretal amount to a prior mortgagee only under O. 34, R. 8 and not under S. 148. 34 A. 388. See also 145 I.C. 591=1933 A. 157; 143 I.C. 903=1933 M. 563=65 M.L.J. 538. As to power of Court to extend time for payment of decretal amount, see 42 I.C. 613=15 A.L.J. 511. Time agreed upon by parties for the payment of decretal amount of mortgage money may be extended by Court in a proper case. 50 I.C. 937=23 C.W.N. 439. Where the terms of a compromise decree are not interdependent and each direction stands by itself and is separately enforceable, the fact that decree-holder and judgment-debtor have been guilty of failure to perform their respective obligations under the decree does not disentitle one party from compelling the other to perform his obligations in execution proceedings and in such a case S. 148 does not debar Court from extending time fixed by the decree. 116 I.C. 651=1929 N. 164. See also 1934 O. 44; 148 I.C. 251; 147 I.C. 559. When there is a decree based on an agreement between the parties, an essential term of that agreement embodied in the decree cannot be changed by an act of the Court on the application of only one of the parties, but the

consent of both the parties to the original agreement would be necessary for its modification. Where a definite period is fixed for the performance of an obligation as an essential part of the contract, the Court has no power to vary the terms and to grant an extension of time, if the time stipulated is an essential part of the terms of the contract embodied in the decree and not a mere threat of a penal nature. A.I.R. 1940 Mad. 817=(1940) 2 M.L.J. 311. Application for extension—Maintainability—Interlocutory order—Direction for dismissal of appeal for non-compliance—Effect. 1932 M.W.N. 655.

CASES WHERE COURT CANNOT EXTEND TIME.—Court cannot extend period fixed for doing an act after final decree is made. 99 P.R. 1912. See also 37 M.L.J. 695; 74 I.C. 573. Where Court directs by its decree that unless payment is made within a certain date suit or appeal will stand dismissed, Court has no power to grant extension of time for the payment. 37 C.W.N. 878. Where time has been fixed by a decree of Court for payment of Court-fee, Court has no jurisdiction to amend the decree so as to enlarge the time for payment. 37 C. L.J. 395=27 C.W.N. 720. See also 1937 A.L.J. 1346=A. I. R. 1938 A. 150; 10 I.C. 268=13 C.L.J. 432. In view of S. 148 the time granted to pay deficit Court-fee can be enlarged from time to time. This section expressly empowers the Court to extend any time fixed by it even after the expiry of the period originally fixed. 162 I.C. 689=40 C.W.N. 747=1936 C. 221. Court cannot enlarge the time for the making of an award when time has expired and award has already been made. 12 I.C. 13=38 C. 522. Court has power under S. 148 to extend time fixed for payment of costs on an *ex parte* decree being set aside or to pass a fresh conditional order. 36 A. 77. Court has no power to extend time for payment of an instalment of decretal amount. 1935 R. 341. Section 148 does not authorise Court to grant extension of time for doing an act prescribed by Provincial Small Cause Courts Act. 1 P.L.T. 323=56 I.C. 810. Conditional decree—Time fixed by, cannot be extended. 73 I.C. 922=1923 L. 572; 27 A.L.J. 968=1929 A. 666. See also 138 I.C. 121=1932 M. 223. Where decree was granted for possession on payment of a certain amount in a fixed time, Court has no jurisdiction to extend the period. 57 I.C. 16=42 A. 639. See also 40 A. 579=47 I.C. 4; 1930 P. 279. Time fixed by compromise decree—Court cannot extend time. 66 I.C. 273=1922 O. 145. See also 6 P.L.T. 511=1925 P. 691; 9 Luck. 387=148 I.C. 251=11 O.W.N. 92=1934 O. 44; 147 I.C. 559=1934 O. 44; 145 I.C. 548=1933 P. 563. Pre-emption decree—Court cannot extend time fixed by. 19 N.L.R. 8=1923 N. 210. See also 23 O.C. 254=57 I.C. 483; 146 I.C. 171; 1 P.L.J. 92=34 I.C. 38; 2 Luck. 425=101 I.C. 258 (but the appellate Court can); 28 Bom.L.R. 1446.



149. Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

## NOTES.

APPEAL.—Orders under S. 148 are not appealable because they are neither decrees nor included in the list of appealable orders. 1935 R. 500.

REVISION.—A Court arbitrarily granting an application for restoration of a suit long after period of limitation expired acts without jurisdiction and its order is open to revision. 52 I.C. 439=4 P.L.J. 428.

SECS. 148 AND 149.—Under Ss. 148 and 149, read together, it is always open to Court to extend the time for the payment of deficient Court-fee even after expiry of the time originally fixed for payment and Court has power to extend time in such circumstances even after passing a decree when the direction as to payment of the Court-fee is not incorporated in it. Such extension should be granted where the mistake is due to mere accident or inadvertence and on the merits, it is a fit case. 149 I.C. 96 (2)=35 P.L.R. 459=1934 L. 537. See also 66 C.L.J. 78. When time is fixed by the Court for payment of deficit Court-fee on a plaint, it is not open to the plaintiff to demand as a matter of right that the time should be extended. The power to grant extension vests in the Courts either under S. 148 or S. 149, under either of these sections the question is one of the Court's discretion and not the plaintiff's right. S. 149 expressly provides for defective documents being retrospectively validated. The Court must, however, exercise its discretion, not capriciously, but judicially and reasonably. 1938 M.W.N. 259=47 L.W. 492=A.I.R. 1938 Mad. 542=(1938) 1 M.L.J. 610. To extend time under Ss. 148 and 149, the Court must have a case before it in regard to which it has jurisdiction. The expressions 'from time to time' in S. 148 and 'at any stage' in S. 149 clearly indicate this. The jurisdiction of a Civil Court commences when a plaint is filed and comes to an end when judgment is pronounced under O. 20, r. 3. Where a preliminary decree for dissolution of partnership fixed a time for payment of deficient Court-fee and stated, that on default the decree would become a nullity, the time so fixed cannot be extended either under S. 148 or S. 149, as the jurisdiction of the Court has come to an end on the pronouncing of the judgment and signing of the same. Such a judgment cannot according to O. 20, r. 3, which is imperative, be altered except as provided by S. 152 or by review. Because of O. 20, R. 6 during the time between the signing of the judgment and the decree, nothing could be altered. 177 I.C. 824=1938 A.L.

C. C. M.—90

J. 673=A.I.R. 1938 All. 497. See also 1941 P.W.N. 516.

SEC. 149: SCOPE OF SECTION.—[N.B.—See also Notes under S. 148.] The discretion conferred on the Court by S. 149 is normally expected to be exercised in favour of the litigant except in cases of contumacy or positive *mala fides* or reasons of a similar kind. The question of *bona fides* in this connection should be construed in the sense that the word is used in the General Causes Act and not as used in the Limitation Act. A thing should be presumed to be done *bona fide*, if it is done honestly whether it is done negligently or not for the purposes of judging whether the discretion under S. 149 should or should not be exercised in favour of the litigant. 40 P.L.R. 413=A.I.R. 1938 Lah. 361 (F.B.). The Court has a double function; it has its judicial function to hear and determine cases; it has also the function of acting as a collector of revenue for the Government in the shape of Court-fees according to the statutes provided, and in exercising that function it has a discretion granted to allow time. Under S. 149, the Court has a clear discretion to allow time to a plaintiff for the payment of Court-fee, and when the Court-fee has been paid, the plaint upon which it was paid must be deemed as having been filed on the day on which it was actually filed. The provision for payment of Court-fees has really nothing to do with the litigation as such or with the merits of the case, and is merely a provision enforcing the payment of revenue by a denial of judicial process to a person who does not pay the provided fees. 18 Pat.L. T. 665=16 Pat. 600=A.I.R. 1937 Pat. 550 (S.B.). See also 1940 Pat. 50. Where a Court passes a decree in a suit, and provides that the decree shall be subject to the condition of plaintiff's paying the deficit Court-fee by a certain date failing which the suit will stand dismissed with costs, there is a final order which cannot be subsequently altered or amended except with regard to clerical orders or on review. The Court has no jurisdiction to extend time under S. 149, for payment of the deficit Court-fee, whether the application for extension of time is made before or after the expiry of the time fixed for payment. The suit stands dismissed under the order already made. If the Court refuses to grant time and holds that the suit already stands dismissed, it is not without jurisdiction, and cannot be interfered with in revision. 1941 P.W.N. 516. See also 1938 A. 497. Power to allow deficiency of Court-fee to be made up is not confined to Court



## NOTES.

receiving the insufficiently stamped document. 13 L.L.T. 31. See also 1940 Pat. 50. Discretion under S. 149 extends to the whole or any part of any fee prescribed and can be exercised at any stage in the case. 33 C.W.N. 781=117 I.C. 493=57 M.L.J. 281 (P.C.). See also 156 I.C. 405=16 P.L.T. 385=1935 P. 201. The section is intended to remedy the hardship caused by rulings in 20 M. 319; 27 C. 376; 28 A. 310; 10 C.W.N. 844 and follows 29 A. 749 (F.B.). Under O. 7, r. 11 the Court may admit a plaint though written on paper insufficiently stamped, if the plaintiff on being required by the Court supplies the requisite stamp paper within the time allowed by the Court, the plaint is a valid plaint and must be regarded as having been filed on the date on which it was originally presented. The Court has a discretion under S. 149 to grant time for payment or to extend the time granted for payment and the discretion of the trial Court in the matter should not be interfered with by the Court of appeal. 48 L.W. 244=A.I.R. 1938 Mad. 560=(1938) 2 M.L.J. 135. Permission to pay deficient Court-fee is in the discretion of Court but would ordinarily be granted unless there was proved deliberate intention of the person liable to pay the Court-fees to evade obligations. 18 R.D. 44. See also 156 I.C. 405=1935 P. 201; 1936 L. 935. Where appeals presented without the proper Court-fee are accepted by the office without objection, the question of the Court-fee payable not being free from doubt, and the appellants are not guilty of any deliberate attempt to avoid payment of proper Court-fee, they (appellants) are entitled to the grant of time for payment of the same. 159 I.C. 274=1935 L. 448. Where in the trial Court the defendants themselves had stated that the Court-fee was payable on a certain amount and the Court after enquiry had fixed that amount as the proper value of the suit, the appellate Court, when it finds this value to be insufficient, should grant the plaintiffs time to make good the deficiency. This is eminently a case to which the provisions of S. 149 apply. 40 P.L.R. 33. A Court has a discretion to extend time for payment of the requisite Court-fee due on a memorandum of appeal, when the appellant had paid a substantial portion of the Court-fee and pleaded poverty as a ground for extension of time. 177 I.C. 505=1938 N.L.J. 155=A.I.R. 1938 Nag. 322. Where the copies supplied to a pleader who filed an appeal showed the value of the suit at a certain amount which was less than the correct amount, and Court-fee was paid thereon, the mistake is clearly *bona fide*, and the Court should allow the deficiency to be made good and not dismiss the appeal. 38 P.L.R. 262. Where an insufficiently stamped memo. of appeal is presented and deficient Court-fee is paid on a later date, the appeal takes effect from date on which Court-fee was paid. 37 C.W.N. 179=146

I.C. 359=1933 C. 796. Where deficient Court-fee is paid within time allowed by Court but after the period of limitation, suit is not barred. 23 I.C. 408=12 A.L.J. 709. See also 21 A.L.J. 333=1923 A. 349 (1); 45 A. 518; 84 I.C. 946; 4 P. 190; 107 I.C. 223. Whatever the reasons for the Courts granting time for payment of deficit Court-fees, the effect of the grant of time, even if it is after the claim is barred by limitation, is that the plaint takes effect as if it had been presented along with the full Court-fee on the date of its first presentation. 52 L.W. 533=A.I.R. 1940 Mad. 934=(1940) 2 M.L.J. 427. In the absence of an order granting time under S. 149, presentation of the unstamped or insufficiently stamped memorandum of appeal will not amount to a valid presentation. 47 L.W. 211=A.I.R. 1938 Mad. 316=(1938) 1 M.L.J. 514. In the certified copies of the judgment and the decree of the lower appellate Court, the value of the suit for purposes of jurisdiction was given as Rs. 5 and on this amount the appellant paid Court-fee while presenting the appeal. Subsequently it transpired that the real value of the suit was much more and therefore the appellant was called upon to pay the deficient Court-fee which he made good within the time allowed but after the period prescribed by law for presentation of the appeal had passed. Held, that this was eminently a fit case in which the delay in filing the deficient Court-fee should be condoned under S. 149. 39 P.L.R. 389=A.I.R. 1937 Lah. 688. Where the Court-fee payable on a memorandum of objections to an award has not been paid through inadvertence, owing to a *bona fide* mistake of the objector's Counsel but the requisite Court-fee is paid at the earliest opportunity, the Court should, under S. 149, accept the Court-fee and should not dismiss the objections as not properly stamped. A.I.R. 1937 Lah. 276. If Court in its discretion allows time for paying the deficiency in Court-fee and the deficiency is made good, S. 149 enables the defective document to be retrospective in its effect. 1934 A.L.J. 1093=1934 A. 740; 156 I.C. 405=1935 P. 201; 154 I.C. 135=1935 O.W.N. 162=1935 O. 231. S. 149 gives wide and unfettered discretion to the Court to accept Court-fees at any stage, and if the Court receives the Court-fee after the expiry of the period of limitation, the instrument is validated retrospectively as from date of its presentation. 163 I.C. 770=1936 O. 340. See also 37 P.L.R. 199. Where High Court remanded the case with direction that plaintiffs should make good deficiency "within ten days of the case reaching trial Court" and the Sub-Judge who heard the case passed an order directing plaintiffs to appear on a certain date and on the latter date asked them to deposit the requisite Court-fee within ten days from the date and that order was complied with, held, the Court could not subsequently reject the plaint on the ground that Court-fee had



## NOTES.

been paid out of time. 137 I.C. 76=1932 L. 235. See also 14 L. 312=146 I.C. 809=1933 L. 598. Where within the time allowed, proper Court-fee and printing fee are paid up, the document on which Court-fee is so made up must be taken to date back to date on which it was originally presented. (1929 P.C. 147, Foll.) 1936 L. 564. See also 38 P.L.R. 445; 162 I.C. 522=40 C.W.N. 758=1936 C. 245. Inability of a party to raise funds is not ordinarily a sufficient ground which would entitle the Court to exercise its discretion under S. 149, and to permit payment of the deficit Court-fees. But that rule has reference only to normal conditions. But where it is shown that the party seeking the Court's discretion lives in a district where an acute famine prevails and that in consequence he was unable to procure the necessary funds, an exception should be made to the rule, and the Court in such a case will exercise its discretion in his favour under S. 149. 40 C.W.N. 1294. Set-off—Written statement not stamped—Trial Court ordering payment of Court-fee, but not realising full Court-fee—High Court's power to direct payment of deficit Court-fee in second appeal. 1936 C. 277. Where Court-fee stamps were affixed on memorandum of appeal, after the period of limitation, the Bench admitting appeal should be considered to have condoned the delay under S. 149, C.P. Code. 35 P.L.R. 472=1934 L. 701. See also 147 I.C. 342=1934 A.L.J. 533=1934 A. 160. Where Court rejected a plaint on the ground that the deficiency in Court-fee had not been made good and plaintiff subsequently, instead of filing a fresh plaint, asked that suit should be restored, and paid the deficiency of Court-fee on the former plaint. Held, that the Court had power to treat the Court-fee already paid as part of the Court-fee and is not compelled to require the plaintiff to pay a full Court-fee on the fresh plaint. 159 I.C. 630=1935 A.L.J. 1127=1935 A. 985. The Court will not in its discretion allow the deficiency of Court-fee to be made up on the day of the hearing unless it is satisfied that some grounds exist for the exercise of its discretion and that a *bona fide* mistake was made. 44 I.C. 398. See also 38 B. 41. In a proper case Court will allow deficiency of Court-fees to be made up even in *second appeal*. 18 R.D. 44; even in revision, 13 L.L.T. 31. *Bona fide* mistake of pleader—Extension of time to be given. 49 I.C. 188=10 P.R. 1919. But where the pleader, even in spite of the mistake being pointed out by Court persisted in his error, Court refused to extend time for payment. 1934 L. 424. Appellant not caring to find out proper Court-fee payable on memorandum of appeal—Discretion under S. 149 to allow party to make up deficiency of Court-fees even after expiration of period of limitation for filing of appeal cannot be exercised. 119 I.C. 700=1929 N. 294; 1934 L. 424. In case of gross negligence of

pleader, see 28 P.L.R. 338; 33 P.L.R. 187. Where Court-fee cannot be definitely ascertained until record is received or the amount is in doubt, Court may extend time but not where it is purposely not fully paid. 3 P.L.J. 74. Appellant cannot get any indulgence by extending time for payment of Court-fees, the law upon the point being settled, when there could have been no misapprehension as to Court-fees payable. 73 I.C. 788. Under S. 149 Court has a discretion to allow the payment of Court-fee at any time. 26 I.C. 33=27 M.L.J. 677. See also 129 I.C. 732=1931 A. 318. When an application for leave to sue *in forma pauperis* is dismissed, the plaint still remains and may be validated by payment of Court-fees within a time to be fixed by Court. This depends upon the discretion of the Court. 46 M.L.J. 254=76 I.C. 767. See also 19 Pat.L.T. 8; 18 Rang.L.R. 629; 43 C.W.N. 686; 1937 Nag. 36; 39 P.L.R. 660=1937 Lah. 819; 171 I.C. 412; 55 P. R. 1913; 1929 P. 637. But see *contra* 1933 N. 237 (1922 N. 160 and 1924 M. 118, Rel. on; and 1929 P. 637, Diss.); 62 C. 711; 1937 N. 36. Where an application to sue *in forma pauperis* found to be *mala fide* the Court in the exercise of its discretion is justified in refusing to grant extension of time under S. 149. 42 P.L.R. 684=A.I.R. 1940 Lah. 446. Where a person files a suit *in forma pauperis* within the period of limitation but his application to sue as pauper is dismissed and he is required to pay Court-fee on a date which went beyond the limitation period and the Court-fee is so paid at a time granted under S. 149, the suit should be regarded as filed when the pauper application was first made. However, if it is to be regarded as filed when Court-fees were paid, then the period during which the applicant was busy in prosecuting his pauper application should be excluded in counting the period of limitation and no question of limitation arises under O. 33, R. 15. A.I.R. 1938 Cal. 730. If an application to sue *in forma pauperis* is filed and pending disposal of that application, the pauper by paying the amount of stamp-fees into Court, admits that he is no longer desirous to sue as pauper, the plaint filed with the application will relate back to the date when the application was filed, always assuming that the application to sue *in forma pauperis* was made *bona fide*. 1935 M.W.N. 863=158 I.C. 790=42 L.W. 655=1935 M. 878 [2 A. 241 (P.C.), Foll.]. See also 62 C. 711; 161 I.C. 954=1936 Pesh. 69; 1936 A. 584 (F. B.). S. 149 cannot empower a Court after refusing to allow a petitioner to sue *in forma pauperis*, to pay Court-fee and treat his application for leave to sue *in forma pauperis* as a plaint. If such an applicant files a suit, whether with the original document contained in his petition or with a plaint subsequently drafted, he can do so only by strict compliance with the provisions of O. 33, R. 15, under which rule alone the suit comes into existence. Where a petitioner,



## NOTES.

on being refused leave to file his suit *in forma pauperis* and ordered to pay the defendant's costs, asks for time for paying Court-fee, and pays the Court-fee on a subsequent day to which the matter is adjourned and at a later stage of the suit the defendant who till then makes no mention of his costs, pleads non-payment of the costs and an issue is framed on the point as to whether the suit is barred by O. 33, R. 18, if the plaintiff pays such costs, S. 149 cannot apply, and the suit cannot be held to be properly filed under O. 33, R. 15, on the date on which the Court-fee has been paid. But though O. 33, R. 15 is imperative, a suit in which the costs have in fact been paid must be treated as one instituted on the day on which the costs are paid, and cannot thereafter be dismissed as barred under O. 33, R. 15. 49 L.W. 323=A.I.R. 1939 Mad. 316=(1939) 1 M.L.J. 738. See also 1937 Rang. L. R. 331=1937 Rang. 185. Father applying to sue *in forma pauperis*—He dying before passing of final order on his application—Joinder of sons as legal representatives who were willing to pay Court-fees allowed. 151 I.C. 219=1934 M. 467=67 M. L.J. 332. Application to sue *in forma pauperis* withdrawn—Court-fee paid beyond limitation—Suit barred. 1 R. 196=1923 R. 256. Where no suit is instituted but only an application under O. 33 for leave to sue as a pauper is made, S. 149 has no application to validate subsequent payment of Court-fees. 118 I.C. 687=1929 N. 268. Under S. 149 the appellate Court when dismissing an application for leave to appeal as pauper can grant him time to pay requisite Court-fee and if the same is paid within time, the Court will admit the appeal. 40 M. 68=31 M.L.J. 269. Where an application for leave to appeal *in forma pauperis* is rejected and a regularly stamped appeal was filed later on, it is only on the latter date that the appeal must for purposes of limitation be deemed to have been presented. 5 Bur.L.T. 294=18 I.C. 518. Where an application for leave to appeal *in forma pauperis* accompanied with a memorandum of appeal was filed on a particular date and the Court-fee stamp was paid on a later date and between the two dates the scale of Court-fees had been increased, *held*, that the Court-fee payable was only according to the scale in force on the date the memorandum of appeal was filed. 140 I.C. 190=1932 O. 343. Payment of deficit Court-fees after several orders but in conformity with the last is within S. 149. Discretion exercised properly under S. 149 is unchallengeable in appeal. 24 C.L.J. 88=29 I.C. 571. See also 41 C. 1092; 21 I.C. 866; 1923 L. 629; 56 I.C. 47; or in revision, 89 I.C. 419. Where there is no *bona fide* mistake in payment of a smaller Court-fee and the omission is deliberate, a Court should not extend time to pay up the deficiency. 75 I.C. 667=1923 L. 309. See also 3 P.L.J. 74; 1 L. 234. See in this connection 134 I.C. 127=1931 L. 343. An extension of time will not

be allowed for payment of Court-fee for an appeal which has been insufficiently stamped in the absence of satisfactory explanation of the mistake, if any. 67 I.C. 130. See also 67 I. C. 901; 57 I. C. 215=1 L. 234; 67 I. C. 106=1922 L. 440; 1932 M. W. N. 104. Section 149 should not be used so as to allow an appellant who files an appeal on insufficient stamps on account of his poverty to pay the balance at his leisure. 49 I.C. 871. See also 13 R. 50=159 I.C. 468=1935 R. 336; 53 I.C. 256; 56 I. C. 143=1922 L. 223=2 L. 1. Poverty or inability to raise funds to pay Court-fee is not a sufficient ground which would entitle the Court to exercise its discretion and allow time for payment under S. 149. Section should not be construed in such a way as to nullify the express provisions of S. 4, Court-Fees Act. 38 C.W. N. 650=61 C. 663=1934 C. 659. Reasons for not paying entire Court-fee must be considered before granting extension. 60 I.C. 493. Appellate Court cannot go into the question as to whether lower Court exercised its discretion in making various orders of payment of Court-fees if the order is not objected to when made or in Court which made it. 56 I.C. 47 (P.). Extension of time for payment of Court-fee, when implied. 5 P.L.J. 544=58 I.C. 216=1 P.L.T. 544. No express order is required for extending time for paying up deficit Court-fee. 5 P. L. J. 544=1 P. L. T. 544. Time fixed by decree—No extension to be given. 72 I.C. 879=1923 O. 16; 85 I.C. 352=1924 R. 375. Time fixed for payment of costs on payment of which appeal was accepted cannot be extended. 1925 P. 153. Order allowing amendment of plaint and directing additional Court-fees and costs within specified time—Extension of time—Permissibility. 140 I. C. 373=36 C.W.N. 869. A Judge acts ministerially in distributing plaints and does not constitute a Court for the purpose of extension of time under S. 149. But the mere fact that the deficiency in Court-fee is made up on his requisition is not material, as even if the plaint is sent to the trial Court with deficient Court-fee, that Court would be bound to ask the plaintiff under O. 7, R. 11 to make up the Court-fee within a period to be fixed by it, and could reject the plaint only if the deficiency is not made up within that period. 39 P.L.R. 199=171 I.C. 764=A.I.R. 1937 Lah. 392. See also 1937 Pat. 550 (S.B.). There is nothing in the wording of S. 149 to support the view that it does not apply to an executing Court. Where Court-fee is payable in a decree but no time is fixed for its payment in the decree itself, there is no reason why the executing Court could not allow time for the payment. An application for execution of that decree filed within time is not, therefore, barred by limitation by reason of the Court-fee having been paid after limitation, if it was paid within the time allowed by the executing Court. 39 P.L. R. 581=A.I.R. 1937 Lah. 720.



## NOTES.

**FORM OF ORDER.**—A decree of the type that "plaintiffs should pay deficient Court-fees on Rs. 470-8-0 within 15 days or suit shall stand dismissed" is undesirable. The proper course is for Court to fix a time for payment and wait until it expires before passing its decree. The decree should then be a final one dismissing the suit and not contain contingent clauses. (1918 A. 98, Ref.). 30 N.L.R. 258=149 I.C. 840=1934 N. 109.

**LIMITATION.**—In case of a suit in which an insufficiently stamped plaint is filed within limitation period, though the deficiency in the Court-fee is made up after limitation period, the suit is deemed to have been instituted on date of the actual filing of the plaint under section 149. 1 P.L.J. 420. Where plaint is filed in time but with an insufficient Court-fee and the deficiency is made good under O. 7, R. 11, no question of limitation arises. The law is otherwise as regards memoranda of appeal. 3 P.L.T. 142, *See also* 18 Pat. L.T. 665=16 P. 600=1937 P. 550 (S.B.) Where in a suit for dissolution of partnership, a defendant is given a final decree for a certain sum on his paying the requisite Court-fee, the proceedings in that Court do not become final until that Court either accepts the Court-fee or holds that the claim is dismissed for non-payment of the Court-fee. Until this Court-fee is paid there is no decree capable of execution, and when there is no decree capable of execution limitation cannot begin to run under Art. 182 of the Limitation Act. As section 149 gives the Court absolute discretion, at any stage, to allow the person by whom Court-fee is payable to pay it, its acceptance of Court-fee though after three years from the date of the order directing the payment of the necessary Court-fee, is quite valid and time for execution of the decree begins to run only after the date when the Court-fee was paid. I.L.R. (1938) All. 848=1938 A.L.J. 917=A.I.R. 1938 All. 539. *See in this connection* 133 I.C. 122; 146 I.C. 753=1933 A. 572=1933 A.L.J. 1357.

**SET OFF.**—Written statement not bearing requisite Court-fee—Power of Court to decide set-off—Demand of Court-fee at late stage—Legality. 16 P.L.T. 76.

**REVISION.**—Where objections were filed against an award without affixing Court-fee stamp, and the Court disposed of the matter without taking any notice of the objections and without giving the objector any opportunity whatsoever to make good the Court-fee stamp. *Held*, in revision, that the Court had acted with material irregularity in the exercise of its jurisdiction in ignoring the provisions of section 28 of the Court-Fees Act and section 149, and its order was, therefore, liable to be set aside. 38 P.L.R. 1163=169 I.C. 672. If the discretion allowed to a Court under section 149 to allow time for payment of Court-fees is exercised in an outrageous fashion which prejudices the defendant, it is quite open to the injured

defendant to go to the High Court for relief in revision; and the High Court, in an application for revision against the order allowing time, would, by virtue of its general powers of superintendence, interfere and check the action of the lower Court. But if the injured party takes no such step, he is not entitled in an appeal from the final decree in the suit to attack the ultimate decree or order of the trial Court on the basis of the wrongful exercise of discretion by the lower Court in allowing extension of time. Such wrong exercise of discretion, whether by the trial Courts or first appellate Courts, must be remedied, if at all, at once by the High Court on the application of the aggrieved party, and it would be too late if that party allows the suit to proceed and then seeks to interfere with the discretion in appeal. 18 P.L.T. 665=16 Pat. 600=A.I.R. 1937 Pat. 550 (S.B.).

**REVIEW.**—If, without an application for review, a Court sets aside its own previous order rejecting a plaint for non-payment of deficient Court-fees and gives a further extension of time under section 149, its subsequent order is not a nullity but remains a perfectly good order until it is set aside by a superior Court or in proper proceedings. 69 C.L.J. 379=A.I.R. 1939 Cal. 722. If plaintiff obtains a grant of time by an entirely false representation, it would be inequitable to allow him to take advantage of his own fraud. An insufficiently stamped plaint was filed on the last day of limitation with an application for granting time for payment of full Court-fee alleging that plaintiff was not possessed of the amount required. The Court granted an extension of time for paying the full stamp and within the time allowed the requisite Court-fees were paid; but subsequently on the date of hearing, the defendant contended that time was obtained by plaintiff on false pretences and the Court reviewed its order granting time, and finding that it was obtained by plaintiff under false pretences, set it aside and dismissed the suit as barred by limitation. *Held*, that the Court had power to review its order granting time under section 149 and reject the plaint as barred by limitation. 1937 N. 87.

**SECTION 149 AND O. 7, R. 11: RELATIVE SCOPE OF.**—The provision in the Code which really enables a Court to grant time to make good a deficiency in Court-fee stamp on the plaint is not R. 11 of O. 7, but section 149, O. 7, R. 11 does not enforce upon a Court, the granting of time to make good the deficiency in Court-fee stamp. It is not an enabling provision but a disabling one. The authority to issue the order granting time lies in section 149 and the penalty for default in R. 11 of O. 7; section 149 gives the Court a discretion either to grant time or to refuse to grant time. 190 I.C. 197=1941 Oudh 30=1940 O.W.N. 797. *See also* 1937 O.W.N. 804=1937 O. 414; 1941 Pesh. 69.



150. Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

151. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

#### NOTES.

SEC. 150.—Section applies also to cases of partial territorial adjustment of jurisdiction and transfer of business with reference to that part alone to another Court. 46 M. 1=42 M.L.J. 344. See also 61 C.L.J. 543; 34 L.W. 271=1931 M.W.N. 842=61 M.L.J. 307 (following 42 M.L.J. 244 and 43 M.L.J. 713); 1929 A. 677. Section 150 only applies to cases where the business of a Court is transferred to another Court on account of the abolition of that Court or the transfer of any local area from the jurisdiction of one Court to that of another. It cannot be invoked to meet a case where there has neither been a transfer of the entire business of a Court owing to its abolition, nor a transfer of any particular case from one Court to another. Where there has only been a transfer of jurisdiction as to future business subject to an express reservation as regards pending cases, the Court in which a suit was pending and which passed the decree has exclusive jurisdiction to entertain and decide applications for restitution arising out of such suit. I.L.R. (1937) All. 670=1937 A.L.J. 538=A.I.R. 1937 All. 515. The word "transfer" is not used in a limited sense of transfers under the special provision of the Code. It implies that the whole business can be transferred to another Court without an order from a superior Court under S. 24. When all proceedings are transferred *ipso facto* to the new Court, such new Court has power to continue execution proceedings relating to lands situated in transferred area pending the former Court at the time of transfer. 37 M. 462=26 M.L.J. 189. See *contra* 42 M. 821=37 M.L.J. 284 (F.B.) and 47 M.L.J. 448. See also 35 I.C. 296=31 M.L.J. 22. Section refers only to cases where business is actually transferred. 114 I.C. 545=53 M. 378=1930 M. 528. Alteration of jurisdiction—Abolition of Court—Execution of decree by new Court—Second Court which acquired territorial jurisdiction by means of the notification could not execute the decree without transmission of the decree from the first to the second Court. 55 M. 801=137 I.C. 305=1932 M. 418=62 M.L.J. 657 (F.B.). Territorial jurisdiction—Transfer of—Execution of decree. 38 I.C. 152. Transfer of jurisdiction—Application to set aside *ex parte* decree. 46 M. 1=42 M.L.J. 344. Injunction—Disobeying of—Transfer of venue—Application for contempt. 43 M.L.J. 713=46 M. 83=86 I.C. 650. See also 26 C.W. N. 216.

SEC. 151: SCOPE OF SECTION—INHERENT POWERS OF COURT.—Scope of section pointed out. 47 C.L.J. 87; 1940 Rang.L.R. 421; 1941 A.L.J. 345. There will be always cases and circumstances which are not covered by the provisions of the Code wherein justice has to be done. 33 C. 927; 33 C. 1094; 40 M. 1069; 1930 C. 20; 36 C. 193; 61 C. 711. Legislature can only foresee the most natural and ordinary events and no rules of any Code can be made to regulate for all time to come and for all cases that may happen. 9 W.R. 402 at p. 406; 1925 O. 128. S. 151 provides only for an extraordinary procedure and action under it is not in any sense obligatory. The section could only be invoked where no other remedy is possible. It does not confer any substantive rights on parties but is mainly meant to get over difficulties arising from rules of procedure, which would otherwise prevent courts from dealing out justice between the parties. 1941 A.L.J. (Supp.) 1=1940 O.W.N. 1072. Per *Blagden, J.*—S. 151 does not empower the Court to make any order which the particular individuals who at a given moment happen to compose it think just or calculated to prevent an abuse of its process. The words "ends of justice" and "abuse of the process of the Court", must, in fact, be construed with due regard to the rest of the provisions of the Code, the section being really intended to prevent the Courts being rendered impotent by any omission in the Code. The section empowers the Court to make "necessary orders," and no other orders. 1940 Rang.L.R. 512=A.I.R. 1940 Rang. 162 (F.B.). A party who had an appropriate remedy under a specific provision of the Code of which he has failed to avail himself cannot be allowed to invoke the inherent powers of the Court. There is no room for the exercise of such powers in a case coming within any specific provision of the Code. 52 L.W. 357=A.I.R. 1940 Mad. 876=(1940) 2 M.L.J. 349. Section 151 does not confer new power on the Court. It simply saves the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court in cases and circumstances which are not covered by the express provisions of the Code which deals only with procedure and not with substantive rights and obligations; by the exercise of inherent power the Court cannot exonerate a litigant from an obligation imposed upon him by the statute. 159 I.C. 443=62 C.L.J. 298=1935 C. 707;



## NOTES.

164 I.C. 200=1936 A.L.J. 736=1936 A. 555; 158 I.C. 971=1935 Pesh. 151. See also 153 I.C. 329=40 L.W. 853=1935 M. 105 (Power to make interim order of maintenance). Ordinarily the preservation of the inherent power would not enable Courts to extend the scope of powers specifically conferred upon them by other provisions of the Code, and S. 151 should not be utilised so as to make it supplementary to S. 115. The inherent powers, which can be exercised by a superior Court, are ordinarily such powers as are necessary to exercise in relation to proceedings pending before it, and would not include a power similar to power of revision under S. 115, even to cases to which that section is not applicable. 156 I.C. 806=1935 A.L.J. 549=1935 A. 599 (F. B.). Court has an inherent power "*ex debito justitiæ*" to consolidate, postpone, pending the decision of a selected action, and to advance the hearing of suits; to stay on the ground of convenience cross suits; to ascertain whether the proper parties are before it; to enquire whether plaintiff is entitled to sue as an adult; to entertain application of a third person to be made a party; to add a party; to allow defence in *forma pauperis*; to decide one question and to reserve another for investigation (the Privy Council pointing out that it did not require any provision of the Code to authorise a Judge to do what in this matter was justice and for the advantage of the parties); to remand a suit in a case to which neither S. 562 nor S. 566 (1882) applies; to stay the drawing up of the Court's own orders or to suspend their operation if the necessities of justice so require; to stay, apart from the question whether the case falls within S. 545, the carrying out of a preliminary order pending appeal; to stay proceedings in a lower Court pending appeal and to appoint temporary guardian of a minor upon such stay; to apply the principles of *res judicata* to cases not falling within Ss. 13 and 14 of the Code (1882) and so forth." 33 C. 927 at p. 932; 6 M. I.A. 393 at pp. 410-411. See also 1915 M. 69; 61 C. 711. Also for "punishing for contempt of Court committed when the Court is not sitting; deciding questions of jurisdiction though the Court is ultimately found not to have jurisdiction over the suit; directing a party who has applied for leave to appeal to His Majesty's Council to pay costs on the dismissal of his application; amending decrees or orders; granting restitution in cases of reversal of execution sales and orders in execution proceedings; restraining by injunction a person from proceeding with a suit in the Small Cause Court; staying proceedings pursuant to its own order in view of an intended appeal; and treating an application for revision as an appeal and *vice versa*." 40 C. 955 at p. 959. See also 61 C. 711. "Since laws are general rules, they cannot regulate the time to come so as to

make express provision against all inconveniences, which are infinite in number, and so that their dispositions shall express all the cases that may possibly happen. It is the duty of a law-giver to foresee only the most natural and ordinary events, and to form his dispositions in such a manner as that, without entering into the detail of singular cases, he may establish rules common to them all; and next, it is the duty of the Judges to apply the laws, not only to what appears to be regulated by their express dispositions, but to all the cases to which a just application of them may be made, and which appear to be comprehended either within the express sense of the law or within the consequences that may be gathered from it." (Domat's Civil Law cited in 9 W.R. at p. 406). Inherent powers are not limited to sections 151 and 152. 1925 C. 420. Section 151 does not confer a new power on the Court, but only makes a statutory recognition of the inherent power of the Court to do certain things *ex debito justitiæ*. 132 I.C. 562=1931 A. 427; 139 I.C. 491=1932 A.L.J. 784=1932 A. 587; 140 I.C. 412=1932 O. 293. It is not only permissible but imperative on Court to grant restitution under this section, provided it is necessary for preventing injustice and does not contravene any statutory provision. 55 A. 221=144 I.C. 492=1933 A.L.J. 60=1933 A. 218. Court can pass such orders in exercise of its inherent powers as may be necessary for the ends of justice. 138 I.C. 328=33 P.L.R. 152=1932 L. 267. See also 132 I.C. 562=1931 A. 427. *Insolvency Courts* possess, as much as other civil Courts, the powers to make orders which may be necessary in the ends of justice and to correct their own errors committed inadvertently or by oversight. 15 L. 698. Section 151 is intended for exceptional cases for which there is no remedy except the Court's inherent powers. It is not intended to enable Court to evade or ignore the provisions of law which govern procedure. Where after passing a decree, a Court *suo motu* set aside its own decree on the ground it had discovered some documentary evidence on the record the procedure is illegal. 21 A.L.J. 447=73 I.C. 494; 86 I.C. 1045 (S.). See also 1928 M. 522; 1929 L. 694=119 I.C. 488. Court cannot amend a decree which is in conformity with the judgment. 100 I.C. 142=1927 L. 403; 1927 C. 203. Court can amend decrees and orders to correct clerical errors even in cases not covered by section 152. 140 I.C. 412=1932 O. 293. See also 139 I.C. 367=9 O.W.N. 633=1932 O. 291; even after an appeal has been filed against such decree or order. 1931 A.L.J. 536=1931 A. 766. See also 134 I.C. 407=1931 O. 346. Remedy by way of appeal may bar exercise of powers under this section. 27 Bom.L.R. 1511. A Court is not only entitled but is bound to brush aside a mere technicality which stands in the way of justice and to amend such mistakes, slips or omissions as



## NOTES.

may appear to prevent justice in order to give effect to the real and substantial right of the parties. Sections 151, 152 and 153 are just as applicable to Courts of first instance as to Courts of appellate jurisdiction and the appellate Court ought to take steps by way of amendments which were clearly open to the first or other lower Court. 34 I.C. 79=38 A. 398; 1 Luck. 187=105 I.C. 146=1927 O. 276. Section 151 empowers Courts to deal with their own decrees and orders and does not give authority to superior Courts by way of conferring jurisdiction over inferior Courts. 42 B. 363=45 I.C. 552. The inherent power of a Court can be invoked only for the attainment of the ends of substantial justice. 19 C.W.N. 835=25 I.C. 267. Court may do what is fair and equitable. 84 I.C. 134=48 M. 494; 138 I.C. 328=1932 L. 267. Section 151 is not a general clause validating every act of a Court which cannot otherwise be justified. The Court can act under the section only if it is necessary for the ends of justice or to prevent abuse of the process of the Court. If the Court purports to prevent an abuse it must find what that abuse is. The Court cannot pass an unconsidered order of dismissal leaving it to be inferred, firstly, that there were circumstances warranting its acting under section 151; and secondly, that it did so act. 54 M.L.J. 665=1928 M. 522. It must not be used to defeat the imperative provisions of section 3 of the Limitation Act. 66 I.C. 270; 86 I.C. 256=1925 L. 321 (2); 142 I.C. 185=1933 R. 90. An application which is barred both by the law of limitation and by the principle of *res judicata* cannot legally be entertained or granted by a Court in the exercise of its inherent powers. 1935 L. 60. The doctrine of inherent power has no scope for application where there is express statutory provisions on the point in controversy. 69 I.C. 718; 75 I.C. 487=1923 L. 506 (2); 106 I.C. 575; 15 I.C. 53=16 C.W.N. 1029. See also 1935 L. 60. It is only when the Court has exhausted its powers under the specific provisions of the Code, that it can fall back upon the residuary power with which it has been vested under section 151. 1935 P. 68; 38 P.L.R. 373. A *reductio ad absurdum* can be avoided by a Judge under the provisions of this section which is wide enough for the purpose. 37 I.C. 382. The inherent powers of a Court are not to be used in order to relieve a party from the consequences of his own mistakes or to enable him to evade the law of limitation. 43 M.L.J. 184=70 I.C. 743; 89 I.C. 427. See also 1925 L. 321; 1935 L. 60. Excusing delay to sue as pauper. 101 I.C. 320 (1)=1927 N. 197. Refund of excess Court-fee—Application made after long delay—Certificate to apply to Government can be refused. 1930 P. 435 (2). Inherent power is that which inheres in a Court by the very fact of its being empowered to exer-

cise any jurisdiction at all so that it comes within the express sense of the law or within the consequence that may be gathered from it. 1 L.W. 882=26 I.C. 63. The power mentioned in section 151 must be used very sparingly and only in the last resort. 67 I.C. 296; 34 I.C. 787; 33 M.L.J. 184=70 I.C. 743=1922 M. 417. If a suit is dismissed by the trial Court for certain reasons, it is open to the Court of appeal to dismiss it for completely different reasons. 4 O.W.N. 862=104 I.C. 824=1927 O. 455. Varieties of inherent powers are well recognized and new categories cannot be invented. 150 I.C. 446=1934 A.L.J. 1191=1934 A. 585.

APPLICABILITY OF SECTION.—Section 151 does not apply where there is an express provision of law. 69 I.C. 718; 3 P. 654=82 I.C. 813=1925 P. 47; 4 P. 180; 38 P. L.R. 373; 38 P.L.R. 331; 1935 M. 753=69 M.L.J. 75; 1935 L. 60; 1935 P. 68; 102 I.C. 543=1927 N. 262; 52 M.L.J. 670; 1930 C. 387=34 C.W.N. 222; 122 I.C. 102 (setting aside sale). Where there is right of appeal or revision open to party, resort to the inherent power to disturb the decree or order is not proper. 55 A. 548=144 I. C. 731=1933 A. 382. Where plaintiff was rejected party can apply under O. 47, R. 1 or file an appeal, and inherent power under this section cannot be invoked. 151 I.C. 696=59 C.L.J. 250=1934 C. 623. See also 144 I.C. 147=1933 P. 132. Where summons was returned unserved and plaintiff applied for issue of fresh summons, but the Court rejected the application and dismissed the suit, apparently under its inherent jurisdiction, *held*, that the Court should have acted under O. 9, Rr. 5 and 6, and that the order of dismissal passed under inherent power should be set aside. 1933 P. 582. See also 149 I.C. 970=1934 A. L.J. 832=1934 A. 442; 151 I. C. 356=1934 A. 624 (2); 152 I.C. 288=1934 P. 582; 57 M. 635=148 I.C. 79=39 L.W. 179=1934 M. 199 (2)=66 M.L.J. 498. High Court has inherent power to transfer suits apart from sections 22 and 23, C.P. Code. 1933 A.L.J. 1507. Where appellate Court is asked to set aside the proceedings in an appeal on the ground that on the date of hearing of the appeal the respondent was not living, the procedure is to apply within the period of limitation for a review of the judgment passed in the appeal and not to apply under section 151. 54 I.C. 284. High Court cannot consolidate suits pending in District or other Courts. 39 B. 604=30 I. C. 560; 27 L.W. 366=1928 M.W.N. 271 (consolidation of appeals). Consent of parties not necessary. 40 I.C. 182; 4 P. 448. Inherent power of Court to deal with two appeals together. 45 A. 506=74 I.C. 411. Consolidation is an inherent power in an appellate Court and is not barred by absence of application therefore in lower Court. 45 I.C. 463=34 M.L.J. 279. Con-



## NOTES.

solidation of second appeal—Single memorandum of appeal, vakalatnama and Court-fee—High Court had no inherent power to order such consolidation. [54 M.L.J. 595, overruled.] 53 M. 248=1930 M. 376=58 M.L.J. 510 (F.B.). Consolidation of Civil Revision Petitions—Filing single vakalat and paying single process-fee to common respondents—Power of High Court—Consolidated process on payment of fee in each case—Whether can be ordered. 53 M. 262=1930 M. 381=58 M.L.J. 521 (F.B.). A Court has inherent power to consolidate suits and this jurisdiction can be exercised even without the consent of the parties. 3 P.L.T. 584=67 I.C. 1000=1922 P. 566; 3 P.L.J. 446=45 I.C. 551.

As to power to admit evidence, see 138 I.C. 328=33 P.L.R. 152=1932 L. 267. The presence of a witness during the examination of the previous witness may well be termed an abuse of the process of the Court and therefore under section 151, Court has inherent power to prevent that abuse by refusing to take the evidence of that witness. 1934 A.L.J. 750=1934 A. 840. See also the following case: 138 I.C. 524=1932 A. 656 (Power to revise its own order superseding a reference to arbitration). The Court has inherent jurisdiction to deal with allegations of misconduct of arbitrator, even though the award is not made. 1933 P. 566. The holder of a decree for mesne profits which has not yet been ascertained, who has applied for the ascertainment thereof and for attachment under O. 21, R. 42, is entitled under this section and under section 73, to claim rateable distribution in the assets realised by prior attaching creditor. 151 I.C. 609=40 L.W. 291=1934 M. 604=67 M.L.J. 303. Where High Court dismisses a suit on the ground that it has no jurisdiction to try it, it can, by virtue of its inherent powers, direct the return of the plaint to the plaintiff for presentation to the proper Court, although O. 7, r. 10, C.P.Code, is not applicable to it. 12 R. 432=1934 R. 342. High Court has inherent power to reinstate legal practitioners who have been dismissed from their profession. (38 C. 309; 11 I.C. 997; 1 P. 684, Rel. on.) 148 I.C. 299=11 O.W.N. 368=1934 O. 140 (S.B.). Where in a suit a party objects that a pleader engaged by the opposite party should not be allowed to appear as he had been previously engaged by him in connection with the same litigation, and the lower Court after hearing both the parties, accepts the objection, an application by the pleader to set aside an order does not lie either under section 151 or section 115, or under section 85, Government of Burma Act. 177 I.C. 511=A.I.R. 1938 Rang. 241. Code has reserved to every Court under section 151 the inherent power to make such orders as should be made *ex*

*debito justiae* and every Court should have in view the shortening of litigation, preventing duplication of proceedings, and saving the parties from harassment and expenses. And delay, by itself, is not sufficient to deprive a party of his remedies, if such delay does not amount to waiver, acquiescence or abandonment of his claim or has not created a corresponding right in his opponent on extinguishment of his own. 61 C. 711.

ENDS OF JUSTICE.—Section recognizes inherent powers of a Court to make orders to prevent a miscarriage of justice. 38 A. 147=36 I.C. 585; 19 Pat. 159; 1938 Sind 137; 86 I.C. 882=1925 C. 1145; 1941 O.W.N. 1239. But not for purpose of remedying the effects of negligence. 148 I.C. 496=1934 A. 250. The proposition that where an alternative remedy is provided the Court is precluded from exercising its inherent jurisdiction under section 151, is too wide and does not take into account cases of a special and exceptional character which may demand the exercise of the equitable jurisdiction in the ends of justice to correct palpable mischiefs. There is no reason to limit the powers of the Court in cases where the Court is moved to correct its own mistake and wants to afford redress to the party who has been made to suffer for such mistake. 1940 O.W.N. 1086=1940 O.A. 104. Section 151 should be applied with great caution and only when the ends of justice require its application. In order to decide whether the ends of justice require the application of the section to a particular case, the Court has to keep in view not only the interest of the applicant but also that of the other party who may be affected by the order sought to be made under the section. 20 Pat.L.T. 883=1939 P.W.N. 832=A. I.R. 1939 Pat. 678 (F.B.). A Court has inherent jurisdiction to recall and cancel its invalid orders. I.L.R. (1938) All. 71=1937 A. L. J. 945=1938 All. 8. A Court has always got an inherent power to vacate or set aside an order made by it when it is brought to its notice that the order is one which is null and void and should never have been made. Its power to so rescind or vacate such an order is not limited to cases of fraud or deception practised upon the Court. 32 S.L.R. 215. Court is bound to exercise its inherent powers cautiously and with circumspection, and it is not at liberty to do so where the order proposed would contravene any principle of the common law or equity, or would affect a matter in respect of which provision has been made by statute either expressly or according to the true intentment thereof. 14 R. 173=163 I.C. 340=1936 R. 208 (F.B.). When the law of the land has provided ample remedies—Statutory and otherwise—for the redress of a wrong suffered by a party owing to the



## NOTES.

conduct of his opponent or the mistakes committed by the Court, a party is not entitled to invoke, and the Court ought not to exercise, the inherent jurisdiction of the Court. 39 Bom.L.R. 112=1937 B. 173. *See also* 1937 S. 101. It is of course easy in the quiet atmosphere of the Court to say that this and that should be done, and another suit should be brought; but any one who has any experience of the difficulties of litigation in India, particularly where a widow or a minor is concerned, can realize that where two courses are open, one in which the Court can take immediate action in a suit that is before it and the other in which the Court can merely say that another suit should be filed, the Court is bound in the exercise of its duty and in answer to its own conscience to direct that course should be taken which would lessen the difficulties and remove obstructions in the way of widows and orphans. 1937 S. 101. A suit can be stayed under the inherent powers under section 151 apart from the provisions of section 10. 10 L. L.J. 470=1929 L. 12; 123 I.C. 50. *See also* 45 L.W. 764=1937 Mad. 563=(1937) 1 M.L.J. 672; 1 P. 149, 235; 144 I.C. 107=1933 L. 50. Cognizance of cases which cut at the root of controversy. 98 I.C. 280=1927 M. 143. Section 151 has been enacted to deal effectually with abuse of process of Court. The institution of a second suit against the same party for the same relief on the same cause of action is not an abuse of the process of the Court. 27 M.L.J. 405=25 I.C. 597. O. 20, R. 3, C.P.Code, is not exhaustive and it is the duty of a Court to invoke its inherent powers to correct errors that have led to injustice through no fault of a party and to do real and substantial justice. 152 I.C. 211=1934 N. 234. Order of Court obtained by misleading it and its process abused—Court can order the party to make good the loss to the other side. 1928 M. 610=110 I.C. 535. A Court in India has power to pass a conditional decree as it can impose a condition doing complete justice to the parties. 23 M.L.J. 652=17 I.C. 987. Where decree-holder is permitted to bid at an auction-sale, subject to certain conditions being fulfilled and he fails to fulfil the condition, the Court has power to refuse to confirm the sale. 69 I.C. 872=1 P. 235. *See also* 143 I.C. 454=1933 M. 399=64 M.L.J. 586. High Court has full power to pass proper order to give relief to parties and it can set aside an order of a subordinate Court although in the revision petition, the petitioner has not moved against it. 64 I.C. 496=2 Pat.L.T. 739. Ends of justice—Wrong execution of decree—Interference. 48 I.C. 107=3 P.L.J. 435. Order based on erroneous view that incorrect procedure has been followed.

It cannot be varied for ends of justice. 1929 N. 251 (F.B.); 48 C.L.J. 594=1929 C. 162. Objection to execution of decree—Objectors alleging mistakenly that they were in possession—Objection upheld but no order passed for possession to objectors—Power of Court to restore possession. 1934 P. 683. When a situation arises in a case of contest between a life-tenant and a remainderman, consequent on the death of the former before the final decision of the Court, the Court has an inherent jurisdiction to make suitable orders for the ends of justice. 150 I.C. 425=11 O.W.N. 917=1934 O. 337.

LIMITATIONS ON THE EXERCISE OF COURT'S POWERS.—The section applies only when there is no other express provision of law. 30 I.C. 38=21 C.L.J. 614; 55 C. 219=103 I.C. 864=1927 C. 850=47 C.L.J. 69; 1933 P. 132; 69 I.C. 718; 82 I.C. 813; 1935 L. 60; 16 C.W.N. 1029. Section 151, is to be invoked when no other remedy under the law is available and one party or other is entitled to relief in equity. 1940 A.W.R. (B.R.) 55=1940 R.D. 159. It is a well-recognised principle that where a party has another remedy, and will not adopt or negligently fails to pursue it, the Court will not, as a general rule, grant him relief under its inherent powers under section 151. 1938 P.W.N. 313=19 Pat.L.T. 111=A.I.R. 1938 Pat. 447. The powers of section 151 have to be exercised sparingly. Where there is specific provision of law, or a specific procedure provided by law, which has not been followed by a party, or of which advantage has not been taken by a party, the Court would certainly hesitate before exercising its inherent jurisdiction under section 151. I.L.R. (1938) Bom. 743=40 Bom.L.R. 1025=A.I.R. 1938 Bom. 510. When there are specific provisions in the Code for the remedy which a party seeks, it is not open to him, after his failure to adopt those remedies, within the period allowed by law, to appeal to the inherent powers of the Court to obtain that remedy. Hence where a party has not applied under O. 21, Rr. 89, 90 or 91 it is not open to him to seek the inherent power of the Court to set aside the sale. A.I.R. 1938 Rang. 433. *See also* 1938 A.L.J. 1041. Where other remedies are open to the applicant under the C.P.Code, the inherent powers of Court under this section cannot be invoked. 1932 L. 28=136 I.C. 735; 1932 O. 220; 8 O.W.N. 1238. *See also* 190 I.C. 174; 1941 Oudh 91=192 I.C. 332; 1941 R.D. 429; 193 I.C. 637=(1940) 2 M.L.J. 349; 1940 O.W.N. 1006; 31 S.L.R. 32=1937 Sind 101; 1940 O.A. 709=1940 A.W.R. (B.R.) 118; (1940) 2 M.L.J. 349; 1940 O.W.N. 1050; 1937 Sind 101; 39 P.L.R. 710=1937 Lah. 416; 41 C.W.N. 893=1937 Cal. 425; 1938 Lah. 4. Court cannot call upon



## NOTES.

next friend of minor plaintiff to provide for security for costs before hearing. 1934 A. 458 (1). There is no inherent jurisdiction in High Court to direct Courts subordinate to it to proceed in a particular manner. Section 151 does not confer any jurisdiction on the Court which did not already exist. It merely preserves the inherent power of the Court which it may possess. Varieties of inherent jurisdiction are well recognised, and new categories cannot be invented. 150 I.C. 446=1934 A. L.J. 1191=1934 A. 585. Rights conferred by sections of the Code—No provision for working out those rights—Inherent powers can be invoked to apply the provisions of the rules which are nearest in point with such modifications as may be necessary. 131 I.C. 610=33 L.W. 359=1931 M. 303=60 M.L.J. 628. Court cannot do what is prohibited by the Code. 3 P. 766=84 I.C. 320=1925 P. 30; 100 I.C. 518=1927 C. 420. Section 151 does not authorise the Court to override the express provisions of Limitation Act or Bengal Tenancy Act. 9 I.C. 246; 7 L.L.J. 13=86 I.C. 256; 1 L. 363=58 I.C. 789. See also 57 I.C. 15; 23 N.L.R. 193. But see 47 C.L.J. 87. Court has no power to grant leave to apply for review *in forma pauperis*. 1930 R. 280. In exercising the inherent powers the decision of the Court should be based on general legal principles subject to any special provisions contained in the Code, meeting the necessities of the case in question. 56 I.C. 255; 98 I.C. 70=1927 C. 158. Judge passing order rejecting plaint under O. 7, R. 11—His successor in office cannot set it aside under Court's inherent jurisdiction. 1929 M. W.N. 140. Section 151 cannot be invoked so as to treat an appeal filed on behalf of one party as the appeal of another, simply because it should have been filed on behalf of the other and it was the intention of the pleader filing it to appeal on behalf of the other. 151 I.C. 25=1934 A. 677.

**WHO CAN MOVE THE COURT.**—Inherent powers of a Court cannot be used for the benefit of the litigant who has his remedy under the Code of Civil Procedure, much less for one who having his remedy has lost it by his own delay. 26 I.C. 46=27 M.L.J. 605. See also 1935 P. 68; 1923 L. 506; 106 I.C. 575; 16 C.W.N. 1029; 1935 L. 60. A stranger to the litigation cannot intervene after the suit or proceedings are disposed of and claim the protection of section 151 or appeal to the inherent powers of the Court to do justice. 42 M.L.J. 563=68 I.C. 910. Court can order restitution to surety. 28 P.L.R. 525.

**ADMINISTRATION SUIT.**—Power to pass appropriate orders. See 1938 M.W.N. 1127.

**AMENDMENT.**—Where a purely clerical

error is brought to the notice of a High Court when it is seized of the matter as Court of appeal it can correct the error. 45 A. 53. See also 1932 L. 267; 1932 O.293; 139 I.C. 491=1932 A. 587. Section applies to amendment of decrees and not to amendment of plaint. But Court can make corrections for ends of justice. Extensive powers of amendment may be exercised under sections 151 and 153. (*Ibid.*) See also 140 I.C. 113=1933 A. 102; 8 O.W. N. 1238; 141 I.C. 400=1933 L. 135. A Court cannot vary or set aside under section 151 a consent decree made by it when the decree and solehnamah are not at variance. 36 I.C. 239. See also 150 I.C. 869=1934 L. 399. The Court has inherent powers to amend or vary a perfected order and to make necessary orders at any time even after an appeal has been preferred against it where the decree is not in accordance with the intention of the Court as gathered from the judgment as a whole. 26 I.C. 946=18 C.W.N. 772. Amendment of decree after disposal of appeal. 8 Pat.L.T. 143. Section 151 would enable a Court to alter a decree when it does not correctly express what the Court actually decided or intended to decide. 73 I.C. 679=1923 L. 147; 157 I.C. 810=1935 O.W.N. 968=1935 O. 461. See also 41 Bom.L.R. 1170; 1937 M.W.N. 1013; 1937 O.W.N. 1110. The Court has always got the power to make an order allowing the amendment of an execution petition in the interests of justice. Its power is not limited by O. 21, R. 17, the Code being not exhaustive. Sections 151 and 153 enable the Court to exercise its inherent powers of amendment when the interests of justice require the same. 39 C.W.N. 1144. As to amendment of plaint and decree see 155 I.C. 236=1935 O.W.N. 471=1935 O. 369; 1941 O.W.N. 1. As to power to amend sale certificate, see 156 I.C. 812=41 L.W. 571=1935 M.W.N. 378=1935 M. 420. Where the decree has not been signed the Court has power to make alteration to make decree consistent. 17 L.W. 254=74 I.C. 416; 37 I.C. 352. It is not competent to a Court to amend the decree of another Court transferred to it for execution even though the error may be obvious. 15 L.W. 301=65 I.C. 710; 34 I.C. 787=3 L.W. 499. Where the question of costs was raised by the applicant for an amendment of the decree in both the first and second appeals which were dismissed, the matter must be presumed to have been adjudicated upon adversely to him. In such circumstances, no application by him for amendment of the decree relating to costs is competent in the first appellate Court. 41 P.L.R. 136=1939 Lah. 312. It is not open to a Court to entertain a second application for amendment of a decree, when a prior application on the same question has been dismissed. 41 P.L.R. 136=A.I.R. 1939 Lah. 312. A decree should not be amended in the exercise of the powers conferred under sections 151 and 152, C. P. Code, long after it was passed so as to prejudice the rights acquired by third



## NOTES.

parties in the property affected by the decree. The principles which apply to the amendment of pleadings cannot be extended to the amendment of a decree after interest of third parties has accrued. 41 Bom. L.R. 800=A.I.R. 1939 Bom. 389. An application to amend a plaint on the ground that the correct view has subsequently been laid down by the High Court should be allowed. 26 I.C. 383. Where the parties allowed a decree to be enforced for six years before attempting to amend it, it should not be amended specially when there is no clerical or arithmetical mistake. 67 I.C. 320. Where the trial Court is of the opinion that the error if any was not one arising from any accidental slip or omission but rather arising from the negligence of the parties, it would not be proper for the High Court to say that there is such an error as would justify an amendment. Further where it cannot be amended under section 152, it could neither be amended under section 151. 186 I.C. 667=1940 O.W.N. 213=A.I.R. 1940 Oudh 298. A Court has inherent power to amend a decree for pre-emption and deduct the amount due to the pre-emptor from the vendee as a charge on the property sold, from the pre-emption money. 54 I.C. 34. Court cannot amend a decree which is in conformity with judgment. 100 I.C. 142=1927 L. 403. Where, in a mortgage suit, the boundaries of the mortgaged property are not correctly given by inadvertence and a sale certificate is issued after the sale held after passing of the preliminary and final decrees, the preliminary and final decrees can be amended and if the misdescription has not affected the sale price, the sale proclamation and the sale certificate can also be amended. If, on the other hand, the sale price has been affected by such misdescription, the sale will be set aside and decree-holder will be entitled to bring the properties to a fresh sale. [41 C. 590 (P.C.). Ref.] 1934 L. 29. Where the mortgaged property is incorrectly described in the plaint, in the preliminary decree and in the final decree, an amendment of the description of the property in final decree can be allowed in the exercise of the inherent powers of the Court. [19 C.W.N. 1021, Rel. on.] 1935 R. 522. *See also* 1936 O.W.N. 575=162 I.C. 233. So also where the *khassra* number of the mortgaged property was wrongly given in plaint. 8 Luck. 734=150 I.C. 791=11 O.W.N. 550=1934 O. 352. Where a mistake as to description of property is made in the plaint and is repeated in the judgment and decree Court has power to amend plaint and decree. 153 I.C. 378=1935 O.W.N. 31=1935 O. 92. Where after the passing of a final decree on a mortgage an application is made under sections 151, 152 and 153, C. P. Code, to amend the mortgage deed, preliminary and final decrees with reference to the extent of the interest mortgaged, namely, from 'five pies' to 'five shares' on the ground that a mistake which crept in the mortgage was repeated in the plaint and in the decrees, it cannot be grant-

ed for the mortgagees cannot be allowed to obtain by this application what they could not have obtained in the suit itself. This is a case which is governed by the rule laid down in section 94 of the Evidence Act. I. L.R. (1939) All. 399=1939 A.L.J. 193=A. I.R. 1939 All. 231. Even in the case of a compromise decree, Court has ample powers under section 151, if not under section 152, to correct its mistake and amend its decree so as to bring it in accordance with the agreement of parties. (36 B. 77 and 10 C. 612, R.) 150 I.C. 721=1934 R. 108. *See also* 36 Bom.L.R. 1217=1935 B. 75. *P* brought a suit for possession of land against *K*. Criminal proceedings between the parties were also pending about the same time and possession of a part of the land in suit was restored to *P* by the Criminal Court. Counsel for *P* consequently made a statement in Court that his client had received possession of a part of the land in dispute. Counsel for *K* stated that an appeal had been preferred against the award of possession. The suit proceeded and finally the Judge granted a decree to *P* for possession of the land in suit excluding that portion given to him by the Criminal Court. Subsequently the owner of Criminal Court was upset in appeal, and *P* was dispossessed of that land. *P* applied under sections 151 and 152 to have this land also included in his decree. *Held*, that section 152 was not applicable, but the amendment could be made under section 151. 1934 L. 735. During pendency of a suit a compromise petition was filed by the parties which stated that the defendant was to pay a certain amount in satisfaction of plaintiff's claim within three months, that as security for such payment defendant had handed over Government promissory notes to one *L* who was not a party to the suit and that if within three months the agreed amount or part thereof was not paid, *L* was to sell the promissory notes or as many of them as necessary and satisfy plaintiff's claim. The petition then prayed that the suit be recorded as compromised. Upon this Court passed the following order: "Let the case and suit be dismissed in terms of compromise." No order was made as to costs nor any decree was prepared. The agreed amount was not paid. *L* instead of selling promissory notes returned them to defendant. Plaintiff sought execution against defendant, but discovering that no decree was passed applied to Court under sections 151 and 152 for amendment of the order. *Held*, that the order of Court dismissing suit was wrong. The plaintiff was entitled to a decree in terms of the compromise petition and failing to realise amount in three months or by sale of promissory notes, he was also entitled to realise it by executing decree against defendant. The liability of the defendant did not cease merely by handing over promissory notes to *L* who was not a party to the suit. Sections 151 and 152 applied and the order of Court should be amended. (34 I.C. 186, Dist.) 1933 P. 135.

ADDING PARTIES.—Even in cases where



## NOTES.

the application for addition or substitution of parties does not fall within the language of the rules of the Code, Courts have power to pass the necessary orders for the addition or substitution of parties. (1932 C. 783; 1929 M. 268; 44 M.L.J. 322 and 38 M. 406, Rel. on.) 1933 A.L.J. 1512. An appellate Court has power to implead only such persons as parties to the appeal as were parties in trial Court and were not made parties to appeal but not those who were complete strangers to the suit. 56 I.C. 726=31 C.L.J. 130; 67 I.C. 10=34 C.L.J. 405. Court cannot use its inherent powers to extend the scope of a provision which places limitation on it. Appellate Court has therefore no jurisdiction to implead a person against whom an appeal has abated as such a person is not one "interested in the result of the appeal" within O. 41, R. 20. 41 L.W. 111=1935 M. 175. Powers of a Court to implead parties under section 151 are circumscribed by O. 41, R. 20 and it is only in exceptional circumstances that the inherent powers under section 151 could be invoked. 73 I.C. 136=1923 L. 490. See also 43 P.L.R. 471; 19 Pat. 159=20 Pat.L.T. 883=1939 Pat. 678 (F.B.). Also 8 L. 161 (power of High Court to transpose parties); 1927 C. 37. A Court has jurisdiction in an appeal to order the addition as parties to the appeal legal representatives of respondents who were not parties to the appeal in the sense that they were dead. Though the appeal might be one against a dead person or persons, the Court has power under sections 151 and 153 to add the legal representatives and amend the record in order to prevent injustice being done to either side. 39 Bom.L.R. 444=I.L.R. (1937) Bom. 602=1937 Bom. 401.

**AFFIDAVIT.**—Power to direct particulars to be put in affidavit or petition. 40 C.W.N. 913.

**ALTERATION OF ORDER PASSED BY PREDECESSOR.**—It is not open to a Judge in the exercise of his inherent powers to modify or alter an *ex parte* order of his predecessor passed in the execution proceedings, when the modification or alteration of the order, more than three years after the order was passed, far from furthering the ends of justice would work serious injustice to the interest of the decree-holder. 158 I.C. 705=1935 O.W.N. 1091. Section 151 is not intended to constitute one Subordinate Judge an appellate authority over his predecessor of like jurisdiction as himself. If one Judge reviews the order of another, he cannot escape the provisions of O. 47 by placing his order under section 151. Both section 151 and O. 47 are to be construed strictly and are not intended to be used to allow one Judge to sit in appeal on orders of his predecessor exercising an equal jurisdiction with his own. I.L.R. (1939) Kar. 330=1938 Sind 137. Where a presiding officer of a Court has passed an order, his successor cannot and should not go behind that order and hold that order to be *ultra vires*. 1938 O.W.N. 348=1938

Oudh 103.

**ARBITRATION.—POWER TO SUPERSEDE ARBITRATION.**—There is an inherent jurisdiction in Court to intervene and supersede the arbitration if the case fell under section 151, viz., where such an order is necessary for the ends of justice or to prevent the abuse of the process of the Court. Where after a reference to arbitration has been made on the agreement of the parties, it is found by the Court that two out of the three arbitrators forming the tribunal are closely connected with one party and that the other party were unaware of the relationship, the circumstances of the case bring the matter within section 151 and the Court has power to supersede the arbitration. 153 I.C. 505=1935 A.L.J. 72=1935 A. 281; 41 L.W. 261=68 M.L.J. 537=1935 M. 349. The Court cannot revoke its order of reference to arbitration in the exercise of its inherent power under section 151, C. P. Code. Such a power does not exist apart from the provisions contained in Sch. II, C. P. Code. 167 I.C. 171=1937 A.L.J. 29=1937 A. 141 (F.B.). See also 1932 A. 655; 41 L.W. 261=68 M.L.J. 537; 71 M.L.J. 648=1937 M. 9.

**AWARD.**—Award under Co-operative Societies Act—Mistakes in—Correction—Jurisdiction of Civil Court executing award to direct rectification. See 40 C.W.N. 89.

**COMMISSION.**—Order of executing Court regarding commission payable to auctioneer—Interference by High Court. See 1935 L. 956.

**COMPENSATION FOR IMPROVEMENT.**—The order of the executing Court confirming a sale which is set aside on appeal does not amount to a decree and therefore an application by auction-purchaser for improvements payable in consequence of that order cannot be said to fall within the purview of section 144 as that section contemplates restitution where a decree has been varied or reversed. Nor does the application fall under section 47 as the question of improvements is one between the auction-purchaser and judgment-debtor and does not relate to the execution, satisfaction or discharge of the decree as such. The application can therefore fall only under section 151. The question of improvements by auction-purchaser is a question incidental to and consequential on the setting aside of the sale. The executing Court under section 151 has jurisdiction to go into the question of improvements. The judgment-debtor cannot be allowed to retain the benefit of the improvements made *bona fide* by the auction-purchaser without paying for them. The case therefore is a fit one for the exercise of the inherent powers of the Court under section 151. 189 I.C. 683=A.I.R. 1940 Lah. 59. Section 151 cannot be interpreted as giving the Courts power which under the general law they do not possess. A Court has no power under the section to give compensation to a decree-holder, who after purchasing property in execution in satisfaction of his decree loses part of that property as the result of another suit. 16 Pat. 729=18 Pat.L.T. 826=1937 Pat. 647.



## NOTES.

**COMPROMISE DECREE** can be set aside in exercise of inherent powers of Court on the ground that the party had not consented to the terms mentioned in the decree. 8 O.W.N. 1267. *See also* 1933 P. 135; 41 Bom.L.R. 994; 57 C. 1143=1931 C. 51. Where a compromise decree is passed by a fraud practised upon the Court, it is within the inherent power of the Court to correct its own proceedings. But where a consent has been obtained by the practice of fraud between the parties, the remedy lies by way of suit and not by way of an application. 13 P. 165=148 I.C. 947=15 Pat.L.T. 103=1934 P. 229. The remedy of a party who impeaches a consent decree on the ground that his consent was induced by fraud is to institute a regular suit for the purpose. Section 151 is not applicable in such a case. In the first place, the section being a residuary section should not be applied at all unless there is no other remedy open to the litigants. In the second place, the matter for enquiry in such matters is something extraneous to the suit itself and the same kind of investigation is necessary as in a contested suit. Further it cannot be said that there was any fraud practised upon the Court which would justify it in exercising its inherent power. 43 C.W.N. 969=A.L.R. 1939 Cal. 658. Compromise effected on behalf of pardanashin lady by fraud—Court can set aside—No appeal lies. 146 I.C. 933=1934 P. 41. A compromise decree under O. 23, R. 3 could be passed only after there has been an order that the compromise be recorded. This is not a purely formal matter, but is a question of substance. Where, therefore, a Court passes a decree on the basis of a compromise without a formal order for recording the compromise the decree is irregularly passed and such a decree can be set aside on an application under section 151. 14 P. 356=16 Pat.L.T. 536=1935 P. 439.

**CONTEMPT OF COURT.**—The effect of the section is to give absolute power to Courts to summarily punish contempts by fine or imprisonment. 50 I.C. 981=23 C.W.N. 389; 86 I.C. 650=1923 M. 92.

**CONSOLIDATION OF SUITS.**—*See* under Applicability of section (*supra*).

**CONVERSION OF ONE PETITION INTO ANOTHER.**—The petition under section 151 can be treated as one for review. 43 M.L.J. 290=70 I.C. 425. Restoration application of an application under O. 9, R. 9 dismissed for default can be treated as one for review. 54 C. 405=103 I.C. 69=1927 C. 534. High Court can condone misapplications of special provisions; it can convert application for revision into memo. of appeal. The High Court's power cannot be exercised if law is not complied with as regards limitation and Court-fees. 48 I.C. 779.

**CONVERSION OF SUIT INTO APPLICATION.**—Where legislature provides a procedure of a summary nature by an application without expressly barring any suit in that behalf, it is always within powers of Courts, when instead of application a suit is filed, to treat

the suit as an application and decide accordingly. 165 I.C. 715=40 C.W.N. 856=1936 C. 342.

**CRIMINAL COMPLAINT.**—The High Court has jurisdiction under section 151 to grant an injunction *in personam* against a person who has submitted to the jurisdiction to restrain him from proceeding with a criminal complaint in a Court which is not subject to the jurisdiction of the High Court, if in the exercise of its discretion the High Court thinks proper to do so. But this is a jurisdiction which should be exercised with extreme caution. 43 Bom.L.R. 287.

**DEFENCE, STRIKING OFF.**—Court can in exercise of its inherent powers strike off the defence in a fit and proper case. Where such order was justified by repeated defaults of defendant it cannot be interfered with in revision. 34 L.W. 864=61 M.L.J. 477.

**DISMISSAL FOR DEFAULT.**—The Court in a proper case can re-admit an appeal dismissed for default. 45 B. 648=60 I.C. 919. *See also* 1927 C. 76. Where the next friend of a minor appellant is of unsound mind, the minor's absence at the hearing cannot be treated as default and his appeal will be re-admitted by Court in exercise of inherent powers. 45 B. 648=60 I.C. 919. A partition suit is not liable to be dismissed for default after the passing of the preliminary decree. 47 M.L.J. 441, relied on. An order by the trial Court dismissing a suit for default after the passing of the preliminary decree cannot be treated as one made under the provisions of O. 9 and although the application to restore the suit has been made under R. 9 it is not in fact governed by the provisions of that Chapter at all but must be deemed to be an application made under section 151 and, therefore, no appeal lies under O. 43, R. 1 (c) against the order of the Court dismissing such an application. 30 L.W. 979=54 M.L.J. 781. *See also* 1940 O. W.N. 1086. When the application itself shows that it is one for the restoration of a suit, justice should not be denied, simply because there is a technical objection to the word "review" which has been employed in the application. As the Code cannot be said to be exhaustive, it is not necessary in every case to have the support of a section of the Code to pass an order not expressly or impliedly forbidden which is required in the interests of justice. 1 L. 339=58 I.C. 748. Where on the hearing of an application under O. 9, R. 13, the Court finds that no sufficient cause for non-appearance has been made out, it should dismiss the application. The Court has no power in such a case to restore the suit on other grounds under its inherent powers. 62 C.L.J. 268=39 C.W.N. 894. Restoration of execution application dismissed for default. 99 I.C. 954=1927 M. 355=52 M.L.J. 123; 50 M. 67=26 L.W. 878. *See also* 1935 R.D. 318; 26 A.L.J. 382=117 I.C. 372; 119 I.C. 494; 13 L. 761=142 I.C. 686=34 P.L.R. 70=1933 L. 99; 4 A.W.R. 1025=1935 A. 27.

**COURT-FEE, REFUND OF.**—In cases which are not governed by sections 13, 14 and 15,



## NOTES.

Court-Fees Act, the High Court has inherent powers to direct a refund under section 151, of excess Court-fee, where Court-fee has been paid in excess of the amount payable, and obvious injustice has been done. 39 C.W.N. 1074=1936 C. 347. See also 1937 M. 178; (1937) 1 M.L.J. 21; 1937 Cal. 86; 1937 A.W.R. 389=1937 A.L.J. 481. Where the Court has inherent power to order the refund of excess Court-fees, a direct order for a refund ought to be passed. If the Court does not possess jurisdiction to pass an order for refund, it is not its duty or function to issue eleemosynary recommendations for the purpose of enabling a litigant to present a memorial *ad misericordiam* to the Revenue Authorities. [55 M. 641 and 57 M. 542 (544), Disappr.] 14 R. 173=163 L.C. 340=1936 R. 208 (F.B.). Where a Court-fee has been paid by a litigant of a larger amount than that exigible under the Court-Fees Act, the Court has inherent jurisdiction to order that the excess Court-fee be refunded *ex debito justitiæ*. But where a specific Court-fee exigible under the Court-Fees Act has duly been paid, and in the Act express provisions are inserted setting forth the circumstances in which a Court-fee can be refunded, the Court has no jurisdiction in the exercise of its inherent powers or otherwise than as therein prescribed to order that the Court-fee chargeable and paid shall be refunded to a litigant. Where, therefore, an order of remand passed by the Court does not come within section 13 of the Court-Fees Act but is one purported to have been passed under its inherent powers, the Court has no jurisdiction either under the Court-Fees Act or in the exercise of its inherent powers to refund the Court-fee paid by the appellant. 14 R. 173=163 L.C. 340=1936 R. 208 (F.B.). See also 154 L.C. 460=1935 Pesh. 8. Plaintiff rejected for deficiency in Court-fee—Plaintiff making good the deficiency and asking for restoration of suit—Power of Court to treat Court-fee already paid as part of Court-fee. See 1935 A.L.J. 1127=159 L.C. 630=1935 A. 985. Refund of unspent process fee or custody fee deposited in respect of attachment of movables. 1937 C. 86. The High Court can under its inherent powers assist an appellant who has erroneously paid excess Court-fee on his memorandum of appeal. What it does judicially in such a case is to decide what is the proper Court-fee and then issue a certificate to the party that excess Court-fee has been levied. It still lies with the Revenue Authorities to decide whether or not they will refund the excess in the circumstances. (Case-law reviewed.) 1932 M. 438=139 L.C. 131=62 M.L.J. 541. See also 7 R. 88=117 L.C. 585. A Court remanding a case under section 151 is equally competent to order a refund of Court-fee paid on memorandum of appeal. 136 L.C. 559=1932 L. 219; 141 L.C. 400=1933 L. 135=34 P.L.R. 270; 151 L.C. 721=40 L.W. 372=1934 M. 643. Court has the power under section 151 to grant a certificate for refund of Court-fee, in cases not covered by sections

13, 14 and 15 of the Court-Fees Act. The discretion of the Court is not barred by the fact that excess fee was paid by the mistake of party and not in consequence of any direction by Court. (55 M. 641, Foll.) 38 L.W. 983. 142 L.C. 633=34 P.L.R. 1=1933 L. 351. See also 152 L.C. 215=38 C.W.N. 185=1934 C. 615; 149 L.C. 1191=39 L.W. 762=1934 M. 409=67 M.L.J. 99. Court has no power, after appeal has been disposed of, to recover deficient Court-fee on memorandum of objections [140 L.C. 191; 46 C. 520; 82 L.C. 588; 51 L.C. 756 (F.B.), Foll.] 142 L.C. 25=1933 M. 321=1933 M.W.N. 330=37 L.W. 300. Provision of section 151 cannot be invoked in order to grant refund of Court-fees, where it is not allowed by the Court-Fees Act. The Court-Fees Act is self-contained enactment and exhaustive on the subject. There are certain provisions in that Act whereby a refund of Court-fee is mandatory and there are others in which a refund is permissive. To allow refunds under any other circumstances would be in effect adding to the Court-Fees Act, and therefore no refund can be granted when a remand is made under section 151. 1935 Pesh. 8. If application for refund of Court-fee is made after long unexplained delay, it is open to Court to refuse certificate to apply for refund to Government. 11 Pat.L.T. 476.

CROWN DEBTS, PRIORITY FOR.—The Crown has priority over unsecured creditors in the payment of debts and the Court can, on application and without a formal attachment being issued, order payment of a Crown debt due by the debtor where there are funds in Court belonging to the debtor. Where in execution of a decree the judgment-debtor's property is sold in Court-auction and money is realised, the Court can on the application of the Government order payment out of the sale proceeds money due by the judgment-debtor on account of income-tax assessed on and due by the judgment-debtor. It is not necessary for the Crown to file a suit for the amount due, when the debt is not disputed and is indisputable. The right to payment being indisputable, justice requires that it should be paid to the Crown when formal application for payment has been made. Both right and convenience demand that the Court should exercise its inherent power. No special Act of the Legislature is required to enable the Crown to apply to the Court for payment of money to which it has an undoubted right. The decree-holder who brings the property to sale is not, by reason of his attachment before sale, placed in the position of a secured creditor. Nor does section 46 of the Income-tax Act operate as a bar to the payment by the Court on mere application. Section 46 is not exhaustive and it cannot, without express words to that effect, take away from the Crown the right of enforcing payment by any other method open to it. *Mockett, J.*—The Court under such circumstances can rightly invoke its power under section 151, making the payment to the person entitled to it. I. L.R. (1938) Mad. 744=47 L.W. 368=1938 Mad. 360=(1938) 1 M.L.J. 351 (F.B.).



## NOTES.

DELAY, which does not amount to waiver, acquiescence or abandonment of claim or has not created rights in the opposite party is no ground to deny relief under this section. 61 C. 711=1935 C. 39.

EVIDENCE.—Section 151 is not to be lightly invoked or intended to permit a Revenue Court to decide a case against the weight of evidence, even if it appears equitable. 1936 R.D. 457. *See also* 1941 A.L.J. 345.

EX PARTE DECREES AND ORDERS.—High Court can under the section or under its inherent jurisdiction set aside an *ex parte* decree which is shown conclusively to be irregular by the record. 38 I.C. 673=15 A.L.J. 24. *See also* 16 I.C. 677=34 A. 518; 133 I.C. 65=1931 S. 97 (F.B.) *contra* 101 I.C. 617=1927 L. 312. *Ex parte* decree against lunatic—Objection by sons of judgment-debtor in execution—Court has power under section 151 to reconstitute the suit and award relief. 34 C.W.N. 989. Court which has on an *ex parte* application granted an extension of time to file an appeal can revoke or alter its order before the appeal is admitted. 45 I.C. 725. Where *ex parte* application is made by a party for granting extension of time for filing an appeal it is the duty of the party to show to Court the points of law or fact in his favour as well as against him. 45 I.C. 725. There is no inherent power in Court to set aside an *ex parte* decree by summary procedure and the power of the Court in that connection is limited to the circumstances mentioned in O. 9, R. 13. 43 M. 94=37 M.L.J. 599; 27 I.C. 12; 98 I.C. 658=1927 N. 95; 1930 C. 387=34 C.W.N. 222; 1930 N. 48. Inherent power should be exercised not capriciously or arbitrarily but *ex debito justitiæ* on sound general principles and so as not to conflict with the intentions of legislature. 43 M. 94=37 M.L.J. 599; 100 I.C. 518=1927 C. 420; 32 C.W.N. 10. Where a definite period of limitation has been prescribed by Art. 164 of the Limitation Act for an application to set aside an *ex parte* decree, Court would not be entitled by purporting to act under section 151 in effect to extend that period. 65 I.C. 341=1 P. 277. A Court can set aside an *ex parte* decree passed by an oversight. 60 I.C. 368=2 Pat.L.J. 251. *See also* 62 I.C. 113=2 Pat.L.J. 270. Court can restore to file a suit in which an *ex parte* decree was obtained against a minor without a guardian, which decree was subsequently declared void. 106 I.C. 575.

EXECUTION OF DECREE.—The provisions of section 151 should not be applied to execution proceedings. 1936 Pesh. 115. When execution is delayed Court can award mesne profits. 63 I.C. 43. Power to grant time to judgment-debtor for payment of decree amount. 84 I.C. 134=48 M. 494; 31 C.W.N. 653. A Court has authority to set aside its order confirming a sale in favour of a person other than the bidder and there can be no question of limitation. 30 I.C. 230. Where an Act does not provide any clear procedure for execution of an order passed under it, the inherent powers of the Court

to execute its own order should be invoked. 114 I.C. 890=1929 A. 211. *See also* 39 C.W.N. 1144; 39 P.L.R. 210=1937 L. 29; 161 I.C. 933=1936 P. 176 (Power to recall order in execution made *ex parte* without notice). Objections as to the validity of a decree and to its executability should be raised at the time when the decree is made a rule of Court and at the time when the decree is put into execution. After the decree has been fully satisfied and possession of the property under terms of the decree has actually been delivered to the decree-holder, no such objection can properly be raised by means of an application under section 151. The appropriate remedy of the applicant, if so advised is by a regular suit in the Civil Court and not by an application invoking the inherent powers of the Court. 1941 O.W.N. 965=1941 O.A. 678. A person obtaining a preliminary decree for partition, is not entitled to ask the Court under section 151, to direct the making of a proclamation about the share. No ground for action under section 151 arises where a remedy is provided by the Code itself. A preliminary partition decree is of a declaratory nature and it is implicit in it that further proceedings are required to complete the partition. 1941 O.W.N. 718=1941 O.A. 478.

EXECUTION, STAY OF.—High Court has inherent power to stay execution in view of an intended appeal to the Privy Council. 40 C. 955=18 I.C. 207. *See also* 7 L.L.J. 457; 89 I.C. 588. Insolvency Court has no power under section 151 to stay execution proceedings in another Court. 32 I.C. 897=3 L.W. 250. High Court has an inherent jurisdiction to stay any suit which is an abuse of the process of the Court. 27 I.C. 455=27 M. L.J. 645. *See also* 75 I.C. 419=1923 L. 514; 40 C. 955=18 I.C. 207. High Court has inherent jurisdiction as a Court of Appeal where appeal is made to it, to stay proceedings in lower Court as ancillary to its powers of reversing the order of the inferior Court. 1919 P. 145=52 I.C. 185. Court has inherent power to stay confirmation of sale. 1930 L. 793 (2). Where a claimant to attached property withdraws his claim petition and later files a declaratory suit under the Specific Relief Act to declare that the decree in execution of which the property was attached is not binding on the estate of the judgment-debtor of whom the plaintiff claimed to be sole legal representative, it is not open to the Court trying the case to stay the execution sale under that decree. The sale cannot affect the plaintiff's right, and if he succeeds then his interests in the property would be deemed not to have been disposed of by the sale. Section 151 cannot be invoked, for it is not necessary in the ends of justice, or to prevent the abuse of the process of the Court, to stay execution when the right, title and interest cannot be affected by the sale. 1940 Rang.L.R. 749. Under section 151 the Court has full power to correct *suo motu* defects which it discovers in its proceedings. It cannot be said that a Court is bound to proceed with the sale of property when it



## NOTES.

has been brought to its notice that by reason of the absence of attachment, misdescription in the proclamation or other defect any sale held is bound to be set aside. The Court is entitled to pause and require that the party concerned should correct an obvious defect. 1938 A.M.L.J. 97.

**EXTENSION OF TIME.**—Extension of time cannot be granted for payment of money under a decree in a suit to set aside a mortgage; the plaintiff should not be allowed to calculate his month from the date he got the copies of the decrees. 42 A. 639=57 I.C. 16. *See also* 1931 A.L.J. 1049=1931 A. 727 (F.B.) (Extension of time for tendering security in an application under section 17, Provincial Small Cause Courts Act—Power of Court to extend time in exercise of its inherent powers). In a partition suit the Court has inherent power to fix time for filing objection to the report of the Commissioner and to reject objections filed afterwards. 50 I.C. 152=17 A.L.J. 498. Section 151 does not give Court any new powers and it cannot extend the time fixed by Art. 163 of the Limitation Act for setting aside dismissal for default. 55 I.C. 55. Courts cannot extend the time for making deposits prescribed by the Code under their inherent powers. 33 I.C. 996=3 L.W. 271. *See also* 1933 A. 157; (1941) 1 M.L.J. 638 (Extension of time for payment of money within a specified time). In a suit for specific performance of a contract of sale, neither the original nor the appellate Court has jurisdiction to extend the time fixed by a decree for performance of contract. 32 I.C. 401=3 L.W. 29. *But see* 32 I.C. 509=9 Bur.L.T. 83. Time fixed by a decree cannot be extended under section 151. That section is not meant to empower the executing Court to alter the decree, or in any way affect its finality. 49 I.C. 840. *See also* 1941 O.W.N. 965. Court has power under section 151 to extend time on an application made after the date fixed for payment of money, if it is necessary for the ends of justice, in a suit for specific performance of a contract to sell. 32 I.C. 509. So also in cases where as a condition for staying delivery of possession in execution, judgment-debtor was ordered to pay some money on a certain date every year. 1933 M. 563=38 L.W. 201=65 M.L.J. 138. *But not* where the default is wilful and deliberate. 1933 M. 879=65 M.L.J. 819.

**EXPUNGING FROM RECORD.**—Where the judgment of a Subordinate Court has not been brought before High Court on appeal or revision High Court has no power to expunge adverse remarks on the character and credibility of a witness from the judgment. 66 I.C. 1005=44 A. 401. High Court has power to expunge irrelevant and scandalous matters in the judgments of Subordinate Courts on an application by a person not a party to the proceeding. The power must be exercised in extremely exceptional cases and with caution. 47 I.C. 981=35 M.L.J. 368. *See also* 33 I.C. 608=3 L.W. 283.

C. C. M.—92

Where remarks made by a Judge in a judgment cast a slur on a Government department but was not required for the disposal of the main case and there was no justification for making such remarks, *held*, that those remarks should be ordered to be expunged from the judgment. 146 I.C. 215=34 P.L.R. 919=1933 L. 711.

**FRAUD.**—Court has inherent power to investigate questions of fraud for preventing injustice. 48 I.C. 135=20 Bom.L.R. 929. Not only has Court the power but it is its duty to set aside a consent decree obtained by fraud practised upon the Court when apprised of it. It is an inherent power of every Court to correct its own proceedings when it has been misled. 27 I.C. 628=19 C.W.N. 419. *See also* 1923 P. 197=2 P. 731; 6 P. 108; 1 Luck. 341. *But see* 23 N.L.R. 79=100 I.C. 220=1927 N. 212; 33 C.W.N. 883=1929 C. 470; 1929 N. 111. Court can vacate an order obtained by manifest fraud on it, in the exercise of its inherent power. 25 I.C. 213=27 M.L.J. 172. The weight of authority in the Calcutta High Court supports the inherent jurisdiction of the Court to interfere in cases involving a fraud on the Court, although there is a remedy by suit and it is the most appropriate remedy. 45 C.W.N. 392. Execution proceedings—Portion of property released from attachment with consent of parties—Decree-holder executing against whole property fraudulently—Power of Court to restore property wrongfully attached. 39 P.L.R. 210=1937 Lah. 29.

**MATRIMONIAL SUITS.**—Where a decree for dissolution of marriage has been made absolute, it is not open to a third party to seek the aid of the Court under S. 151, to set it aside on the ground that one of the parties to the divorce proceedings was a minor and has not been represented by a guardian *ad litem*. Nor is there any provision in the Divorce Act to set aside a decree absolute in the manner in which a decree *nisi* could be attacked. 15 Luck. 350=1940 C. 279.

**MISREPRESENTATION.**—Order obtained by misrepresentation of facts can be vacated by the Court in exercise of its inherent powers. 131 I.C. 717=1931 S. 111.

**MISTAKE.**—*See* under “Amendment,” *supra*. Court has inherent power to correct its own order passed on a mistaken basis. 56 I.C. 4=31 C.L.J. 48. *See also* 19 I.C. 916=19 C.L.J. 251; 39 C. 265=12 I.C. 151; 47 A. 546=87 I.C. 225; 38 M. 387=25 M.L.J. 198; 7 R. 88=1929 R. 158. Where rights of third parties have not intervened, it is not only in the power, but it is the duty of the Court to relieve a party of the injury done to him by it, by reason of its mistakes and defaults or mistakes or defaults of its officers inadvertently committed. 63 C. 1079=40 C.W.N. 680=1936 C. 343. Clerical error in plaint giving rise to error in decree and judgment. 1934 L. 561 (1); 144 I.C. 901=35 Bom.L.R. 365=1933 B. 200. *Judg-*



## NOTES.

ment pronounced without hearing parties. 151 I.C. 899=40 L.W. 34=1934 M. 506. Order passed under misapprehension of facts. 148 I.C. 614=1934 A.L.J. 862=1934 A. 287. Error apparent on the face of record. 1933 M.W.N. 1309. Court possesses inherent power to correct a mistake that would render infructuous an agreement between the parties which had been approved by Court and made the basis of the decree. Where in a suit for partition a compromise was arrived at on the basis of a map which allowed the plaintiff a passage of 11 inches to his house and none was aware at that time of the mistake and subsequently on an application made to the Court, *held*, that the Court had the power to correct the mistake and was justified in allowing the plaintiff a passage of two feet. 1933 A. 608=1933 A.L.J. 509. For the revocation of an erroneous order no sufficient cause other than the irregularity of the order itself need be considered and the Court has inherent power to rectify its own errors inadvertently committed. 145 I.C. 607=1933 A.L.J. 1318=1933 A. 517. *See also* 40 C.W.N. 1229 (Power of Insolvency Court to rectify omission). Where property is wrongly described in a plaint in a mortgage suit and the mistake is repeated in the preliminary and final decrees, without being noticed either by the parties or by the Court, the Court has ample powers to amend the plaint, the decrees and the judgment and correct the mistakes. 153 I.C. 378=1935 O.W.N. 31=1935 O. 92. But *see also* 151 I.C. 959=1934 P. 493; 8 Luck. 734=1934 O. 352; 147 I.C. 633=1934 A. 100. But all persons not parties to the action but who have acquired interests on the existing record acting in good faith and being purchaser for valuable consideration without notice of the existence of matters made clear by the amendment, are not prejudiced thereby without hearing by the Court determining that they have no equities as entitled them to be exonerated from the effect of the amendment. 39 C. 265=12 I.C. 151; 47 A. 304=84 I.C. 746. Where order of a Court fails to give effect to its intention it is the duty of the party to have it corrected. Court has power to do so. 40 M. 259=32 M.L.J. 477 (F.B.). In order to set aside the decree passed in pursuance of compromise by a lady whose signature was obtained by mistake or fraud of an agent, the remedy is by way of review petition. 43 M.L.J. 290=70 I.C. 42. Court has inherent power to rectify mistakes in judicial orders arising from the ignorance of the Court or of its subordinate officers. 69 I.C. 112; 39 I.C. 763=2 Pat.L.J. 861. *See also* 1935 A.L.J. 1076=157 I.C. 277=1935 A. 914 (Plaint naming X as defendant instead of Y—Application for amendment, if and when can be allowed—Procedure).

**GUARDIAN AD LITEM.**—To appoint a guardian *ad litem*, without issuing notice to the

natural guardian is illegal and the Court has inherent power under S. 151 to correct the errors or mistakes committed by itself. 70 I.C. 867. Guardian giving up relief against one defendant—Court can re-open on application by minor. 22 L.W. 629=1926 M. 119.

**GUARDIAN AND WARD.**—District Judge has ample powers under S. 151 to recall the records of an order made under the Guardians and Wards Act on being apprised that the order was made on a misrepresentation of facts. 25 I.C. 275=19 C.W.N. 84.

**IMPLEADING OF PERSON AGAINST WHOM APPEAL HAS ABATED.**—The Court cannot use its inherent powers to extend the scope of a provision which places limitation on it. An appellate Court has therefore no jurisdiction to implead a person against whom an appeal has abated as such a person is not one "interested in the result of the appeal" within O. 41, r. 20. 156 I.C. 110=41 L.W. 111=1935 M. 175.

**INJUNCTION.**—Code is not exhaustive. Court possesses inherent powers to act *ex debito justitiæ*. A person asking Court to exercise its discretionary jurisdiction must make out a strong case and must show that there is no other remedy open to him by which he can protect himself from the consequences of the injury complained of. 55 I.C. 403; 140 I.C. 843=34 P.L.R. 51=1933 L. 73. *See also* 140 I.C. 843; 1925 L. 242; 1925 L. 618; 1927 L. 833 (2); 164 I.C. 16=1936 L. 567. Court will issue a temporary injunction if plaintiff shows that injunction is an appropriate relief and unless defendant is forthwith restrained irreparable injury will follow. 55 I.C. 403=24 L.W. 854=1927 M. 210. *See also* 1940 A.W.R. (H.C.) 71 (Power to pass orders for interim protection of property which is the subject-matter of suit); I.L.R. (1941) 1 Cal. 490 (Injunction restraining defendant from litigating in another Court); 43 Bom. L.R. 287 (Injunction restraining a party from proceeding with a criminal complaint filed by him). Whatever may be said as to the power of the High Court to issue injunction for purposes other than those mentioned in O. 39, and to punish disobedience thereof in exercise of its own inherent power as a Court of record, the power of the Subordinate Courts must be found within the four corners of the Code and it seems to be too much to suggest that when the Code has expressly dealt with injunction in O. 39, S. 151 can be invoked to add to the powers conferred. 1938 M. 190=(1937) 2 M.L.J. 888. High Court has inherent power to order an injunction against a person living within the jurisdiction of another High Court when the circumstances so require. 57 C. 1280=130 I.C. 252=1931 C. 279. *P* sued for declaration that *D* was not entitled to possession of property. According to *P*'s own showing, he had no present right to possession of this property and he would at the most be declared to be



## NOTES.

entitled to a certain charge on it after the death of a widow. *D* had, on the other hand, purchased the property in execution of a decree. *Held*, that, under such circumstances, temporary injunction restraining *D* from obtaining possession of property from purchaser cannot be granted by resorting to S. 151. 150 I.C. 15=36 P.L.R. 142=1934 L. 79 (2). *P* deliberately chose the Civil Court as the forum for the determination of her claim against *D*. Having done so and having in the process of negotiations for settlement with *D* obtained from *D* a sum of money, he gave the go-by to the Civil Court and attempted to recover money alleged to be due to him under the agreement which was the subject-matter of litigation, by summary procedure under the District Local Boards Act. Thereupon *D* applied for an interim injunction. *Held*, that though the application did not fall under O. 39, Rr. 1 and 2, the equities were entirely in favour of *D* and as such the Court should exercise its inherent power and issue interim injunction to prevent abuse of the process of Court. 1934 S. 179; 1938 O.W.N. 931=1938 A. W.R. (B.R.) 383. The provisions of S. 151 are very wide and where the interests of justice so require, it is competent to the Court to order an interim injunction to issue even in execution proceedings. A.I.R. 1937 Sind 315.

**INSOLVENCY.**—Insolvency Court has the same jurisdiction that the ordinary Courts of law possess under the Code to correct any mistake either of a clerk or the parties themselves upon a question of fact when a mistake is proved. 51 I.C. 55. There is no provision in the C.P. Code or in the Provincial Insolvency Act which specifically empowers the High Court in revisional applications under S. 115, C.P. Code or S. 75 of the Provincial Insolvency Act to pass an order calling on the applicant to furnish security for costs. But under S. 151, C.P. Code, it is competent to the High Court to make such an order as is contemplated by O. 25, R. 1 or O. 41, R. 10, C.P. Code. I.L.R. (1938) Bom. 743=40 Bom.L.R. 1025=A.I.R. 1938 Bom. 510. Decree-holder obtaining garnishee order against Official Assignee—Latter paying into Court dividend payable to creditor in insolvency—Decree-holder withdrawing amount from Court—Proof of claim of creditor subsequently expunged—Application by Official Assignee for refund—Powers of executing Court. 13 R. 722.

**INSTALMENT DECREE.**—Power of Court to relieve against condition in decree to pay instalments promptly—Clause giving concession to judgment-debtor only on regular payment not penal. S. 151 cannot be invoked to give relief to the defaulting party. I. L. R. (1941) Kar. 389. (Cited under S. 148.)

**ISSUES.**—Court has inherent power to frame issues going to the root of the matter

in controversy between the parties at any stage of the case. 36 M. 607=23 M.L.J. 321.

**JURISDICTION AND PROCEDURE.**—Court is not justified in applying its powers of inherent jurisdiction to introduce a new form of procedure for which no provision is made by law. 1922 C. 1 (1). Suit dismissed under O. 17, r. 3—Appeal preferred—During pendency of appeal application for restoration allowed—Appeal dismissed for want of subsisting decree—On revision preferred by defendant order restoring suit was reversed—Application made to revive appeal—Appeal could be revived. 122 I.C. 402=1930 A. 100. Even if an order has been passed it can be recalled if it transpires that it has been made without jurisdiction. 20 C.L.J. 213=26 I.C. 275. Apart from the power to correct clerical or arithmetical error or to review a judgment, a Court has no inherent power to alter an order passed in Court. 74 I.C. 110=1924 P. 136. The Court can under its inherent powers postpone passing a decree in pursuance of a compromise. 9 P. 314. Jurisdiction—Recalling an order passed by the predecessor is beyond jurisdiction and invalid. 69 I.C. 742=1922 P. 204; 1929 M.W.N. 140.

**LIMITATION.**—Inherent powers of Court cannot be invoked to override or evade the Law of Limitation. 1932 O. 220=138 I.C. 149=9 O.W.N. 430; 62 C. 61=156 I.C. 126=1935 C. 336; 13 R. 595=1935 R. 466; 15 P. 299=160 I.C. 976=16 Pat.L.T. 813=1936 P. 48. See also 142 I.C. 185; 9 I.C. 246; 1 L. 363=58 I.C. 789; 57 I.C. 15; 47 C.L.J. 87; 37 L.W. 48=142 I.C. 185; 1935 L. 60; 43 P.L.R. 471; 1938 A.M.L.J. 124.

**MAINTENANCE.**—Court has got inherent power to make an interim order of maintenance during the pendency of partition suit. 40 L.W. 853=1935 M. 105. See also 1941 Mad. 55=52 L.W. 487=(1940) 2 M. L.J. 572.

**PARTITION.**—When the decree of the lower Court directs partition in an impossible manner, Court has power to set it right in exercise of its inherent power. 27 N.L.R. 347. Court has got power to order payment of interim maintenance pending partition suit. 40 L.W. 853=1935 M. 105.

**RECONSTRUCTION OF RECORDS.**—Where owing to accident or other cause the records of a Court of Justice have been destroyed or lost, Court has an inherent power to reconstruct its records. Appellate Court has the same power to reconstruct the records of Court from which an appeal lies to it. 46 M. 679=44 M.L.J. 673 (F.B.). Where a judgment has been lost the proper course for the Judge is to write it from memory and from materials before him and place it on record. 38 M. 488=25 M.L.J. 445. If any credible witness who read the judgment or the part of the judgment which contained the decision can depose to what he heard a decree can be drawn up. There is nothing in the Code to



## NOTES.

prevent that. 1923 R. 113. Judge could not take evidence regarding the question as to the matter on which a Court of law based its judgment in order to consider whether there was any arithmetical or clerical error in the judgment and he must rely solely on what it contained in the judgment itself. 100 I.C. 309=1927 C. 203. See also 1938 P.W.N. 192=1938 Pat. 593 (Power to recall order passed by mistake or inadvertence). See also 1938 All. 8; 32 S.L.R. 215.

REFUND OF MONEY.—Court has inherent power to re-call money paid out of Court in a land acquisition case. 21 I.C. 111=17 C.W.N. 1057. See also 43 C. 269=20 C.W.N. 188. One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression "the act of the Court" is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. (1922 P.C. 269, Rel. on.) 1935 Sind 214. See also 163 I.C. 121=38 P.L.R. 717=1936 L. 212; 1935 M. 212=68 M.L.J. 265; 1940 Sind 191. Where a decree is attached in execution of a decree and portion of proceeds is paid to one of decree-holders of decree attached before satisfaction of the decree of the attaching decree-holder, the Court can order refund under S. 151. 150 I.C. 174=36 P.L.R. 147=1934 L. 142. Where a Court-sale of properties in a mortgage suit is set aside on the ground that there was no valid final decree the Court has no power to direct a refund of the poundage paid. The most that could be done in such a case would be to give a certificate to the party that the case is a fit one for a refund and leave it to the revenue authorities to comply with it. That is no more than a recommendation. 149 I.C. 1191=39 L.W. 762=1934 M. 409=67 M.L.J. 99. Court has inherent jurisdiction to order refund of purchase-money allowed to be withdrawn by the auction-purchaser. (39 I.C. 763; 1922 P.C. 269, Rel. on. (1933 L. 850. During the pendency of appeal by petitioners an application was made for an injunction restraining the respondent from executing the decree in O.S. No. 6 of 1911 and drawing the money in deposit and an order was made that he might draw it on furnishing security to the satisfaction of the Ramnad Sub-Court. The security was furnished and the respondent having bound himself by the execution of the bond to obey any orders that may be passed for its refund withdrew the money. After the termination of the appeal, the petitioners applied to the Subordinate Judge of Ramnad for restitution. Held, that S. 144, was inapplicable but as money had been improperly drawn out under the decree it was competent for the Court to rectify the mis-

take and order restitution in the exercise of its inherent jurisdiction. 57 M. 849=1934 M. 320=67 M.L.J. 49. The new Code contains no provision for the refund of amount deposited as security; Courts can deal with them under S. 151. 22 M.L.J. 190=12 I.C. 692. Section 151 empowers the Courts to order refund of Court-fees which was paid by mistake. 3 P.L.J. 452=46 I.C. 271; 1930 A. 471 (1)=122 I.C. 188; but not Court-fees paid on an appeal dismissed as not maintainable. 6 P. 599=105 I.C. 740.

RES JUDICATA.—Inherent powers of a Court ought not to be exercised against the express provisions of a statute. An application which is barred both by the law of limitation and by the principle of *res judicata* cannot legally be entertained or granted by a Court in the exercise of its inherent powers. 1935 L. 60.

RESTITUTION.—As to the power of Court to order restitution, see S. 144, *supra*. See also 69 M.L.J. 84; 43 L.W. 773=1936 M. 636; 1937 M. 195; 39 P.L.R. 210=1937 L. 29; 58 C. 1070=134 I.C. 906=35 C.W.N. 483; 35 C.W.N. 105=53 C.L.J. 49=134 I.C. 1185=1931 C. 779 (2); 1933 A.L.J. 60; 1939 Nag. 101; 53 L.W. 356=(1941) 1 M.L.J. 407; 1937 Mad. 95; 1937 Mad. 694; 19 Pat.L.T. 111. Where property has been taken away from a third party under an erroneous order of the Court, and that party has subsequently established by a suit that the property belongs to him, and not to the judgment-debtor in execution of a decree against whom the property was so taken, the Court must use its inherent powers to reconstitute to such innocent party his property of which he has been deprived by the erroneous order of the Court. The fact that a suit is maintainable at the instance of that party is no ground for refusing redress under S. 151 when the wrong has been done under the order of the Court. 19 Pat.L.T. 119=A.I.R. 1938 Pat. 468; 34 C.W.N. 746=130 I.C. 236=1931 C. 42. Execution Court has inherent powers to make restitution orders in cases that may not fall under S. 144; it has powers to direct refund of money paid out of Court. 35 C.L.J. 53=64 I.C. 864; 21 C.L.J. 624=30 I.C. 49; 24 I.C. 384. Under S. 151, Court can apply the principle of S. 144 to cases to which it would not ordinarily apply and can order such restitution as may be necessary. 63 I.C. 43. See also 14 I.C. 456=15 C.L.J. 187; 42 M.L.J. 308=67 I.C. 369; 42 M.L.J. 473=67 I.C. 546; 149 I.C. 365=14 Pat.L.T. 753=1934 P. 150; 150 I.C. 924=1934 L. 322; 36 P.L.R. 119=1934 L. 1023; 60 C.L.J. 44. Where the High Court passed an order as to mesne profits pending disposal of appeal, the order could be given effect to by the executing Court. 103 I.C. 328=1927 L. 346. But S. 151 cannot enlarge the scope of S. 144 and cannot convert an application for relief which has nothing to do with restitution into an application for restitution. 34 I.C. 774=4



## NOTES.

L.W. 400. Appellate Court can direct refund where a Subordinate Court mistakenly orders payment to a decree-holder when that order is set aside. 21 C.L.J. 624=30 I.C. 49. Application by the judgment-debtors for compensation during the period they were kept out of possession of their property under an execution sale which they subsequently got set aside does not fall within S. 144 but would be covered by S. 151. 2 Pat.L.J. 206=39 I.C. 653; 1930 P. 280. A defeated claimant under O. 21, R. 58, whose properties have been sold in execution of the decree, consequent on his failure to comply with Court's order to pay one year's interest as a condition for stay of execution, is nevertheless entitled to apply for restitution under this section from the auction-purchaser, when he ultimately succeeded in appeal from the dismissal of his suit to establish his title by the trial Court. 1933 P. 564 (2). Where decree is nullity, as when suit was instituted against a dead man, and execution was levied thereon, Court has inherent power to rectify its mistake and to allow restitution of money paid in execution. 146 I.C. 564=38 L.W. 874=1933 M. 888 (1). It is not only permissible but imperative for the Court to order restitution in necessary cases. 55 A. 221=1933 A.L.J. 60=1933 A. 218. An order for restitution of mesne profits passed on an erroneous view of High Court passed on an application for stay is open to appeal. 146 I.C. 301=34 P.L.R. 938=1933 L. 485; 53 L.W. 356=(1941) 1 M.L.J. 407. Petitioners paid money to avoid attachment of their movables in execution of a decree. On their objections, the execution proceedings were set aside and they applied for refund of money paid under S. 151. The Court refused the application, but lower appellate Court allowed it. In second appeal it was contended that lower Court had no jurisdiction to entertain the appeal as the order of lower Court was passed under S. 151. *Held*, that even assuming that no appeal lay, High Court was competent to revise the order of the execution Court and that it was equitable that the benefit received by the decree-holder under the execution proceedings should be restored to the petitioners when those proceedings were set aside. 149 I.C. 1105=1934 L. 108. See also 19 Pat.L.T. 111; 1938 Nag. 326; 19 Pat.L.T. 118.

REMAND.—Remand (see also O. 41, Rr. 23, 25). 19 A.L.J. 553=63 I.C. 501; 1925 P. 760; 87 I.C. 575=1925 C. 1157; 1930 L. 224. Inherent power of appellate Court to remand, when exercisable—Comparison of old and new Code—Power wider under the new Code than under the old Code. See 11 L.L.J. 507=122 I.C. 473=1930 L. 224. See also 134 I.C. 495=1931 L. 299; 37 Bom.L.R. 241=1936 B. 222; 154 I.C. 859=1935 P. 49; 37 Bom.L.R. 203=1935 B. 216; 156 I.C. 958=41 L.W. 758=1938 M. 715; 156 I.C. 253=1935 L. 555; 37 Bom.L.R. 241; 1935

P. 68; 60 M.L.J. 475=1931 M. 791; 133 I.C. 127=1931 L. 302; 1933 L. 157=143 I.C. 685; 1935 P. 49; 1935 P. 68. Case where otherwise irreparable injury would result to a party. 122 I.C. 485=1930 L. 441. Section 151 should seldom be resorted to for the purpose of making a remand. The trial would have to be so radically defective as not to amount to a trial at all before its provisions could be availed of for such a purpose. 1941 N. L. J. 519=1941 N. 308. Where both the primary and the first appellate Court gave a decision in a case without understanding, it is not a proper decision and the High Court should in second appeal remit the case for re-trial. 19 A. L.J. 553=63 I.C. 501; 103 I.C. 854=1927 L. 480. An order refusing an adjournment is appealable and the appellate Court has power to set aside the decree and order a re-trial if the adjournment had been wrongly refused. 63 I.C. 478=23 Bom.L.R. 769. Appellate Court has the power to order a re-trial and this power is to be adopted in exceptional circumstances where the Code does not provide adequate procedure. 64 I.C. 599. See also 1936 N. 140; 1935 P. pp. 49 and 68; 139 I.C. 126=33 P.L.R. 487=1932 L. 443; 35 C.L.J. 345=70 I.C. 547. The power of an appellate Court to remand is not circumscribed within the Rr. 23 and 25 of O. 41, C.P. Code. An order of remand under section 151 would be a proper order, if it is made by the appellate Court in a case in which the evidence on the record is not sufficient for a correct decision on the point at issue to obtain further evidence before the trial Court which had refused to give an opportunity to produce that evidence. 1941 O.A. 503=1941 O.W.N. 754. Appellate Court has power to make an order of remand under section 151 when O. 41, R. 23 does not apply. 73 I.C. 915. See also 164 I.C. 1085=1936 P. 491; 20 Pat.L.T. 883=1938 Pat. 678 (F.B.); 138 I.C. 202=33 P.L.R. 285=1932 L. 331; 1932 L. 219=136 I.C. 559=33 P.L.R. 54; 1933 P. 706; 44 C. 929=41 I.C. 598; 100 I.C. 135=1927 M. 335=52 M.L.J. 90; 9 I.C. 306 is not good law 52 I.C. 985=29 C.L.J. 419; 64 I.C. 599; 39 I.C. 651; 1930 L. 441. But the power is one that must be cautiously exercised and there is no appeal from an order of remand in such a case. 3 Pat.L.J. 253=43 I.C. 959; 56 I.C. 834; 37 M.L.J. 535=53 I.C. 417; 70 I.C. 665; 1940 N. L.J. 350. Where the order of remand is held invalid the subsequent judgment after remand will also be invalid. 58 I.C. 538. Whether an anomalous order of remand falls under the section. 45 C.L.J. 537. The C.P. Code makes no provision for an appeal where a suit has been remanded under the inherent powers of the Court and hence no appeal can lie in such a case. 1939 A.M.L.J. 110. Remand order by subordinate Court—Ultimate decree—Appeal from—High Court whether can go into validity of legal view



## NOTES.

taken in remand order. 27 A.L.J. 448=1929 A. 421; no appeal lies against an order of remand under section 151. 1929 L. 245; 1929 M. 205; 164 I.C. 1085=1936 P. 491. But see 117 I.C. 678. The effect of an order of remand for a new trial is entirely to nullify the first decision and to re-open the whole case. This rule however does not apply where the remand is for the determination of a particular point. 14 Pat.L.T. 138=1933 P. 220.

RESTORATION OF SUIT.—Section 151 cannot be invoked for the purpose of restoring to the file a suit which has been dismissed. 48 C.L.J. 596=1929 C. 158. But see 138 I.C. 248=34 Bom.L.R. 714=1932 B. 271; 13 L. 761; 1936 L. 759; 165 I.C. 268=1936 Pesh. 191; 42 Bom.L.R. 238. Application to restore suit time barred—No inherent power to restore suit. 37 L.W. 48. Though a plaint is rejected under O. 7, R. 13 a Judge has jurisdiction under section 151 to restore the suit. 1939 A.L.J. 335=A.I.R. 1939 All. 452. See also 1939 Pat. 678. Where owing to the death of a sole plaintiff before the hearing of the suit there was no appearance for him on that date, it is not competent to the Court to dismiss the suit for default of appearance under O. 9, R. 8 and 9. If, however, the Court dismisses the suit inadvertently as for default, it has inherent power to set aside the dismissal. The legal representative of the deceased plaintiff could apply to be made a party within six months of the death under Art. 176 of the Limitation Act 35 A. 31=25 M.L.J. 148 (P.C.). Where a suit is dismissed for default of plaintiff in ignorance of the plaintiff's death and subsequently an application is filed by his legal representative to bring him on record, the Court can set aside order of dismissal and restore suit to file under section 151 and substitute the legal representative's name for the deceased plaintiff. 31 N.L.R. 314=158 I.C. 602=1935 N. 189. See also 14 I.C. 28; 87 I.C. 438 (Restoration without notice to the other party); 3 R. 488; 89 I.C. 350=47 A. 878; 27 A.L.J. 1183=1929 A. 811. It is open to a District Judge acting under section 114, or under the inherent powers of the Court to reconsider an order granting letters of administration. 37 A. 380=29 I.C. 133. Restoration—Suit dismissed for want of letters of administration—Subsequent production of letters. 24 Bom.L.R. 738=70 I.C. 910. Court has jurisdiction under its inherent power under section 151 to restore a suit dismissed for default when it finds that it cannot be restored under O. 9, R. 9. 63 I.C. 440; 32 C.W.N. 811=1929 C. 17; 1939 Lah. 223. *Contra* see (Regarding dismissal under O. 9, R. 3). 103 I.C. 620=1927 P. 369. (Regarding dismissal under O. 9, R. 8.) 143 I.C. 158=1933 Pesh. 59. Restoration—Appeal—Act of Court not to prejudice party. 56 I.C. 4=31 C.L.J. 48. Appellate Court can restore and remand an *ex parte* decree.

32 C.W.N. 191. See also 134 I.C. 1169=1931 Sind 153 (Power to restore to file appeal dismissed for default of payment of printing charges in time). Section 151 expressly saves the inherent power of the Court, and every Court must be deemed to possess as inherent in its very constitution all such powers as are necessary to do right and undo a wrong in the course of the administration of justice. An application to set aside an order dismissing an appeal for not filing the appellant's list within the time allowed may be entertained under section 151, and neither O. 41, R. 19 nor O. 47, R. 1 would apply. 19 Pat. 159=20 Pat.L.T. 883=A.I.R. 1939 Pat. 678 (F.B.). A surety who is a party to an order holding him liable for payment to the decree-holder can, on reversal of that order on appeal, apply to the Court for restitution under the inherent jurisdiction of the Court, apart from section 144. 40 P.L.R. 289=A.I.R. 1938 Lah. 833. See also 1938 O.W.N. 911=1938 Oudh 221 and notes under section 144, *supra*. Suit on P.N. dismissed as a result of decision in another matter between plaintiff and another where the plaintiff's title to the P.N. was negatived. As appeal was filed in the other matter, the Court observed in the dismissal order that the suit may be revived if plaintiff succeeds in the appeal. Plaintiff succeeded in appeal and applied under section 151 for the restoration of the suit. *Held*, that it cannot be restored as there were other remedies open to plaintiff, add also as defendants were not parties to the appeal. 144 I.C. 103=1933 M. 485.

RESTORATION OF APPLICATIONS.—Court can restore claim petition under O. 21, R. 58, dismissed for default. 148 I.C. 584=23 N. L.R. 176=1933 N. 176. But see *contra* 40 L.W. 665=1934 M. 699; 165 I.C. 268=1936 Pesh. 191; 1935 Pesh. 186; 41 P.L.R. 544=1939 Lah. 233 (Application under O. 21, R. 90 dismissed for default can be restored under this section). Where a petition for recording a compromise presented by a party to a suit is dismissed owing to the absence of the petitioner on the date of hearing of the petition, his proper remedy is by way of an application under S. 151, to have the order of dismissal set aside. 43 C.W.N. 1113. Application under O. 21, R. 100, if dismissed for default cannot be restored. 152 I.C. 24=59 C.L.J. 218=1934 C. 653. The Court has jurisdiction to entertain an application made by the judgment-debtor for the restoration of his previous application made for setting aside the sale. 27 A.L.J. 1079=119 I.C. 851=1929 A. 721. See also 1931 A.L.J. 622=1931 A. 594. Court can under S. 151 restore an application made for the restoration of suit. 118 I.C. 669 (1)=1929 A. 624; 18 R.D. 203=15 L. R. 254 (Rev.). But not where that application itself was time barred, as the Court has no right to interfere with a lawful bar of limitation. 143 I.C. 240=37 L.W. 48=1933 M. 258=65 M.L.J. 193. Where ap-



## NOTES.

plication to set aside an *ex parte* decree is dismissed for default, an application for the restoration of such application can be made, under inherent jurisdiction of the Court. 1929 A. 906; 1933 R. 406. Execution applications can be restored under inherent powers. 13 L. 761=142 I.C. 686=34 P.L.R. 70=1933 L. 99; 1935 A. 27. Even when the decree was not passed by it but only transferred for execution. 145 I. C. 995=1933 A.L.J. 1032=1933 A. 783 (F. B.).

RETURN OF PLAINT.—O. 7, R. 10 is not restricted only to those cases in which the Court for want of territorial jurisdiction returns the plaint. A plaint returned on the ground of pecuniary jurisdiction is also to be considered as returned under this provision and not under S. 151. Hence the order returning the plaint on this ground for presentation to proper Court is appealable. 175 I.C. 684=A.I.R. 1938 Sind 124.

REVIEW.—Every Court has no inherent power to review an erroneous decision. 53 I.C. 39=30 C.L.J. 1. See also 1936 P. 506; 1936 Pesh. 213; 40 P.L.R. 755=1938 Lah. 472; 138 I.C. 121=1932 M. 223; 141 I.C. 188=1933 L. 169; 47 I.C. 917; 89 I.C. 946; 2 R. 659=85 I.C. 284; 31 C.W.N. 822; 32 I.C. 527. But see *contra* 141 I.C. 188=34 P.L.R. 88=1933 L. 169. A review if forbidden by Code cannot be granted under S. 151. 42 I.C. 711=45 C. 519. Where a Subordinate Judge usurps an appellate jurisdiction which he does not possess and reviews an order made by his predecessor on the ground of an error of law, the order reviewing the predecessor's order is one without jurisdiction and is liable to be set aside in revision by the High Court. The fact that the order is made under S. 151, makes no difference. I.L.R. (1939) Kar. 330=A.I.R. 1939 Sind 137. See also 1938 Oudh 103. The power of a Court to review its order exists only if it is conferred by statute, except possibly in cases where the order is made without jurisdiction. 63 I.C. 56=37 M.L.J. 162. The Court has power to review its order rejecting the petition under O. 7, R. 11. 2 P. 504=72 I.C. 629.

SCHEME SUIT.—Modification of Scheme. See 1940 O.A. 582.

SECURITY FOR COSTS OF PROCEEDING.—The mere fact that a case does not fall within the four corners of O. 25 does not prevent the Court from acting under S. 151 *ex debito justitiae* and to prevent the abuse of its process if there be any occasion for it. It is somewhat difficult to hold that because the legislature has provided for security for costs being ordered in certain specified cases the legislature thereby intended to deprive Court of its inherent jurisdiction to make similar orders in cases not specifically provided for. 26 S.L.R. 21=140 I.C. 233=1932 S. 33.

SURETY BOND.—Respondent and another executed a bond for the production of certain movables attached in execution of a decree by the appellant. The terms of the bond provided that "if any default is made in respect of the properties, overselves (the sureties) would be liable for all the loss that may be sustained thereby and for any amount that may be directed by the Court." On the failure of the sureties to produce the articles the assignee of the decree applied for the arrest of the second surety. Held, that although the case did not fall under S. 145 Court had inherent power to enforce the bond without recourse to a suit, the proper procedure would have been to get an order from Court, after notice to the sureties, that the bond is forfeited and then to proceed to execute that order. (42 A. 158 and 51 M.L.J. 239, relied on.) 145 I.C. 1004=1933 M. 722=38 L.W. 450=65 M.L.J. 507. See also 65 M.L.J. 342. Surety bond executed by plaintiff to the Court as condition for temporary injunction—Suit dismissed—Enforceability of bond in execution. Held, that (i) as the bond had been executed in favour of the Court and not in favour of any particular officer, it could not be assigned and sued on; (ii) S. 145 did not apply to a case where the executant of the bond was a party to the suit; (iii) even if S. 74 was not applicable, the Court had, nevertheless, inherent power to enforce its bond without recourse to a suit. 56 M. 989=1933 M. 691=65 M.L.J. 342.

MISCELLANEOUS.—Power to stay criminal proceedings pending civil suit. See 7 L. L.J. 73=88 I.C. 526. Court could order refund of the Court-fee apart from S. 15, Court-Fees Act. 7 R. 88=117 I.C. 585. The power to discharge and remove or to give directions to a Receiver are inherent in the Court which appointed the Receiver and the appellate Court has got all the powers of the original Court. 17 I.C. 583=1912 M.W.N. 1208. Assuming the Court has jurisdiction to allow an appellant to continue an appeal in *forma pauperis* it can be exercised only if on a perusal of the judgment and decree appealed from and the appeal memorandum the Court is of opinion that that decree is contrary to law. 38 M. L.J. 146=54 I.C. 761. See also 1933 A. 295. Objection to delivery of property not covered by the Court-sale certificate is not covered by S. 47 or O. 21, R. 100 but by S. 151. 1929 P. 391. See also 1931 L. 344. Appeal relating to part of decree only—Memorandum accompanied by copy of that part of decree only—Copy of unnecessary portions of decree—Power of Court to dispense with. 40 C.W.N. 1298.

SETTING ASIDE SALE.—There is no inherent power in a Court to set aside a sale outside the provisions of O. 21. 1932 A.L.J. 392=1932 A. 403. See also 1938 Rang. 433; 1938 A.L.J. 1041. S. 151 does not confer an unlimited jurisdiction on the Courts to do what they please and further when another



## NOTES.

remedy was or is open to a party, he has no right to invoke the inherent jurisdiction of the Court. An application under S. 151 by a decree-holder purchaser to set aside the sale in execution of the materials of a house only, is incompetent where the decree-holder had submitted to the sale and had acquiesced in it and had allowed his other remedies to be barred by time. 1939 A. L.J. 398=A.I.R. 1939 All. 497. No doubt the Court has inherent power under S. 151 to set aside an execution sale before its confirmation, where there is an abuse of the process of the Court. But there is certainly no jurisdiction to set aside the sale under that section on the application of a third party on the ground that owing to a misapprehension due to the conduct of another third party he failed to be present on the day of the sale and therefore was unable to bid. It might be otherwise if that had been due to some omission or wrong procedure on the part of the Court. 43 C. W.N. 250=A.I.R. 1939 Cal. 161. Where the Court directed that the property should be sold in execution of a mortgage decree free from a prior mortgage but the sale-proceeds should be deposited in Court for payment to the prior mortgagee and that the decree-holder would be entitled to the surplus alone, if any, but the decree-holder who purchased the property did not implead the prior mortgagee in the course of execution proceedings and did not deposit in Court any amount for him, the decree-holder did not conduct himself in an honest manner and the sale is liable to be set aside. 40 P.L.R. 128=A.I.R. 1938 Lah. 232. See also 16 Pat. 738. Court cannot set aside a consent decree in exercise of its inherent powers under S. 151. 26 S.L.R. 395. Excessive execution—Sale of entire property in execution of a decree for small amount—Power to set aside sale. See 134 I.C. 695=33 Bom.L.R. 611=1931 B. 385; 1940 Lah. 59; 1937 Lah. 416=39 P.L.R. 710. Power to set aside sale held in contravention of order of Court. See 37 L.W. 484. (See also 46 M. 583, Foll.); 39 P.L.R. 364=1937 L. 72. (Minor auction purchaser applying to set aside sale on the ground of his minority).

SETTING ASIDE EX PARTE ORDER.—See 133 I.C. 65=1931 S. 97 (F.B.). Where no case is made out to satisfy O. 9, r. 13, it is not open to the Court to enlarge the rule by invoking S. 151. 128 I.C. 94=34 C.W.N. 419=1930 C. 488.

SET-OFF.—Order 21, r. 18 is exhaustive; and no set-off other than those mentioned in r. 18 can be allowed. Inherent powers to allow set-off cannot be invoked under S. 151. 138 I.C. 285=33 P.L.R. 671=1932 L. 537. Execution — Set-off — Equitable set-off—Claim arising under same decree—Power of Court. 44 L.W. 34=1936 M. 626. Set-off not falling under O. 21, r. 19—Power of executing Court to entertain. 1936 C. 409.

STAY OF EXECUTION.—Under S. 151, the High Court has power to stay execution of decrees which form the subject-matter of petitions for revision. 1934 L. 909. Where an appeal has been preferred to the Privy Council against a preliminary decree in a mortgage suit, the appellate Court has under S. 151 power to stay further proceedings with regard to preparation of final decree, when no loss would be caused to the decree-holder by the stay of proceedings, *e.g.*, where the judgment-debtors offer security for the decretal amount with interest. (1932 L. 271 and 40 C. 955, Rel. on.) 1934 L. 238=150 I.C. 47=36 P.L.R. 138. Where a claimant, after succeeding under O. 21, r. 58, fails in an action brought by the decree-holder to establish his right to sell the property in suit, the Court cannot order stay of execution either under O. 21, r. 29 or O. 41, r. 6 (2), but can order stay in its inherent jurisdiction. If however in such a case stay is ordered without putting the unsuccessful claimant to terms, the Court acts without jurisdiction. 152 I.C. 686=15 Pat.L.T. 783=1934 P. 637. See 54 A. 344 (Power of High Court to order stay of execution of final decree pending appeal from the preliminary decree); 1932 A. 238=136 I.C. 75. See also 1932 A.L.J. 582=1932 A. 655. Court can stay confirmation of sale. 123 I.C. 824=1930 A. 131; 1932 A.L.J. 861; 145 I.C. 307=1933 A.L.J. 221=1933 A. 259 (F.B.) (staying order of High Court suspending advocate from practice on such order being made the subject of appeal to Privy Council). See also 1931 B. 384. The Collector, as representing the Court of Wards which was in possession of the estate of certain Hindu widows, withdrew the suit brought by him just about the expiry of the period of limitation. A reversioner applied to the Court for being permitted to continue the suit. His application was dismissed, but on revision a Bench of the High Court allowed his application and directed that he be brought on the record as the plaintiff in place of the Collector and be permitted to proceed with the suit. Leave to appeal to His Majesty in Council from order passed in revision by High Court was granted under S. 109 (c) and the appeal before Privy Council was pending. The defendant applied that the proceedings in the Court below should be stayed till the disposal of the Privy Council appeal, *held*, that High Court had no jurisdiction to do so. *Held, further*, that even assuming it had such power under S. 107, Government of India Act, on merits no stay should be ordered. O. 45, r. 13 has no application where the party applied for the stay of proceedings in the Court below as distinct from the stay of execution of a decree. 150 I.C. 446=1934 A.L.J. 1191=1934 A. 585. See also 45 C.W.N. 1023; 1939 Cal. 308. See also "Execution, stay of" noted *supra*.

STAY OF SUIT.—A plea as to the jurisdic-



## NOTES.

tion of a Court to entertain a suit involving questions of difficulty and importance should not be dealt with by an application for stay of the suit. It may be set down as a preliminary question of law for determination when the suit comes on for trial. I.L.R. (1940) 1 Cal. 497=44 C.W.N. 460=1941 Cal. 236. See also 1941 Pesh. 34. S. 151 cannot be invoked to stay a suit which cannot be legally stayed under S. 10, C. P. Code. A.I.R. 1940 Lah. 85. See also 1941 Pesh. 34. In order to justify a stay or a suit it is, as a rule necessary that something more should exist than a mere balance of convenience in favour of proceeding in some other place. It must be proved to the satisfaction of the Court that either the expense or the difficulties of trial of the suit in the place in which it is brought are so great for the litigant applying for stay as to result in injustice being done. 1940 Cal. 134=I.L.R. (1939) 2 Cal. 199.

**STAY OF SUIT.**—Pending second appeal, 133 I.C. 222=53 C.L.J. 619=1931 C. 779; 1933 L. 50. See also 132 I.C. 257. The High Court has ample jurisdiction under S. 151, C.P. Code, to stay the proceedings in connected suits. 1938 N.L.J. 120. A Court in the United Provinces is not competent under S. 151 to issue a stay order to a Court in another province. I.L.R. (1938) All. 650=1938 A.L.J. 481=A.I.R. 1938 All. 434. As to stay of suit, see 163 I.C. 895=1936 P. 408. Where one party files a suit for recovery of possession and the opposite party files a counter-suit in the same Court for declaration of title against the first party, the proper action for the Court is that under the inherent powers of Court, the hearing of the possessory suit should be stayed until the question of title to the land has been decided. 1935 R. 355.

**TRANSFER OF SUIT** on the ground that the Judge had expressed a strong opinion on the evidence can be ordered under this section. 133 I.C. 876=32 P.L.R. 388. See also 56 A. 201; 12 R. 548=151 I.C. 573=1934 R. 265 (F.B.).

**VAKALATNAMA.**—Court can condone or correct formal defects in a vakalatnama. 12 Pat.L.T. 558=133 I.C. 171.

**APPEAL.**—No appeal lies from an order passed under S. 151. A.I.R. 1939 Lah. 508. No appeal lies against an order under the section. 104 I.C. 331=1927 C. 867; 26 P.L.R. 130; 102 I.C. 28 (1)=1927 M. W.N. 286; 12 L. 602=134 I.C. 292=1931 L. 344; 140 I.C. 843; 14 Pat.L.T. 1; 43 L.W. 773=1936 M. 636; 30 S.L.R. 170=165 I.C. 305=1936 S. 166; 163 I.C. 121=38 P.L.R. 717=1936 L. 212; 1936 P. 491; 161 I.C. 21; 158 I.C. 998; 157 I.C. 1083; 117 I.C. 372; 1930 L. 468; 122 I.C. 102; 12 P. 202=14 P.L.T. 1=1933 P. 139; 1933 P. 564; 1934 L. 349. But see 31 C.W.N. 290=100 I.C. 735 (2)=1927 C. 285; 6 P. 381. An order under S. 151 is not appealable. It is not correct to say that when an order which does not strictly come under

S. 144 is passed under S. 151, it is appealable. The right of appeal is a creature of the statute and unless there are express provisions of law relating to the maintainability of an appeal, it would not be correct to say that because an appeal is allowed by statute in certain cases it must be allowed by way of analogy in other similar cases. Where an application for restitution is made under S. 151, and is treated as such by the Court and an order is passed, it is not appealable. 1939 O.W.N. 765=A.I.R. 1939 Oudh 273. The nature of an order is not determined by the provision of law to which it may wrongly have been assigned. The true test is, what is the order itself. A Court cannot change its true order merely because it is given a wrong name. Where a Court amends a final decree passed by it purporting to do so under S. 151, it cannot be said that no appeal lies in the matter on the ground that an order under S. 151 is not appealable. A Court cannot evade the appellate jurisdiction of the Court above it by arbitrarily placing its order under a provision of law, orders under which are not appealable. The appellate Court should not treat the amending decree as an appealable order but it should regard the decree as amended by the order and the amended decree being appealable the appellate Court should deal with the matter as an appeal from the amended decree and proceed to hear and determine the same. I.L.R. (1939) Kar. 428=A.I.R. 1939 Sind 303. As there is no specific provision in the Code of Civil Procedure for an appeal against an order passed under S. 151, no appeal lies from such an order and therefore the order of an appellate Court passed on appeal from such order is passed without jurisdiction. And where such an order has been passed without jurisdiction a further appeal or a revision application can be entertained to set aside the order which has been passed without jurisdiction. A.I.R. 1938 Pesh. 81. Judge passing orders under O. 32, r. 6 that money deposited should not be withdrawn—Successor's order cancelling it is not appealable. 1929 L. 884. An order under S. 151 can be challenged in appeal under S. 105 if it affected the decision of the case on the merits. Otherwise the appellate Court is not bound to set it aside. 147 I.C. 1013=35 P.L.R. 266=1934 L. 312. An order refusing to grant temporary injunction restraining the decree-holder purchaser from obtaining possession of property purchased is one passed under S. 151 and not under O. 39, r. 1; and as such no appeal lies from such order. 150 I.C. 15=1934 L. 79 (2). An appeal against an order of remand under S. 151, C.P. Code, is not competent; but when the lower Court has not exercised the power vested in it under the law, it can be set aside. 149 I.C. 1050=1934 L. 233. Where a suit is disposed of on the merits by the trial Court and on appeal the lower appellate Court remands the case for re-trial after amendment



152. Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.

## NOTES.

of plaint, the order of remand is one made under the inherent powers of the Court even though the appellate Court orders refund of Court-fee paid on the memo. of appeal and the order is not appealable. 141 I.C. 400=34 P.L.R. 270=1933 L. 135.

REVIEW.—*See* 40 Bom.L.R. 1180. Where an order permitting withdrawal of the suit was obtained by practising fraud upon the Court by a defendant acting in collusion with a minor plaintiff's next friend and the Court subsequently vacated its order. *Held*, that the Court had power under S. 151, C. P. Code, to vacate an order obtained by misleading and practising fraud upon Court and hence the order of the Court vacating its previous order was right. 1937 S. 101.

REVISION.—*See* 1940 Cal. 92=43 C.W.N. 1028. Propriety of order under this section cannot generally be questioned in revision under S. 115, C.P. Code. 59 C.L.J. 389=1934 C. 780. But *see* 140 I.C. 843=34 P.L.R. 51=1933 L. 73; 149 I.C. 1105=1934 L. 108; 27 A.L.J. 1079=119 I.C. 851=1929 A. 721; 1937 N. 151. Even if upon a strict construction of S. 115, High Court is precluded from interfering in revision with an order of a lower Court refusing to amend a decree, it is still open to it to interfere under S. 151. (1935 O.W.N. 968, Rel. on.) 167 I.C. 586=1937 O.W.N. 268=1937 O. 246. Unless a matter could be brought under S. 115, C.P. Code, S. 151 could not be used to set aside an order of a lower Court against which no appeal or revision lies. 1940 N.L.J. 93. It is perfectly competent to a Court to vacate its own prior order. The provisions of Ss. 151 and 154, C.P. Code, are wide enough to allow this being done. Where the Court feels that it is necessary in the interests of justice to vacate a previous order made by it, it can do so, and such an order vacating a prior wrong order cannot be said to be improper or without jurisdiction. 40 Bom. L.R. 1180. Ss. 151 and 152, C. P. Code, cannot apply to a case where there is no accidental slip or error or omission on the part of the Court or there is no accidental slip, error or omission or slip in the plaint which intended one thing and owing to an accidental slip stated another, but the parties were labouring under a mistake at the time of the decree and the mistake was embodied in the decree. 40 P.L.R. 100=A.I.R. 1938 Lah. 331.

SEC. 152: SCOPE AND APPLICATION OF SECTION.—*See* 59 B. 158=36 Bom.L.R. 1217=1935 B. 75. According to the section an amendment can be made "at any time". 11 A. 267 at 288 (F.B.); 12 M.L.J. 96; 74 I.C. 842=1924 A. 127; even after a lapse of years.

60 C. 753=37 C.W.N. 500=1933 C. 627; 1937 C. 96. No question of limitation arises. 39 P.L.R. 769=1937 Lah. 894. *See also* 1941 O.W.N. 474=1941 A.W.R. (Rev.) 281. Decree not in conformity with judgment—Application for amendment—Mistake due to office—Amended decree as taking effect from date of original decree, 30 P. L.R. 363=115 I.C. 542=1929 L. 664. Distinction between this section and S. 151. *See* 102 I.C. 124=1927 A. 585. A plea that the compromise was obtained by fraud, etc., is not open to a decree-holder under a compromise decree in proceedings taken by the judgment-debtor to have the decree amended under S. 152. 1929 L. 400. An application under S. 152 to amend the consent decree on the ground of fraud is entirely outside the section. 33 C.W.N. 883=1929 C. 470. Consent decree cannot be amended without consent of parties. 57 C. 1143=1931 C. 51; 28 C. 574; 157 I.C. 209=1935 Pesh. 104. But *see* I.L.R. (1937) Bom. 837=39 Bom.L.R. 915=1937 B. 457 (clerical and arithmetical errors even in consent decrees and orders can be amended). An unintentional error or accidental omission in an order which incorrectly stated the effect of a decree on compromise can be corrected under this section. 139 I.C. 903=13 Pat.L.T. 576=1932 P. 321; 165 I.C. 799=1936 O.W.N. 1229=1937 O. 191. Section applies to amendment of decree and not to amendment of plaint or sale certificate. 139 I.C. 491=1932 A.L.J. 784=1932 A. 587; 165 I.C. 904. *See* 22 Pat.L.T. 267. An application for amendment of a decree presented long after date of the decree is not sustainable. 7 P.L.R. 1915=27 I.C. 639=32 P.W.R. 1915; 37 P.L.R. 623. Where there is a long and unexplained delay in applying for correction of decree, the Court may reject the application. 139 I.C. 528=36 C.W.N. 97=1932 C. 563. *See also* 1937 C. 96. Clerical mistake can be amended even after decree has been affirmed by the Privy Council. 36 C.W.N. 665. *See also* 15 N.L.J. 124 (Court has got a discretion in allowing amendment, and there is no absolute right in any party to have any clerical error amended). Where the property is wrongly described in a plaint in a mortgage suit and the mistake is repeated in the preliminary and final decrees, without being noticed either by the parties or by the Court, the Court has ample powers to amend the plaint, the decrees and the judgment and correct the mistakes. 153 I. C. 378=1935 O.W.N. 31=1935 O. 92. Amendment of decree is not to be allowed so as to affect rights of third parties. *See* 54 M. 184=129 I.C. 818=1931 M. 399=60 M.L.J. 721. *See also* 1933 C. 627=60 C.



## NOTES.

753; 142 I.C. 880=15 N.L.J. 124. The test for determination of an application for amendment under S. 152 is whether the decree is or is not in accordance with the intention of the Judge who decided the case. 134 I.C. 1009=1931 O. 422. *See also* 39 Bom.L.R. 915=1937 Bom. 457; 1937 M.W.N. 1013; 1937 O.W.N. 1110. Where the entry in the decree to which objection was made by the opposite party had been made deliberately by the Court on the application of the applicant after due consideration of the circumstances. *Held*, it may have been right or it may have been wrong, but it was not an error that could be corrected by an order passed under S. 152 behind the back of the applicant without giving him an opportunity of being heard. 158 I.C. 618=1935 A.L.J. 1015=1935 A. 841; 157 I.C. 209=1935 Pesh. 104. *See also* 15 L.W. 393=1922 M. 192 (Effect of allowing time for review expire); 33 C.W.N. 958=1929 C. 470; 115 I.C. 161 (2)=1929 N. 34; 157 I.C. 810. *See also* 99 I.C. 655=1927 M. 435. Correction of error is discretionary. 47 A. 44=82 I.C. 1030=1925 A. 187; 1932 C. 563; 39 P.L.R. 769=1937 Lah. 894. Amendment not to be refused to be considered on merits on ground of decree having been approved and signed by party's Pleader. 2 O.L.J. 141=87 I.C. 333=1925 O. 373. S. 152 is confined to correction of clerical errors made by the Court itself and has no concern with the mistakes of parties. 51 I.C. 55; 50 I.C. 497=4 Pat.L.J. 205. *See also* 157 I.C. 209; 1941 Lah. 417. Where sums awarded by High Court are those found by the trial Court, whose figures were not impugned in course of the argument in second appeal, it is not open to a party to raise these questions by an application for amendment of decree on the ostensible ground that it is not in conformity with the judgment. 149 I.C. 949 (1)=1934 A. 128. *See also* 44 C. 28=38 I.C. 584; 21 I.C. 540=7 S.L.R. 53 (Court can amend of its own motion); 51 A. 672=1929 A. 337. A Court can correct a clerical error in a plaint in whatever subsequent record it is repeated by slip or inadvertence or by mistake. 62 I.C. 652=14 L.W. 445. *See also* 139 I.C. 491=1932 A. 587; 1938 M.W.N. 250. Where a property has been accidentally misdescribed in a mortgage bond and the mistake has been repeated throughout the proceedings to enforce the mortgage but where there is no doubt as to the identity of property mortgaged and the property sold at auction, Court has ample power to amend the decree. 151 I.C. 959=15 Pat.L.T. 805=1934 P. 493. A mistake in the plaint about Khasra number of the mortgaged grove repeated in the judgment and decree can be corrected by Court under Ss. 151 and 152. 8 Luck. 734=11 O.W.N. 550=1934 O. 352. *See also* 1935 O. 92. But an amendment allowing a correct description of the property which completely alters the plaint and

the decree and also the deed on which the plaint is based cannot be said to be the correction of a clerical mistake in a judgment and cannot be allowed under S. 152. 147 I.C. 633=1934 A. 100. Section does not contemplate a practical reversal of Court's finding even on a formal issue. 24 I.C. 831=7 S.L.R. 186. Court of first instance can amend its decree when an appeal against it is pending. 11 A. 267 at 288; 44 I.C. 248=7 L.W. 8; 28 I.C. 377=17 M.L.T. 244. *See also* 25 Bom.L.R. 888=77 I.C. 171=1924 B. 166; 1929 L. 317. Also a successor in office of Judge that passed the decree. 2 Pat.L.T. 296=63 I.C. 840. Where a decree is confirmed on appeal, the only Court competent to amend the decree is the Appellate Court and not the Court against whose decree appeal was preferred. 31 M.L.J. 438=(1916) 2 M.W.N. 249=35 I.C. 891 (24 M. 646, Dist.); 63 I.C. 799; 21 I.C. 540=7 S.L.R. 53; 31 I.C. 320; 28 I.C. 586; 43 I.C. 360; 23 A.L.J. 518=86 I.C. 396=1925 A. 556. *See also* 1938 Lah. 4. S. 152 gives Court power to amend its decree if the amendment is merely of clerical or arithmetical mistake, even though its decree has merged in the decree of the appellate Court. 151 I.C. 568=1934 A.L.J. 937. *See also* 1941 O.W.N. 270=193 I.C. 53; 1941 Lah. 419; 1941 O.W.N. 1239. When an appeal abates so far as one of the respondents is concerned but is decided on the merits so far as the other respondents are concerned, a subsequent application for amendment of the decree under S. 152, C.P. Code, at the instance of the legal representatives of the deceased respondent must be made in the appellate Court and not in the trial Court. The power of amendment must be limited to the appellate Court when an appeal has abated only in part and a decree on the merits has been given as against the other respondents, because in such a case there is a decree capable of execution passed by the appellate Court. 1941 Mad. 123=52 L.W. 458=(1940) 2 M.L.J. 393. Appellate Court can amend the decree of the First Court. 19 A.L.J. 375=62 I.C. 910. *See also* 46 I.C. 376=16 A.L.J. 451; 42 I.C. 970; 31 I.C. 478=1915 M.W.N. 914; 1927 R. 57. Amendment of decree after disposal of appeal, *see* 8 Pat.L.T. 143; 1929 M.W.N. 729=1929 M. 830. *See also* 15 N.L.J. 124. A District Court could not rectify an error in its final decree copied from High Court's preliminary decree. 31 I.C. 320. Errors in High Court decree, must be rectified by High Court. 24 I.C. 283=1 L.W. 298. High Court can revise and set aside or modify a decree of a Small Cause Court. 58 I.C. 630; 1 L. 322. Court should not amend its decree except in accordance with this section. 8 A. 377. Courts in India can amend or vary decrees in order to bring them into accord with the judgments even if the amendments do not fall within S. 152. 52 I.C. 574=92 P.R. 1919 (37 C. 649, Ref.) *See also* 36 Bom.L.R.



## NOTES.

1217=1935 B. 75; 31 I.C. 478=1915 M.W. N. 914. Clerical error in a decree must be rectified by an application under this section, and not by an application for review. 6 C. 22. An order setting aside an *ex parte* decree is a judgment within the meaning of S. 2 (9) and cannot be lightly set aside save as provided by S. 152 or on review. 145 I.C. 302=1933 O. 385. When order has been made in an improper form, Court can rectify it. 16 B. 104. Clerical errors copied from pleading can be corrected. 22 I.C. 774=1914 M.W.N. 107. *See also* 66 I.C. 693=8 O.L.J. 416; 74 I.C. 1020=1924 R. 104 (Omission of one of the mortgaged properties in plaint); 50 A. 859=1929 A. 147 (inclusion of stranger's property in the suit.) A Court has no jurisdiction to entertain an application for amendment of a decree on the merits in the absence of the opposite party. 42 P.L.R. 263=A.I.R. 1940 Lah. 182.

PRINCIPLES ON WHICH AMENDMENTS ARE GRANTED.—The object of empowering the Court to correct decrees and orders is to correct errors and if it may be shown that an alleged mistake falls within the class of errors dealt with by S. 152, it seems to put an unnecessary hindrance upon the power to do justice which the section gives, to say that the only mistakes of which the Court can take cognizance are those made either in the plaint or in subsequent documents in Court. There is nothing which limits the power of the Court under S. 152 to correcting errors, mistakes and omissions, which arise in the suit. Nothing prevents the Court from doing justice in an appropriate case where such mistake arose by reason of copying an erroneous document into the plaint. A suit for rectification of the instrument and decree is not the only remedy; an application for review may be appropriate, but that is no obstacle under S. 162 to an application. 1931 M. 260=61 M.L.J. 805. Under S. 152, there is no right in any party to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of Court and the discretion has to be exercised in view of the peculiar facts of each case. 146 I.C. 310=10 O.W.N. 884=1933 O. 466. There is no right in any party under S. 152 to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the Court, and the discretion has to be exercised in view of the peculiar facts of each case. Where by the granting of an application to have the mistake corrected, the opposite party will be deprived of the advantage they have already gained by the applicant's omission to question the provision in decree in appeal the application should not be granted. 10 O.W.N. 1087=1933 O. 529. Where a suit for redemption was decreed and the entire amount due on the mortgage paid and the mortgage extinguished, by a mistake the decree was drawn up with reference to only

half the property, but the mortgagee obtained possession over the whole, the mistake was held to be one of a clerical nature arising from an accidental slip or omission and that it could be corrected even after a lapse of many years. 1941 O.W.N. 474=1941 A.W.R. (Rev.) 281. A decree can be brought into conformity with the judgment even after the lapse of years; the only limitation is that the Court may deem it inexpedient or inequitable to exercise its powers where third parties have acquired under the erroneous decree without a knowledge of the circumstances which would tend to show that the decree was erroneous. 60 Cal. 753=146 I.C. 658=37 C.W.N. 500=1933 Cal. 627. There is no time limit prescribed by law within which an application for amendment of a decree under S. 152, C.P. Code, has got to be made. It is true that when there are undue laches on the part of the decree-holder or the interest of third parties has intervened, the Court should be reluctant in allowing amendments of this description. But where the omission of the schedule of the mortgaged properties in the final decree for sale was due to a mistake, if any, on the part of the Court officers and the misdescription in the name of the decree-holder was also a palpable error apparent on the face of it, the decree-holder applying for amendment of the decree is under no obligation to satisfy the Court that really there were no laches on his part. 41 C.W.N. 1330=65 C.L.J. 455. Person against whom decree for costs had been passed did not appear in Court and hence had no knowledge of the discrepancies between judgment and decree. Consequently there was great delay in making the application for amendment of the decree. *Held*, that in these circumstances the equities were not so much against the applicant and therefore the application should be granted. 171 I.C. 207=A.I.R. 1937 Cal. 96. Court has a discretion in allowing amendment and there is no right in any party to have a clerical mistake corrected. Where, therefore, the applicants, even after they became aware of the defect in the decree, took no effective steps to set matters right but allowed the other party to obtain decrees against them as though there was nothing wrong with the decree, a subsequent application for amendment of the decree cannot be allowed. 142 I.C. 880=15 N.L.J. 124. Where property is wrongly described in a plaint in a mortgage suit and the mistake is repeated in the preliminary and final decrees, without notice either by the parties or by the Court, Court has ample powers to amend the plaint, the decrees and the judgment and correct the mistakes. 153 I.C. 378=1935 O.W.N. 31=1935 O. 92. If a decree is subsequently amended, the amendment does not take effect from the date of the decree so as to affect the rights of a purchaser who has acquired the property after the decree and before the making of the amendment. 1937 O.W.N.



## NOTES.

25=A.I.R. 1937 Oudh 217 (F.B.). Although after the case has been decided and the decree has been satisfied, the Court becomes *functus officio*, yet it does not debar the Court in appropriate cases, to rectify an error which has crept into its record either by accident or by design. The only limitation upon the exercise of such a power by Court may be found in cases where third parties have acquired rights under the erroneous judgment in the interval. Lapse of time however considerable, is no bar to the correction of errors either under S. 151 or 152. 1941 O.W.N. 474=1941 A.W.R. (Rev.) 281. An application for amendment of a decree to bring it into conformity with the judgment will be rejected, if it is made long after a third party acquires an interest in the decree by taking an assignment of the decree without being aware of the defect in it. 44 C.W.N. 708; 1932 A.L.J. 784=1932 A. 587 (Incorrect description of mortgaged property in the deed repeated in plaint, preliminary and final decrees, execution proceedings and sale certificate discovered late in mutation proceedings in Revenue Court can be corrected under this section); 136 I.C. 850=1932 M. 275=62 M. L. J. 350 (Wrong survey number entered in the mortgage-deed and copied in plaint and preliminary decree—Correction of). See also 61 M.L.J. 805; 1933 A. 102. (Omission to describe property sought to be sold—Intention otherwise clear—Amendment allowable); 139 I.C. 367=1932 O. 291 (Erroneous order due to slip of memory can be corrected); 132 I.C. 562=1931 A. 427 (Preliminary and final decrees in mortgage suit—Final decree alone containing clause for sale—Correction if can be allowed). See also 142 I.C. 880=15 N.L.J. 124. Application for amending decree in accordance with judgment—Whether barred by decree-holder accepting payment under decree—Circumstances disentitling decree-holder for amendment. 1929 M.W.N. 729=1929 M. 836; 13 I.C. 113=11 M.L.T. 33. Where the decree follows the judgment in its entirety and there is no incidental slip or omission, an application for amendment of the decree under S. 152, is not maintainable. If the judgment and the decree are a bit ambiguous, it is a matter of interpretation of the decree, having regard to the pleadings of the case and the other relevant papers, but it is not a matter for which an application for amendment could be made. 65 C.L.J. 452. The judgment in appeal directed 'the costs in appeal would be costs in the suit' and no mention was made of the costs of the lower Court. The decree was drawn up stating that costs of the original hearing and costs of re-trial ordered by the decree and the costs of appeal should abide by the result of the re-trial. Held, that the language of the decree was different from that of judgment and as doubts and difficulties arose thereby, the decree could be amended to be

in agreement with judgment. 171 I.C. 207=A.I.R. 1937 Cal. 96. Mistakes anterior to suit cannot be corrected under this section. 8 N.L.R. 13=14 I.C. 407. Rectification may be ordered for mistake and not where there is gross negligence of the party. 11 I.C. 537; 9 I.C. 433. Where a right has been extinguished by a decree, it cannot be reviewed by any subsequent act of the Court or the party at fault. 19 I.C. 347=16 O.C. 5. Calculation of amount due—Over-looking of order of Court is mistake which can be corrected at any time. 74 I.C. 842=1924 A. 127. See also 50 L. W. 719=(1939) 2 M.L.J. 751 (accidental omission to award further interest). Where after the passing of a decree, an application for its amendment on the strength of certain accounts newly filed, is allowed, and the decree amount is reduced, the Court in so doing has not merely corrected any clerical error but has altered the decree in a substantial manner, in the light of accounts produced, at a stage when the Court had no jurisdiction to receive fresh documentary evidence. The procedure is not justified by the powers of the Court under S. 152. 1938 A.L.J. 1080. Pre-emption decree—Amount entered wrongly—Correct amount paid in time—Decree can be amended even after expiry of time fixed for payment. 2 O.W.N. 218=87 I.C. 987=1925 O. 418. Sale ordered for a sum larger than what was due under the decree—Court has power to set aside sale. 27 Bom.L.R. 657=89 I.C. 569=1925 B. 389. Where there is no variation between decree and judgment no amendment can be allowed. 11 I.C. 896; 101 I.C. 147=1927 L. 403; 103 I.C. 298 (2). But see 25 L.W. 102=99 I.C. 655=1927 M. 435; 1930 L. 210; 42 I.C. 66=4 O.L.J. 475 (obvious error in judgment may be corrected). A consent decree can be varied only by consent. 27 I.C. 830=16 Bom.L.R. 668. See also 27 I.C. 134=16 Bom.L.R. 670 (Note); 50 I.C. 497=4 P. L.J. 205; 21 I.C. 115. A judgment ordering a decree to be entered up in terms of a compromise is not such a judgment as is contemplated by this section. 7 C.W.N. 880. See also 1933 P. 135. S. 152 does not empower a Court to rectify a decree merely because the decree is wrong or unfair or because the parties have not realised their rights and put them before the Court in such a way as to enable a correct decree to be passed. The powers given under that section only relate to arithmetical mistakes or errors arising from an accidental slip or omission. And the Court has no jurisdiction under S. 152 to add to a term in a consent decree without the consent of both parties to the decree. Ordinarily the High Court will not entertain a revision petition when a remedy by way of appeal is available. But in very special circumstances if there is a clear error relating to jurisdiction it may at its discretion do so. (24 Mad. 646, considered). 51 L.W. 252=A.I.R. 1940 Mad. 538=(1940) 1 M.L.J. 310. Court



## NOTES.

cannot under this section correct a judgment based on an award wherein the error lies. 103 I.C. 829=1927 M. 726=53 M.L.J. 38. If a compromise decree does not embody all the terms of the compromise the decree could be corrected. 21 I.C. 115. *See also* 1933 P. 135; 50 I.C. 497=4 Pat.L.J. 205. An application by the plaintiff to amend the decree to bring it in conformity with the judgment must be made to the Court which passed it and not to the Appellate Court. 57 I.C. 710. Any divergence between the decree and the judgment is a matter for amendment of the decree and not for a fresh suit for setting the decree aside. 43 C. 217=31 I.C. 13=19 C.W.N. 1228; 31 I.C. 478=1915 M.W.N. 914. Mere delay in applying for amendment does not amount to gross negligence. 99 I.C. 655. *See also* 139 I.C. 528=1932 C. 563=36 C.W.N. 97. The exercise of the power of amendment under S. 152 is discretionary and an application for amendment of a decree should be rejected as too late if the rights of third parties acting in good faith have intervened. 43 M.L.J. 559=1923 M. 57. Mistake in suit record owing to misdescription of suit property in plaint may be corrected by the Court under this section. 21 A.L.J. 328=72 I.C. 483=1923 A. 349; 25 L.W. 102=99 I.C. 655=1927 M. 435. It is open to the successor in office of a Judge to rectify an accidental error in the judgment of his predecessor. If the Judge declines to do so, High Court might interfere in revision. 18 A.L.J. 501=55 I.C. 963. *See also* 37 A. 323=29 I.C. 50=13 A.L.J. 449; 2 Pat.L.T. 296=63 I.C. 840. But successor cannot construe judgment and amend decree. 1927 P. 25. A decree should not be amended except in the presence of the parties concerned, or after service of notice on them to attend. 2 W.R. (Mis.) 15. *See also* 8 A. 377; 63 I.C. 799=(1921) 4 U.B.R. 1 (necessity for notice to other parties). Court can extend time for performance in case of decree for specific performance. 5 R. 615=105 I.C. 467=1927 R. 311. The Court has power to correct a mistake made in both the judgment and the decree. It should not refuse to correct the error on the ground that since the mistake appears in the judgment, the error in the decree is not accidental. 41 P.L.R. 119. S. 152 is not restricted to mistakes or errors which occur for the first time in the plaint or the subsequent proceedings in Court. The section applies also to cases where the mistake occurred in the earlier document evidencing the transaction itself and was copied in the plaint and the decree in the suit brought to enforce the transaction. 54 L.W. 344=(1941) 2 M.L.J. 452. *See also* 22 Pat.L.T. 267. Where in a suit instituted against the legal representatives of a deceased mortgagor as such, the Court passes a personal decree against them, there is an accidental omission in the decree in

failing to limit their liability. The Court has power under S. 152, which it should exercise, to correct the omission in the decree. The Court is not debarred from exercising its power merely because that error has been brought to its notice in the course of an application in which the decree-holder is seeking to execute the decree. An executing Court has power to rectify such error when it is the same Court which passed the decree. The omission by the legal representatives to raise an objection to the form of the decree in a previous execution application, does not operate as *res judicata*. Nor can the doctrine of estoppel be introduced when there is no ground for suggesting that the decree-holder has thereby altered his position to his detriment. 1940 Cal. 202=I.L.R. (1939) 1 Cal. 305=43 C.W.N. 490.

ILLUSTRATIVE CASES.—A decree against one person cannot be amended by adding another as judgment-debtor when no decree has been passed against him. 40 I.C. 47. The fact that a dead man had been made a party by mistake does not deprive the Court of the power to implead his legal representatives and proceed with the hearing of the appeal. S. 153 allows the Court a discretion to do so in a fit case, *e.g.*, where the mistake is a *bona fide* one. 165 I.C. 201=1936 Pesh. 192. *See also* 29 S. L.R. 445=163 I.C. 30=1936 S. 53; 1935 O. 369=1935 O.W.N. 471. Where a munsif by a clerical error recorded in his final order an order dismissing the suit instead of decreeing it and the decree was prepared accordingly, *held*, that the munsif is competent under S. 152 to subsequently correct the error. 29 I.C. 144. *See also* 22 I.C. 935=7 L.B.R. 81 (decree for foreclosure inadvertently passed in place of decree for sale). Mere clerical error in the relief claimed and in the decree that was prepared in accordance therewith can be corrected throughout the record. 23 I.C. 344=12 A.L.J. 185. *See also* 27 I.C. 922=13 A.L.J. 60; 21 I.C. 540=7 S.L.R. 53. Court has no jurisdiction for amendment of certificate of sale so as to alter the share of the property sold according to the sale proclamation. 18 I.C. 725. *See also* 22 Pat. L.T. 267 (Application by decree-holder purchaser for amendment of plaint, decree, execution petition, sale proclamation and sale certificate). A clerical mistake regarding costs can be amended under this section. 6 C. 22; 1904 A.W.N. 94; 54 I.C. 821. But *see also* 17 I.C. 418=47 P.R. 1913=5 P.W.R. 1913. Court can add costs to judgment already pronounced. 57 I.C. 739; 54 I.C. 821. An amended decree which has not been appealed against cannot be questioned in the course of execution proceedings. 9 C.W.N. 605; 44 I.C. 998=16 A.L.J. 262. Grounds for amendment being change of circumstances—Proper remedy. 27 I.C. 300. Where a decree passed on an award by mistake or inadver-



## NOTES.

tence embodied a relief as to payment of costs not mentioned in the award the defect can be cured only by an appeal or review. 34 I.C. 787=3 L.W. 499. An application to correct an error made in a decree awarding costs will be refused, if the applicant is guilty of laches. 42 P.L.R. 263=A.I.R. 1940 Lah. 182. The award of costs to which the party successful may be entitled is neither an arithmetical mistake nor an accidental slip or omission under S. 152. A decree cannot, therefore, be amended under that section, if the method of assessment of costs is wrong. 42 P.L.R. 263=A.I.R. 1940 Lah. 182. There was an appeal against an interlocutory order passed in a suit, and during the pendency, the plaintiff died. His legal representative was brought on record. After the disposal of the appeal, legal representative carried on the litigation, resulting in a decree being passed against the plaintiff, but the decree as drawn up was against the plaintiff. *Held*, that no joinder of the legal representative was necessary in the suit before the decree was passed, as the Court could have brought it in conformity with the appellate decree which contained the names of the legal representatives of the plaintiffs. 45 C. 94 (P.C.), Foll. *Held also* that the decree could be executed against the estate of the deceased in the hands of the legal representative. 120 I.C. 516=1930 S. 96. A person who purchases a decree purchases the rights in the decree and if one of these rights vesting in the vendor is a right to have the decree amended under the law, this right also passes to vendee. 41 P.L.R. 99=A.I.R. 1939 L. 255. *See also* 22 Pat.L.T. 267.

**RIGHT OF SUIT.**—Mistake anterior to suit can be rectified only by separate suit. 8 N. L.R. 13=14 I.C. 407.

**BAR TO SUIT.**—A suit for amending a judgment or decree passed by a competent Court on the ground of mistake is not maintainable in a Civil Court. 15 C.L.J. 675=14 I.C. 93=17 C.W.N. 82 (10 C.W.N. 1024; 6 C.W.N. 889; 3 C.W.N. 575, Rel.; 8 C.W.N. 473, Dist.). *See also* 133 I.C. 366=1931 P. 296. (8 C.W.N. 473, Diss.).

**JURISDICTION.**—Where an appeal is summarily dismissed under O. 41, R. 11, the decree remains the decree of the lower Court and not of High Court. So, it is the lower Court and not High Court, that can entertain an application for amendment of the decree. 11 P. 409=138 I.C. 908=1932 P. 238 (21 B. 548, Foll.; 24 C. 759, Not Foll.).

**APPEAL.**—There is no appeal from an amendment under S. 152. 54 I.C. 387; 24 P.R. 1911=10 I.C. 850; 73 I.C. 679=1923 L. 147 (2). But *see* 61 I.C. 992 (appeal lies where the whole system of calculation adopted by the Court was challenged). Where a Court purporting to act under S. 152, wrongly passes a fresh decree, an appeal is competent from that decree. The mere fact that the new decree is wrongly

passed does not take away the right to appeal. 35 P.L.R. 610=1934 L. 839. No appeal lies against an order granting an amendment, but an appeal lies against the amended decree. 3 C.L.J. 188; 1 A.L.J. 701; 22 M. 646. No appeal lies to His Majesty in Council, 33 C. 679; nor under the Letters Patent, 14 A. 226 (F.B.). Application for amendment on ground that costs had been assessed on an erroneous principle is bad. Proper remedy is by way of appeal. Amendment would not be granted on ground that an appeal is barred. 17 I.C. 418=47 P.R. 1913. When judgment simply states "decreed as prayed for and costs" and the sum awarded in the decree differs from that claimed in the plaint decree can be rectified under this section. 22 B. 370. Appeal lies against an order under this section extending time for performance in the case of a decree for specific performance. 105 I.C. 467=1927 R. 311.

**REVISION AND APPEAL.**—An order under this section is subject to revision. 28 C. 177; 7 A. 876 (F.B.); 31 B. 447; 1936 A. M.L.J. 117; 1940 O.W.N. 1010; 24 P.R. 1911=10 I.C. 850; 18 A.L.J. 501=55 I. C. 963; 37 A. 323=29 I.C. 50=13 A.L. J. 449; 1941 Lah. 419. An order to amend the decree is different from the amended decree and a revision lies from the former order. 147 I.C. 633=1934 A. 100 (2). An application under section 152, the Court is not bound to correct the decree. Court has a discretion to make the amendment or not. And in such case the applicant has no right in revision proceedings to demand an adjudication upon any point; his right is merely to bring the matter to the notice of High Court and to leave it to the discretion of the Court to interfere, if interference is necessary in the interests of justice. High Court will not interfere unless the lower Court has exercised its discretion in such a manner that it was obviously wrong and unjust for it to make the order it did. 10 O.W.N. 958=1933 O. 425. Where a decree is amended and the amendment is substantial in that it alters the amount declared due on a mortgage, at least so far as the additional amount is concerned, there is a new decree from which there is an appeal. It cannot therefore be revised. But in the appeal it is open to the appellant to challenge the decree on the ground of jurisdiction. 1938 A.M.L.J. 88. Simply because an order is passed under the inherent powers it does not necessarily become appealable. If however the inherent powers are used to expand a remedy in order to do justice to cover a case not within the exact words of but within the purpose of a procedural section, the Court is in effect using its inherent powers to act as if the orders were made under the section in question. In such a case, even justice demands that one side should be given a remedy and the other side should, as a matter of justice, be allowed the right to appeal that would have existed had a parti-



153. The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

## NOTES.

ular section really applied instead of its being applied by means of a fiction. 1933 Nag. 326. Where an objection to the passing of a final decree or a mortgage is raised on the ground that certain payment made after the preliminary decree has not been given credit to, but the objections are dismissed owing to default in appearance, a refusal to restore such application is not appealable, for it is an order passed on an application to exercise the Court's inherent jurisdiction under section 151. A.I.R. 1939 A. 28 = 1938 A.L.J. 1055.

REVIEW.—Circumstances might, however, arise, which would render amendment necessary on review, as when the description of the mortgaged property as given in the decree differs from that given in the bond, the remedy was one by way of review. See 16 M. 424; 1906 A.W.N. 220; 156 I.C. 585 = 1935 Pesh. 91. If judgment is attacked the matter is one for review. 5 Pat. L.J. 253 = 1 Pat.L.T. 219 = 58 I.C. 510.

LIMITATION.—Applications under this section are not governed by the Limitation Act. 10 M. 51; 11 B. 284; 21 C. 259; 11 A. 267; 40 C.W.N. 83; 74 I.C. 842 = 1924 A. 127; 21 I.C. 540 = 7 S.L.R. 53. Although there is no limitation for an application to amend a decree under section 152, it is obvious that such an application must be made before the decree has become unexecutable owing to the 12 years limitation provided by section 48. 1939 A.M.L.J. 27. S. 152—Amendment of decree after expiry of 12 years does not revive right to execute decree. See (1940) 1 M.L.J. 235 (F.B.).

SECS. 152 AND 153.—Where a partition follows a mortgage and other properties are allotted to the mortgagor in lieu of the mortgaged property, there can be no doubt that the mortgagee can proceed against the substituted security and can bring to sale the property which represents the property originally mortgaged. When the mortgagee does not proceed against the substituted security but ignoring the partition proceeds against the property originally mortgaged and bring the same to sale and difficulties arise after the whole proceedings are over in obtaining delivery of possession, he may be permitted to amend the plaint, preliminary decree and final decree, but no further amendment can justifiably be made, i.e., no amendment can be made in any of the relevant documents and proceedings following the final decree, such as the execution petition, sale proclamation and the sale certificate. If an amendment were allowed in the latter, the result would be that property will have been

bought and sold which has never been even put up for sale. After such amendment fresh steps will have to be taken to bring the substituted property to sale. But when there is a serious dispute as to what was the subject-matter of the mortgage, proceedings for amendment of the relevant documents in the case are not appropriate. A question involving the identity of the property mortgaged cannot be dealt with on an application to amend. A case of misdescription can be dealt with by amending the plaint, and decree, but not a dispute as to the identity of the properties which are the subject-matter of the mortgage. 22 Pat. L.T. 267.

SEC. 153 [N.B.—See Notes under sections 151 and 152].—Under sections 99, 152 and 153 the Court has ample powers to afford opportunity to rectify defects in pleadings and under section 153 is bound to do so. 1933 A.L.J. 110 = 1933 A. 295. See 139 I.C. 491 = 1932 A.L.J. 784 = 1932 A. 587; 1935 O.W.N. 471 = 1935 O. 369. Where plaint was presented by a vakil whose name was omitted from body of his *vakalatnama* and who had signed on the back in token of acceptance, it was held that it was a mere clerical error and that an order of Court, on an application to correct the mistake, that that correction should be made and given retrospective effect, was not without jurisdiction. 1934 A. 810. Court ought to give all reasonable indulgence with regard to amending. However negligent or careless the first omission and however late the proposed amendment, the amendment should be allowed, if it can be allowed without injustice to the other side. *Per* Lopes, L.J., in 19 Q.B.D. 394, cited in 32 C. 600. The verification in an application for leave to appeal *in forma pauperis* not being in the manner prescribed by the Code, the Court rejected it. *Held*, in revision, that it was the duty of the Court to allow the applicant a chance to correct the defect in the verification before rejecting the application itself. 1937 N. 108 = 168 I.C. 894. The expression "any proceeding" is general enough to include filing of an appeal. 123 I.C. 824 = 1930 A. 131. The term "proceeding" in section 153 must be interpreted as any application to a Court of justice, however made, "for aid in the enforcement of rights, for reliefs, for redress of injuries, for damages or for any remedial object". An application for a challan for depositing the necessary amounts for the purpose of setting aside an execution sale, and a memorandum accompanying the receipt obtained for the deposit are "proceedings" within the mean-



Saving of present right of appeal.

154. Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement.

155. The enactments mentioned in the Fourth Amendment of certain Acts. Schedule are hereby amended to the extent specified in the fourth column thereof.

156. [Repeals.] Repealed by S. 3 and Schedule II of the Second Repealing and Amending Act, 1914 (XVII of 1914).

157. Notifications published, declarations and rules made, places appointed,

#### NOTES.

ing of section 153, though they may or may not be treated as applications to set aside the sale under O. 21, R. 89 for want of a formal prayer to set aside the sale. Such a challan or memorandum may be amended so as to add a prayer therein that the sale be set aside, under section 153. The fact that the period of limitation for making an independent application for setting aside the sale has expired is no ground for refusing the amendment under section 153. 45 L.W. 633=A.I.R. 1937 Mad. 342=(1937) 1 M.L.J. 658. To proceed to recall and cancel an invalid order is the duty of the Judge. 5 C.L.J. 611. Also an order improperly or fraudulently obtained. 6 C.L.J. 662. Over-valuing suit to get round a previous decision which will operate as *res judicata*—Decision is an abuse of process of Court. 83 I.C. 1=1925 A. 142. Section allows the Court to give leave for amendment at any time in any proceeding in a suit. 25 Bom.L.R. 888=77 I.C. 171=1924 B. 166. Where a decree is passed if it is final, the original Court is, generally speaking, *functus officio*, and the occasion for amendment of pleading cannot arise. (*Ibid.*) Suit on pronote found to be insufficiently satmped cannot be amended into one on the original cause of action. 138 I.C. 783=34 Bom.L.R. 643=1932 B. 394. (3 R. 183, Not Foll.; 48 C. 32 (P.C.), rel.on.) Addition of legal representatives in a suit against a dead man is illegal. 45 M.L.J. 231=75 I.C. 739=1924 M. 56. Appeal against dead respondent—Amendment of cause title allowed. 1925 M. 1210=49 M.L.J. 590 (F.B.). The fact that a dead man has been made a party by *bona fide* mistake does not deprive the Court of the power to implead the proper legal representatives and proceed with the hearing of the appeal. See 165 I.C. 201=1936 P. 192. Suit in name of non-existing or non-juristic person—Amendment by substitution—Power of Court. 20 N.L.J. 65=1937 N. 173=171 I.C. 763=I.L.R. (1937) Nag. 514. Under the provisions of section 153 a Court may, subject to the provisions of section 5, Limitation Act, allow the amendment of an appeal against the person who had died before the date of the presentation of the memorandum, although it is found that no appeal in law exists. Such discretion is not however available to a Court where it is sought to substitute a per-

son for the potential appellant who died before the memorandum of appeal was filed. 1934 N. 274. Mistake discovered on appeal may be corrected. 20 A.L.J. 159=66 I.C. 208=1922 A. 81. See also 66 I.C. 693=8 O.L.J. 416. Amendment of sale certificate without notice to judgment-debtor is irregular. 65 I.C. 732=16 L.W. 760=1922 M. 63. Want of signature and verification does not entail rejection of the plaint as they can be supplied at any stage. 25 M.L.J. 174=17 I.C. 580. Application for sale after dismissal of execution application is defective, but can be cured under this section. 25 I.C. 883=1 L.W. 665. On this section, see also 3 Pat.L.T. 149=1922 P. 121. It is open to a party in a suit to invoke the inherent power of the Court to get the judgment and the decree amended under the provisions of sections 151, 152 and 153 of the Code quite apart from the limitation applicable to the institution of the appeal or review. He has a right to apply but it is for the Court to see whether his application deserves consideration. 6 O.W.N. 604=118 I.C. 753=1929 O. 385 (F.B.).

SEC. 154.—The general law that a right of appeal is more than a matter of procedure and an alteration of law of procedure would not re-act upon the right of appeal is superseded by this section. 6 S.L.R. 168=19 I.C. 348. This section has no bearing on the powers of an appellate Court in dealing with appeals before it. 9 I.C. 815. Where in a suit instituted before the coming into force of the new Code an order of remand is passed after the new Code has come into force, the right of appeal against the order is regulated by the new and not by the old Code. 1 P. R. 1913=15 I.C. 725. (21 M.L.J. 631, Diss.). The words "any present right of appeal" in this section mean a right of appeal in *esse*. (*Ibid.*)

SEC. 157.—Rules framed by the Local Government under section 269 of the old Code are in force until rules are made by the High Court under the power given by section 128 (2) of the new Code. 24 M. L. J. 637=37 M. 17. But rules under old Code which were *ultra vires* then are not valid simply because they could be made under the new Code. 29 M.L.J. 663=31 I.C. 924. The words "consistent with the Code" mean only consistent with the sections of the Code and not with the rules which are alterable by the High Court. 24 M.L.J. 637=20 I.C. 775=37 M. 17.



Continuance of orders under repealed enactments. agreements filed, scales prescribed, forms framed, appointments made and powers conferred under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed shall, so far as they are consistent with this Code, have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under this Code and by the authority empowered thereby in such behalf.

158. In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable be taken to be made to this Code or to its corresponding Part, Order, section or rule.

## THE FIRST SCHEDULE.

### CONTENTS.

#### ORDER I. PARTIES TO SUITS.

##### RULES.

1. Who may be joined as plaintiffs.
2. Power of Court to order separate trials.
3. Who may be joined as defendants.
4. Court may give judgment for or against one or more of joint parties.
5. Defendant need not be interested in all the relief claimed.
6. Joinder of parties liable on same contract.
7. When plaintiff in doubt from whom redress is to be sought.
8. One person may sue or defend on behalf of all in same interest.
9. Misjoinder and nonjoinder.
10. Suit in name of wrong plaintiff.  
Court may strike out or add parties.  
Where defendant added, plaint to be amended.
11. Conduct of suit.
12. Appearance of one of several plaintiffs or defendants for others.
13. Objections as to nonjoinder or misjoinder.

#### ORDER II. FRAME OF SUIT.

1. Frame of suit.
2. Suit to include the whole claim.  
Relinquishment of part of claim.  
Omission to sue for one of several reliefs.
3. Joinder of causes of action.
4. Only certain claims to be joined for recovery of immovable property.
5. Claims by or against executor, administrator or heir.
6. Power of Court to order separate trials.
7. Objections as to misjoinder.

#### ORDER III.

##### RECOGNIZED AGENTS AND PLEADERS.

1. Appearances, etc., may be in person, by recognized agent or by pleader.
2. Recognized agents.
3. Service of process on recognized agent.
4. Appointment of pleader.
5. Service of process on pleader.
6. Agent to accept service.  
Appointment to be in writing and to be filed in Court.

##### RULES.

#### ORDER IV.

##### INSTITUTION OF SUITS.

1. Suit to be commenced by plaint.
2. Register of suits.

#### ORDER V.

##### ISSUE AND SERVICE OF SUMMONS.

##### *Issue of Summons.*

1. Summons.
2. Copy or statement annexed to summons.
3. Court may order defendant or plaintiff to appear in person.
4. No party to be ordered to appear in person unless resident within certain limits.
5. Summons to be either to settle issues or for final disposal.
6. Fixing day for appearance of defendant.
7. Summons to order defendant to produce documents relied on by him.
8. On issue of summons for final disposal, defendant to be directed to produce his witnesses.

##### *Service of Summons.*

9. Delivery or transmission of summons for service.
10. Mode of service.
11. Service on several defendants.
12. Service to be on defendant in person when practicable, or on his agent.
13. Service on agent by whom defendant carries on business.
14. Service on agent in charge in suits for immovable property.
15. Where service may be on male member of defendant's family.
16. Person served to sign acknowledgment.
17. Procedure when defendant refuses to accept service, or cannot be found.
18. Endorsement of time and manner of service.
19. Examination of serving officer.
20. Substituted service.  
Effect of substituted service.  
Where service substituted, time for appearance to be fixed.
21. Service of summons where defendant resides within jurisdiction of another Court.
22. Service within Presidency-towns, of summons issued by Courts outside.



## RULES.

23. Duty of Court to which summons is sent.
24. Service on defendant in prison.
25. Service where defendant resides out of British India and has no agent.
26. Service in foreign territory through Political Agent or Court.
27. Service on civil public officer or on servant of railway company or local authority.
28. Service on soldiers, sailors or airmen.
29. Duty of person to whom summons is delivered or sent for service.
30. Substitution of letter for summons.

## ORDER VI.

## PLEADINGS GENERALLY.

1. Pleading.
2. Pleading to state material facts and not evidence.
3. Forms of pleading.
4. Particulars to be given where necessary.
5. Further and better statement, or particulars.
6. Condition precedent.
7. Departure.
8. Denial of contract.
9. Effect of document to be stated.
10. Malice, knowledge, etc.
11. Notice.
12. Implied contract or relation.
13. Presumptions of law.
14. Pleading to be signed.
15. Verification of pleadings.
16. Striking out pleadings.
17. Amendment of pleadings.
18. Failure to amend after order.

## ORDER VII.

## PLAINT.

1. Particulars to be contained in plaint.
2. In money suits.
3. Where the subject-matter of the suit is immovable property.
4. When plaintiff sues as representative.
5. Defendant's interest and liability to be shown.
6. Grounds of exemption from limitation law.
7. Relief to be specifically stated.
8. Relief founded on separate grounds.
9. Procedure on admitting plaint.
10. Return of plaint.
11. Rejection of plaint.
12. Procedure on rejecting plaint.
13. Where rejection of plaint does not preclude presentation of fresh plaint.

*Documents relied on in plaint.*

14. Production of document on which plaintiff sues.
15. Statement in case of documents not in plaintiff's possession or power.
16. Suits on lost negotiable instruments.
17. Production of shop-book.
18. Inadmissibility of document not produced when plaint filed.

## ORDER VIII.

## WRITTEN STATEMENT AND SET-OFF.

1. Written statement.
2. New facts must be specially pleaded.
3. Denial to be specific.
4. Evasive denial.

## RULES.

5. Specific denial.
6. Particulars of set-off to be given in written statement.
7. Defence or set-off founded on separate grounds.
8. New ground of defence.
9. Subsequent pleadings.
10. Procedure when party fails to present written statement called for by Court.

## ORDER IX.

## APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE.

1. Parties to appear on day fixed in summons for defendant to appear and answer.
2. Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.
3. Where neither party appears, suit to be dismissed.
4. Plaintiff may bring fresh suit or Court may restore suit to file.
5. Dismissal of suit where plaintiff, after summons returned unserved, fails for three months to apply for fresh summons.
6. Procedure when only plaintiff appears.
7. Procedure when defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.
8. Procedure where defendant only appears.
9. Decree against plaintiff by default bars fresh suit.
10. Procedure in case of non-attendance of one or more of several plaintiffs.
11. Procedure in case of non-attendance of one or more of several defendants.
12. Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.
13. Setting aside decree *ex parte* against defendant.
14. No decree to be set aside without notice to opposite party.

## ORDER X.

## EXAMINATION OF PARTIES BY THE COURT.

1. Ascertainment whether allegations in pleadings are admitted or denied.
2. Oral examination of party, or companion of party.
3. Substance of examination to be written.
4. Consequence of refusal or inability of pleader to answer.

## ORDER XI.

## DISCOVERY AND INSPECTION.

1. Discovery by interrogatories.
2. Particular interrogatories to be submitted.
3. Costs of interrogatories.
4. Form of interrogatories.
5. Corporations.
6. Objections to interrogatories by answer.
7. Setting aside and striking out interrogatories.
8. Affidavit in answer, filing.
9. Form of affidavit in answer.
10. No exception to be taken.
11. Order to answer or answer further.



## RULES.

12. Application for discovery of documents.
13. Affidavit of documents.
14. Production of documents.
15. Inspection of documents referred to in pleadings or affidavits.
16. Notice to produce.
17. Time for inspection when notice given.
18. Order for inspection.
19. Verified copies.
20. Premature discovery.
21. Non-compliance with order for discovery.
22. Using answers to interrogatories at trial.
23. Order to apply to minors.

## ORDER XII.

## ADMISSIONS.

1. Notice of admission of case.
2. Notice to admit documents.
3. Form of notice.
4. Notice to admit facts.
5. Form of admissions.
6. Judgment on admissions.
7. Affidavit of signature.
8. Notice to produce documents.
9. Costs.

## ORDER XIII.

## PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS.

1. Documentary evidence to be produced at first hearing.
2. Effect of non-production of documents.
3. Rejection of irrelevant or inadmissible documents.
4. Endorsements on documents admitted in evidence.
5. Endorsements on copies of admitted entries in books, accounts and records.
6. Endorsements on documents rejected as inadmissible in evidence.
7. Recording of admitted and return of rejected documents.
8. Court may order any document to be impounded.
9. Return of admitted documents.
10. Court may send for papers from its own records or from other Courts.
11. Provisions as to documents applied to material objects.

## ORDER XIV.

## SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON.

1. Framing of issues.
2. Issues of law and of fact.
3. Materials from which issues may be framed.
4. Court may examine witnesses or documents before framing issues.
5. Power to amend, and strike out, issues.
6. Questions of fact or law may by agreement be stated in form of issues.
7. Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

## ORDER XV.

## DISPOSAL OF THE SUIT AT THE FIRST HEARING.

1. Parties not at issue.
2. One of several defendants not at issue.
3. Parties at issue.
4. Failure to produce evidence.

## RULES.

## ORDER XVI.

## SUMMONING AND ATTENDANCE OF WITNESSES.

1. Summons to attend to give evidence or produce documents.
2. Expenses of witness to be paid into Court on applying for summons.  
Experts.  
Scale of expenses.
3. Tender of expenses to witness.
4. Procedure where insufficient sum paid in.  
Expenses of witnesses detained more than one day.
5. Time, place and purpose of attendance to be specified in summons.
6. Summons to produce document.
7. Power to require persons present in Court to give evidence or produce document.
8. Summons how served.
9. Time for serving summons.
10. Procedure where witness fails to comply with summons.
11. If witness appears, attachment may be withdrawn.
12. Procedure if witness fails to appear.
13. Mode of attachment.
14. Court may of its own accord summon as witnesses strangers to suit.
15. Duty of persons summoned to give evidence or produce document.
16. When they may depart.
17. Application of rules 10 to 13.
18. Procedure where witness apprehended cannot give evidence or produce document.
19. No witness to be ordered to attend in person unless resident within certain limits.
20. Consequence of refusal of party to give evidence when called on by Court.
21. Rules as to witnesses to apply to parties summoned.

## ORDER XVII.

## ADJOURNMENTS.

1. Court may grant time and adjourn hearing.  
Costs of adjournment.
2. Procedure if parties fail to appear on day fixed.
3. Court may proceed notwithstanding either party fails to produce evidence, etc.

## ORDER XVIII.

## HEARING OF THE SUIT AND EXAMINATION OF WITNESSES.

1. Right to begin.
2. Statement and production of evidence.
3. Evidence where several issues.
4. Witnesses to be examined in open Court.
5. How evidence shall be taken in appealable cases.
6. When deposition to be interpreted.
7. Evidence under section 138.
8. Memorandum when evidence not taken down by Judge.
9. When evidence may be taken in English.
10. Any particular question and answer may be taken down.
11. Questions objected to and allowed by Court.
12. Remarks on demeanour of witnesses.
13. Memorandum of evidence in unappealable cases.
14. Judge unable to make such memorandum to record reasons of his inability.



## RULES.

15. Power to deal with evidence taken before another Judge.
16. Power to examine witness immediately.
17. Court may recall and examine witness.
18. Power of Court to inspect.

## ORDER XIX.

## AFFIDAVITS.

1. Power to order any point to be proved by affidavit.
2. Power to order attendance of deponent for cross-examination.
3. Matters to which affidavits shall be confined.

## ORDER XX.

## JUDGMENT AND DECREE.

1. Judgment when pronounced.
2. Power to pronounce judgment written by Judge's predecessor.
3. Judgment to be signed.
4. Judgments of Small Cause Courts.  
Judgments of other Courts.
5. Court to state its decision on each issue.
6. Contents of decree.
7. Date of decree.
8. Procedure where Judge has vacated office before signing decree.
9. Decree for recovery of immovable property.
10. Decree for delivery of movable property.
11. Decree may direct payment by instalments.

Order, after decree, for payment by instalments.

12. Decree for possession and mesne profits.
13. Decree in administration-suit.
14. Decree in pre-emption suit.
15. Decree in suit for dissolution of partnership.
16. Decree in suit for account between principal and agent.
17. Special directions as to accounts.
18. Decree in suit for partition of property or separate possession of a share therein.
19. Decree when set-off is allowed.  
Appeal from decree relating to set-off.
20. Certified copies of judgment and decree to be furnished.

## ORDER XXI.

## EXECUTION OF DECREES AND ORDERS.

*Payment under Decree.*

1. Modes of paying money under decree.
2. Payment out of Court to decree-holder.

## COURTS EXECUTING DECREES.

3. Lands situate in more than one jurisdiction.
4. Transfer to Court of Small Causes.
5. Mode of transfer.
6. Procedure where Court desires that its own decree shall be executed by another Court.
7. Court receiving copies of decree, etc., to file same without proof.
8. Execution of decree or order by Court to which it is sent.
9. Execution by High Court of decree transferred by other Court.

## APPLICATION FOR EXECUTION.

10. Application for execution.
11. Oral application.  
Written application.
12. Application for attachment of movable property not in judgment-debtor's possession.
13. Application for attachment of immovable

## RULES.

property to contain certain particulars.

14. Power to require certified extract from Collector's register in certain cases.

15. Application for execution by joint decree-holder.

16. Application for execution by transferee of decree.

17. Procedure on receiving application for execution of decree.

18. Execution in case of cross-decrees.

19. Execution in case of cross-claims under same decree.

20. Cross-decrees and cross-claims in mortgage-suits.

21. Simultaneous execution.

22. Notice to show cause against execution in certain cases.

23. Procedure after issue of notice.

## PROCESS FOR EXECUTION.

24. Process for execution.

25. Endorsement on process.

## STAY OF EXECUTION.

26. When Court may stay execution.

Power to require security from, or impose conditions upon, judgment-debtor.

27. Liability of judgment-debtor discharged.

28. Order of Court which passed decree or of appellate Court to be binding upon Court applied to.

29. Stay of execution pending suit between decree-holder and judgment-debtor.

## MODE OF EXECUTION.

30. Decree for payment of money.

31. Decree for specific movable property.

32. Decree for specific performance, for restitution of conjugal rights, or for an injunction.

33. Discretion of Court in executing decrees for restitution of conjugal rights.

34. Decree for execution of document, or endorsement of negotiable instrument.

35. Decree for immovable property.

36. Decree for delivery of immovable property when in occupancy of tenant.

## ARREST AND DETENTION IN THE CIVIL PRISON.

37. Discretionary power to permit judgment-debtor to show cause against detention in prison.

38. Warrant for arrest to direct judgment-debtor to be brought up.

39. Subsistence-allowance.

40. Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.

## ATTACHMENT OF PROPERTY.

41. Examination of judgment-debtor as to his property.

42. Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined.

43. Attachment of movable property, other than agricultural produce, in possession of judgment-debtor.

44. Attachment of agricultural produce.

45. Provisions as to agricultural produce under attachment.

46. Attachment of debt, share and other property not in possession of judgment-debtor.

47. Attachment of share in movables.

48. Attachment of salary or allowances of public officer or servant of railway company or local authority.

49. Attachment of partnership property.



## RULES.

50. Execution of decree against firm.
51. Attachment of negotiable instruments.
52. Attachment of property in custody of Court or public officer.
53. Attachment of decrees.
54. Attachment of immovable property.
55. Removal of attachment after satisfaction of decree.
56. Order for payment of coin or currency notes to party entitled under decree.
57. Determination of attachment.
- INVESTIGATION OF CLAIMS AND OBJECTIONS.
58. Investigation of claims to, and objections to attachment of, attached property.
- Postponement of sale.
59. Evidence to be adduced by claimant.
60. Release of property from attachment.
61. Disallowance of claim to property attached.
62. Continuance of attachment subject to claim of incumbrancer.
63. Saving of suits to establish right to attached property.

## SALE GENERALLY.

64. Power to order property attached to be sold and proceeds to be paid to person entitled.
65. Sales by whom conducted and how made.
66. Proclamation of sales by public auction.
67. Mode of making proclamation.
68. Time of sale.
69. Adjournment or stoppage of sale.
70. Saving of certain sales.
71. Defaulting purchaser answerable for loss on re-sale.
72. Decree-holder not to bid for or buy property without permission.

Where decree-holder purchases, amount of decree may be taken as payment.

73. Restriction on bidding or purchase by officers.

## SALE OF MOVABLE PROPERTY.

74. Sale of agricultural produce.
75. Special provisions relating to growing crops.
76. Negotiable instruments and shares in corporations.
77. Sale by public auction.
78. Irregularity not to vitiate sale, but any person injured may sue.
79. Delivery of movable property, debts and shares.
80. Transfer of negotiable instruments and shares.
81. Vesting order in case of other property.

## SALE OF IMMOVABLE PROPERTY.

82. What Courts may order sales.
83. Postponement of sale to enable judgment-debtor to raise amount of decree.
84. Deposit by purchaser and re-sale on default.
85. Time for payment in full of purchase money.
86. Procedure in default of payment.
87. Notification on re-sale.
88. Bid of co-sharer to have preference.
89. Application to set aside sale on deposit.
90. Application to set aside sale on ground of irregularity or fraud.
91. Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest.

## RULES.

92. Sale when to become absolute or be set aside.
93. Return of purchase-money in certain cases.
94. Certificate to purchaser.
95. Delivery of property in occupancy of judgment-debtor.
96. Delivery of property in occupancy of tenant.
- RESISTANCE TO DELIVERY OF POSSESSION TO DECREE-HOLDER OR PURCHASER.
97. Resistance or obstruction to possession of immovable property.
98. Resistance or obstruction by judgment-debtor.
99. Resistance or obstruction by *bona fide* claimant.
100. Dispossession by decree-holder or purchaser.
101. *Bona fide* claimant to be restored to possession.
102. Rules not applicable to transferee *lite pendente*.
103. Orders conclusive subject to regular suit.

## ORDER XXII.

## DEATH, MARRIAGE AND INSOLVENCY OF PARTIES.

1. No abatement by party's death, if right to sue survives.
2. Procedure where one of several plaintiffs or defendants dies and right to sue survives.
3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.
4. Procedure in case of death of one of several defendants or of sole defendant.
5. Determination of question as to legal representative.
6. No abatement by reason of death after hearing.
7. Suit not abated by marriage of female party.
8. When plaintiff's insolvency bars suit. Procedure where assignee fails to continue suit or give security.
9. Effect of abatement or dismissal.
10. Procedure in case of assignment before final order in suit.
11. Application of Order to appeals.
12. Application of Order to proceedings.

## ORDER XXIII.

## WITHDRAWAL AND ADJUSTMENT OF SUITS.

1. Withdrawal of suit or abandonment of part of claim.
2. Limitation law not affected by first suit.
3. Compromise of suit.
4. Proceedings in execution of decrees not affected.

## ORDER XXIV.

## PAYMENT INTO COURT.

1. Deposit by defendant of amount in satisfaction of claim.
2. Notice of deposit.
3. Interest on deposit not allowed to plaintiff after notice.
4. Procedure where plaintiff accepts deposit as satisfaction in part. Procedure where he accepts it as satisfaction in full.

## ORDER XXV.

## SECURITY FOR COSTS.

1. When security for costs may be required from plaintiff.



## RULES.

Residence out of British India.

2. Effect of failure to furnish security.

## ORDER XXVI.

## COMMISSIONS.

*Commissions to examine witnesses.*

1. Cases in which Court may issue commission to examine witness.
2. Order for commission.
3. Where witness resides within Court's jurisdiction.
4. Persons for whose examination commission may issue.
5. Commission or request to examine witness not within British India.
6. Court to examine witness pursuant to commission.
7. Return of commission with depositions of witnesses.
8. When depositions may be read in evidence.

## COMMISSIONS FOR LOCAL INVESTIGATIONS.

9. Commissions to make local investigations.
10. Procedure of Commissioner.  
Report and depositions to be evidence in suit.

Commissioner may be examined in person

11. Commission to examine or adjust accounts
12. Court to give Commissioner necessary instructions.

Proceedings and report to be evidence.

Court may direct further inquiry.

## COMMISSIONS TO MAKE PARTITIONS.

13. Commission to make partition of immovable property.

14. Procedure of Commissioner.

## GENERAL PROVISIONS.

15. Expenses of commission to be paid into Court.
16. Powers of Commissioners.
17. Attendance and examination of witnesses before Commissioner.
18. Parties to appear before Commissioner.

## COMMISSIONS ISSUED AT THE INSTANCE OF FOREIGN TRIBUNALS.

19. Cases in which High Court may issue commission to examine witnesses.
20. Application for issue of commission.
21. To whom commission may be issued.
22. Issue, execution and return of commissions and transmission of evidence to foreign Court.

## ORDER XXVII.

## SUITS BY OR AGAINST THE CROWN OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY.

1. Suits by or against the Crown.
2. Persons authorized to act for the Crown.
3. Plaints in suits by or against the Crown.
4. Agent for the Crown to receive process.
5. Fixing of day for appearance on behalf of Crown.
6. Attendance of person able to answer questions relating to suit against Crown.
7. Extension of the time to enable public officer to make reference to Crown.
8. Procedure in suits against public officer.
- 8-A. No security to be required from Crown or a public officer in certain cases.
- 8-B. Definitions of "Crown" and "Crown pleader."

## ORDER XXVIII.

## SUITS BY OR AGAINST MILITARY OR NAVAL MEN OR AIRMEN.

1. Officers, soldiers, sailors & airmen who

## RULES.

cannot obtain leave may authorize any person to sue or defend for them.

2. Person so authorized may act personally or appoint pleader.

3. Service on person so authorized, or on his pleader, to be good service.

## ORDER XXIX.

## SUITS BY OR AGAINST CORPORATIONS.

1. Subscription and verification of pleading.
2. Service on corporation.
3. Power to require personal attendance of officer of corporation.

## ORDER XXX.

## SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN.

1. Suing of partners in name of firm.
2. Disclosure of partners' names.
3. Service.
4. Right of suit on death of partner.
5. Notice in what capacity served.
6. Appearance of partners.
7. No appearance except by partners.
8. Appearance under protest.
9. Suits between co-partners.
10. Suit against person carrying on business in name other than his own.

## ORDER XXXI.

## SUITS BY OR AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS.

1. Representation of beneficiaries in suits concerning property vested in trustees, etc.
2. Joinder of trustees, executors and administrators.
3. Husband of married executrix not to join.

## ORDER XXXII.

## SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND.

1. Minor to sue by next friend.
2. Where suit is instituted without next friend, plaint to be taken off the file.
3. Guardian for the suit to be appointed by Court for minor defendant.
4. Who may act as next friend or be appointed guardian for the suit.
5. Representation of minor by next friend or guardian for the suit.
6. Receipt by next friend or guardian for the suit of property under decree for minor.
7. Agreement or compromise by next friend or guardian for the suit.
8. Retirement of next friend.
9. Removal of next friend.
10. Stay of proceedings on removal, etc. of next friend.
11. Retirement, removal or death of guardian for the suit.
12. Course to be followed by minor plaintiff or applicant on attaining majority.
13. Where minor co-plaintiff attaining majority desire to repudiate suit.
14. Unreasonable or improper suit.
15. Application of rules to persons of unsound mind.
16. Saving for Princes and Chiefs.

## ORDER XXXIII.

## SUITS BY PAUPERS.

1. Suits may be instituted *in forma pauperis*.
2. Contents of application.
3. Presentation of application.



## RULES.

4. Examination of applicant.  
If presented by agent, Court may order applicant to be examined by commission.
5. Rejection of application.
6. Notice of day for receiving evidence of applicant's pauperism.
7. Procedure at hearing.
8. Procedure if application admitted.
9. Dispaupering.
10. Costs where pauper succeeds.
11. Procedure where pauper fails.
12. Provincial Government may apply for payment of court-fees.
13. Provincial Government to be deemed a party.
14. Copy of decree to be sent to Collector.
15. Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.
16. Costs.

## ORDER XXXIV.

## SUITS RELATING TO MORTGAGES OF IMMOVABLE PROPERTY.

1. Parties to suits for foreclosure, sale and redemption.
2. Preliminary decree in foreclosure suit.
3. Final decree in foreclosure suit.
4. Preliminary decree in suit for sale.  
Power to decree sale in foreclosure suit.
5. Final decree in suit for sale.
6. Recovery of balance due on mortgage in suit for sale.
7. Preliminary decree in redemption suit.
8. Final decree in redemption suit.
- 8-A. Recovery of balance due on mortgage in suit for redemption.
9. Decree where nothing is found due or where mortgagee has been overpaid.
10. Costs of mortgagee subsequent to decree.
11. Payment of interest.
12. Sale of property subject to prior mortgage.
13. Application of proceeds.
14. Suit for sale necessary for bringing mortgaged property to sale.
15. Mortgages by the deposit of title deeds and charges.

## ORDER XXXV.

## INTERPLEADER.

1. Plaintiff in interpleader-suits.
2. Payment of thing claimed into Court.
3. Procedure where defendant is suing plaintiff.
4. Procedure at first hearing.
5. Agents and tenants may not institute interpleader-suits.
6. Charge for plaintiff's costs.

## ORDER XXXVI.

## SPECIAL CASE.

1. Power to state case for Court's opinion.
2. Where value of subject-matter must be stated.
3. Agreement to be filed and registered as suit.
4. Parties to be subject to Court's jurisdiction.
5. Hearing and disposal of case.

## ORDER XXXVII.

## SUMMARY PROCEDURE ON NEGOTIABLE INSTRUMENTS.

1. Application of Order.
2. Institution of summary suits upon bills of exchange, etc.

## RULES.

3. Defendant showing defence on merits to have leave to appear.
4. Power to set aside decree.
5. Power to order bill, etc., to be deposited with officer of Court.
6. Recovery of cost of noting non-acceptance of dishonoured bill or note.
7. Procedure in suits.

## ORDER XXXVIII.

ARREST AND ATTACHMENT BEFORE JUDGMENT.  
*Arrest before judgment.*

1. Where defendant may be called upon to furnish security for appearance.
2. Security.
3. Procedure on application by surety to be discharged.
4. Procedure where defendant fails to furnish security or find fresh security.
5. Where defendant may be called upon to furnish security for production of property.
6. Attachment where cause not shown or security not furnished.
7. Mode of making attachment.
8. Investigation of claim to property attached before judgment.
9. Removal of attachment when security furnished or suit dismissed.
10. Attachment before judgment not to affect rights of strangers, nor bar decree-holder from applying for sale.
11. Property attached before judgment not to be re-attached in execution of decree.
12. Agricultural produce not attachable before judgment.
13. Small Cause Court not to attach immovable property.

## ORDER XXXIX.

## TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

*Temporary Injunctions.*

1. Cases in which temporary injunctions may be granted.
2. Injunction to restrain repetition or continuance of breach.
3. Before granting injunction, Court to direct notice to opposite party.
4. Order for injunction may be discharged, varied or set aside.
5. Injunction to corporation binding on its officers.

*Interlocutory Orders.*

6. Power to order interim sale.
7. Detention, preservation, inspection, etc., of subject-matter of suit.
8. Application for such orders to be after notice.
9. When party may be put in immediate possession of land the subject-matter of suit.
10. Deposit of money, etc., in Court.

## ORDER XL.

## APPOINTMENT OF RECEIVERS.

1. Appointment of receivers.
2. Remuneration.
3. Duties.
4. Enforcement of receiver's duties.
5. When Collector may be appointed receiver.

## ORDER XLI.

## APPEALS FROM ORIGINAL DECREES.

1. Form of appeal.
- What to accompany memorandum.



## RULES.

Contents of memorandum.

2. Grounds which may be taken in appeal.
3. Rejection or amendment of memorandum.
4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all.

STAY OF PROCEEDINGS AND OF EXECUTION.

5. Stay by Appellate Court.  
Stay by Court which passed the decree.
6. Security in case of order for execution of decree appealed from.
7. Omitted.
8. Exercise of powers in appeal from order made in execution of decree.

PROCEDURE ON ADMISSION OF APPEAL.

9. Registry of memorandum of appeal.  
Register of appeals.
10. Appellate Court may require appellant to furnish security for costs.

Where appellant resides out of British India.

11. Power to dismiss appeal without sending notice to lower Court.
12. Day for hearing appeal.
13. Appellate Court to give notice to Court whose decree appealed from.

Transmission of papers to Appellate Court.

Copies of exhibits in Court whose decree appealed from.

14. Publication and service of notice of day for hearing appeal.

Appellate Court may itself cause notice to be served.

15. Contents of notice.

PROCEDURE ON HEARING.

16. Right to begin.
17. Dismissal of appeal for appellant's default.  
Hearing appeal *ex parte*.
18. Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.
19. Re-admission of appeal dismissed for default.
20. Power to adjourn hearing, and direct persons appearing interested to be made respondents.
21. Rehearing on application of respondent against whom *ex parte* decree made.
22. Upon hearing, respondent may object to decree as if he had preferred separate appeal.  
Form of objection and provisions applicable thereto.
23. Remand of case by Appellate Court.
24. Where evidence on record sufficient, Appellate Court may determine case finally.
25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.
26. Findings and evidence to be put on record.  
Objections to finding.  
Determination of appeal.

C. C. M.—95

## RULES.

27. Production of additional evidence in Appellate Court.
28. Mode of taking additional evidence.
29. Points to be defined and recorded.

JUDGMENT IN APPEAL.

30. Judgment when and where pronounced.
31. Contents, date and signature of judgment.
32. What judgment may direct.
33. Power of Court of Appeal.
34. Dissent to be recorded.

DECREE IN APPEAL.

35. Date and contents of decree.  
Judge dissenting from judgment need not sign decree.
36. Copies of judgment and decree to be furnished to parties.
37. Certified copy of decree to be sent to Court whose decree appealed from.

## ORDER XLII.

APPEALS FROM APPELLATE DECREES.

1. Procedure.

## ORDER XLIII.

APPEALS FROM ORDERS.

1. Appeals from orders.
2. Procedure.

## ORDER XLIV.

PAUPER APPEALS.

1. Who may appeal as pauper.  
Procedure on application for admission of appeal.
2. Inquiry into pauperism.

## ORDER XLV.

APPEALS TO THE KING IN COUNCIL.

1. "Decree" defined.
2. Application to Court whose decree complained of.
3. Certificate as to value or fitness.
4. Consolidation of suits.
5. Remission of dispute to Court of first instance.
6. Effect of refusal of certificate.
7. Security and deposit required on grant of certificate.
8. Admission of appeal and procedure thereon.
9. Revocation of acceptance of security.  
9-A. Power to dispense with notices in case of deceased parties.
10. Power to order further security or payment.
11. Effect of failure to comply with order.
12. Refund of balance deposit.
13. Powers of Court pending appeal.
14. Increase of security found inadequate.
15. Procedure to enforce orders of King in Council.



## RULES.

16. Appeal from order relating to execution.
17. Appeals to Federal Court.

## ORDER XLVI.

## REFERENCE.

1. Reference of question to High Court.
2. Court may pass decree contingent upon decision of High Court.
3. Judgment of High Court to be transmitted, and case disposed of accordingly.
4. Costs of reference to High Court.
5. Power to alter, etc., decree of Court making reference.
6. Power to refer to High Court questions as to jurisdiction in small causes.
7. Power to District Court to submit for revision proceedings had under mistake as to jurisdiction in small causes.

## ORDER XLVII.

## REVIEW.

1. Application of review of judgment.
2. To whom applications for review may be made.
3. Form of applications for review.
4. Application where rejected.  
Application where granted.
5. Application for review in Court consisting of two or more Judges.
6. Application where rejected.
7. Order of rejection not appealable.  
Objections to order granting application.
8. Registry of application granted, and order for rehearing.
9. Bar of certain applications.

## RULES.

## ORDER XLVIII.

## MISCELLANEOUS.

1. Process to be served at expense of party issuing.  
Costs of service.
2. Orders and notices how served.
3. Use of forms in appendices.

## ORDER XLIX.

## CHARTERED HIGH COURTS.

1. Who may serve processes of High Courts.
2. Saving in respect of Chartered High Courts.
3. Application of rules.

## ORDER L.

## PROVINCIAL SMALL CAUSE COURTS.

1. Provincial Small Cause Courts.

## ORDER LI.

## PRESIDENCY SMALL CAUSE COURTS.

1. Presidency Small Cause Courts.

## APPENDICES TO THE FIRST SCHEDULE.

## Forms.

## A.—Pleadings.

1. Titles of suits.
2. Description of parties in particular cases.
3. Plaints.
4. Written statements.

## B.—Process.

## C.—Discovery, Inspection and Admission.

## D.—Decrees.

## E.—Execution.

## F.—Supplemental Proceedings.

## G.—Appeal, Reference and Review.

## H.—Miscellaneous.

## THE FIRST SCHEDULE.

## ORDER I.

## PARTIES TO SUITS.

1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or

Who may be joined as plaintiffs. transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

## NOTES.

SCH. I: RULES, CONSTRUCTION OF.—The C.P. Code must be regarded a whole and it came into being as a whole as its first section will show. The scheme was to make the body of the Code confer jurisdiction and the schedules to detail the mode in which that jurisdiction is to be exercised.

Therefore, if there is any conflict between the body and the schedules the former must prevail. I.L.R. (1939) Nag. 250=1939 N.L.J. 228=A.I.R. 1939 Nag. 186 (F.B.).

O. 1, R. 1: SCOPE OF.—The rule is only an enabling one allowing a number of plaintiffs, with the same right to relief, to join



## NOTES.

in one suit, instead of bringing separate suits. 24 C. 385 (388). *See also* 38 M. 406=28 M.L.J. 535 (P.C.). The words "in respect of the same transaction" are wider than the words "in respect of the same cause of action". 25 M. 745. Suit by one member for recovery of family debt, other members being impleaded as defendants not bad for non-joinder. 99 I.C. 565=1927 L. 129 (1); 1927 M. 984=106 I.C. 140.

APPLICABILITY.—O. 1, R. 1 applies not only to joinder of plaintiffs, but also to joinder of causes of action. So under that rule several causes of action can be joined in one suit if some common question of law or fact would arise. 41 C.W.N. 27=1936 C. 650. Rule applies to appeals also. 75 I.C. 950=1923 L. 638.

PERSONS.—A ship is a person. 12 B. 241.

EFFECT OF.—The words "in the alternative" apply to cases in which there is doubt as to who is the person entitled to sue. 6 M. 243. *See also* 18 A. 433.

WHO MAY BE JOINED AS PLAINTIFFS.—Where the interests of two plaintiffs are identical and not antagonistic, they can sue jointly. 16 B. 119. Plaintiffs who have separate interests in subject-matter of suit may join. 4 A. 261 (F.B.); 1929 A. 790. All persons having a common cause of action are entitled to join as plaintiffs. 15 B. 309. A plaintiff is entitled to join as co-defendants, persons against whom he has different causes of action in cases where common questions of law and fact are involved. 55 C. 164. Suits by different sets of plaintiffs claiming in the alternative is maintainable, provided there is a common question of law or fact. 10 P.R. 1916=32 I.C. 526; 43 M.L.J. 277. Several persons having distinct shares in certain properties can join in a suit against a person in possession under a deed of gift sought to be set aside. 4 A. 261 (F.B.). *See also* 33 C. 367. Several persons could not file a joint suit for damages for their wrongful detention in jail after the expiry of their term of imprisonment. 11 C. 524. Suit by several plaintiffs—Each plaintiff having separate cause of action in which others are not interested—Misjoinder of causes of action arises. 1926 M.W.N. 723=1926 M. 1140=98 I.C. 463. Parties and causes of action—Misjoinder—Suit by temple servants to set aside order of dismissal by temple trustee if and when bad for misjoinder. 1926 M. 57=91 I.C. 525. Joinder of different causes of action permitted by change of phraseology if other conditions are satisfied. Co-plaintiffs—All defendants not interested in relief—Joinder of different causes of action—Effect of. 17 L.W. 25=69 I.C. 402=1923 M. 331 (2). Same person can be plaintiff and

defendant in two distinct capacities in the same suit. 93 I.C. 214=1926 S. 4. Where a defendant in a suit claims relief as against a co-defendant, in respect of the same transaction as that with reference to which the suit is brought, he could be added as a co-plaintiff, for, if he brought a separate suit a common question of law and fact would arise. 178 I.C. 286=A.I.R. 1939 Pat. 157.

CO-MORTGAGEES.—Suit for sale by one—Others refusing to join to be added as defendants—Form of decree to be passed. 47 C. 175=46 I.A. 272=37 M.L.J. 483 (P.C.).

CO-SHARERS.—Co-sharer landlords can sue tenants collectively even if they collect rent separately and the rent refers to different periods. 10 I.C. 891=14 C.L.J. 373. A co-owner of immovable property can sue for injunction against intending trespassers without joining the other co-owners as parties. 35 I.C. 147=3 L.W. 542. Where auction-purchaser of a residuary share of an estate sued the co-sharers for joint possession in separate suits, no secret arrangement among the co-sharers regarding the mode of enjoyment of the property will bind the purchaser and the suits will not be bad for splitting up of claim. 44 C.L.J. 293=99 I.C. 177=1927 C. 237. One co-sharer cannot sue for enhancement of his share of rent. 4 C. 96 (F.B.). *See also* 20 C. 107; 19 C. 610. All co-sharers are necessary parties in a suit for profits for *jerait* land held by defendants in addition to their shares. 1 P.L.J. 573=35 I.C. 868 (F.B.). All co-owners must join in a suit to recover their property. 10 B. 32. One of several joint proprietors cannot sue in ejectment. 4 C. 961. *See also* 1936 R. D. 85. One of several joint lessors cannot sue for his share of rent, payable under a lease to all the lessors. 5 A. 40. *See also* 4 C. 89.

CO-TRUSTEES.—Ordinarily all trustees should be co-plaintiffs, and only such of them should be made defendants as are unwilling to join as plaintiffs, or have done some act precluding them from being plaintiffs. 1932 C. 27=35 C.W.N. 478 (5 C. L.J. 527, Foll.; 48 I.A. 302, Fef.) *See also* 1 P.L.J. 437=24 I.C. 806; 30 M.L.J. 619=33 I.C. 52.

CO-PROMISEES.—Suit by one of them—Others joined as co-defendants—Suit not bad when the other promisees have raised pleas contrary to plaintiff. 133 I.C. 871=1931 L. 445.

EJECTMENT.—A plaintiff who has made the co-sharer landlords *pro forma* defendants in a suit for ejectment is entitled to get a decree for recovery of possession of the property in suit to the extent of his share jointly with the *pro forma* defendants in the suit. 58 C.L.J. 133. *See also* 1936 R.D. 85. On a suit for ejectment of a trespasser, all the joint owners are not



## NOTES.

necessary parties. 1933 L. 999=147 I.C. 505.

**JOINT TORT-FEASORS.**—Frame of suit against—Single suit by several injured persons, if proper. See 138 I.C. 77=1932 A. L.J. 497=1932 A. 401.

**MAINTENANCE SUIT.**—Where same decree ordered a person to pay maintenance to mother as well as widow of his deceased nephew, *held*, the two women could jointly sue for arrears of maintenance and it was not necessary that they should file separate suits. 1933 P. 644.

**SUIT BY OR AGAINST REGISTERED TRADE UNION.**—Proper parties in such suit. See 1933 L. 203=14 L. 330=34 P.L.R. 203.

**OTHER ILLUSTRATIVE CASES.**—Benamidar for another in a transaction need not be joined in a suit in respect of such transaction. 10 I.C. 779=4 Bur.L.T. 74. A trustee of temple properties cannot sue singly for rent without making other co-trustees parties to the suit. 1 P.L.J. 437=24 I.C. 806; 35 C.W.N. 478. But see 30 M.L.J. 619=33 I.C. 52, *contra*. Manager of a joint family can sue on contract entered into by him in his own name without impleading the other members as parties to the suit. 35 M. 685=21 M.L.J. 508; 71 P.R. 1911=13 I.C. 305; 23 Bom. L.R. 1135=46 B. 358. Mortgage suit by manager on behalf of all members is maintainable. 39 I.C. 427; 38 I.A. 45=33 A. 272 (P.C.); 35 M. 685. A *karnavan* of a Malabar *tarwad* can alone sue for the *tarwad* property. 15 M. 19.

**WHO ARE NECESSARY PARTIES.**—All members of a *tarwad* are necessary parties to suit by one member against the *karnavan* for an increased rate of maintenance. 7 M. 428. Receiver is a necessary party to appeal by a claimant whose claim with regard to property sold by Receiver as belonging to an insolvent has been dismissed. 94 I.C. 660 (1)=1926 L. 696. Transferee of property sold in execution is necessary party to set aside the sale if the proceedings have been commenced after transfer. 15 I.C. 176=39 C. 881. Some of the executors under a will cannot maintain an action without impleading the other executors. 44 M. L.J. 249. In a suit for accounts of the partnership on death of a partner, all representatives of the deceased partner should join. 33 C. 564. All members of a firm are proper parties to a suit on a pro-note in favour of the firm when the obligation on it was contracted. 15 I.C. 380=11 M.L.T. 246. In an appeal against an order in a partition suit that the property be sold as it was incapable of partition all shares are necessary parties. 100 I.C. 17 (2)=1927 L. 189. See also 91 I.C. 567=1926 C. 741.

**WHO ARE NOT NECESSARY PARTIES.**—A person remotely or indirectly interested is

not a necessary party. 17 C.W.N. 835=16 C.L.J. 385. See also 59 I.C. 292. In respect of a private water-course, where no relief is asked against Government, the latter is not a necessary party. 50 I.C. 299=177 P.W.R. 1918. In a partition suit, persons who have no interest whatsoever in the suit properties need not be made parties. 39 I.C. 160=5 L.W. 207. But all interested parties should be joined either as plaintiffs or as defendants. 23 O.C. 62=56 I.C. 304. A dormant partner is not a necessary party in suit on a contract either with the firm or with one of its members. 31 I.C. 913 (2); 38 I.A. 45=21 M.L.J. 378 (P.C.); 33 A. 272. In an appeal by a secured creditor, or an insolvent debtor, where Receiver is a party, it is not necessary to join all creditors. 58 I.C. 10=24 C.W.N. 401. When defendant's tenants in a rent suit plead title of a third person, the third person is not a necessary party to the proceedings. 32 I.C. 553. See also 146 I.C. 15. Suit by one lessee against another lessee for possession is not bad for not joining the landlord as party. 94 I.C. 3=1926 O. 422. In suit under section 9, Specific Relief Act, the owner who is not in physical possession is not a necessary party. 5 B. 208. It is doubtful whether alienees or trespassers on trust property can be joined as parties to a suit under section 92. 38 M. 1064=27 M.L.J. 266. A Hindu widow and her two daughters can sue in one suit for maintenance and for the marriage expenses of the daughters. 6 A. 632. Strangers to the contract claiming adverse possession are not proper parties to a suit for specific performance of the contract. 35 I.C. 871=4 L.W. 397. See also 5 B. 177; 10 C. 1061. Suit under section 53, Transfer of Property Act, for a declaration that a conveyance is voidable must be brought by or on behalf of all the creditors. 34 C. 999. One of two partners cannot sue in his own name as agent of the firm for breach of contract. 27 M. 80. A person has no right to sue for damages for *slander* of his sister. 1 M. 383. Neither can a father sue for *defamation* of his daughter. 11 A. 104. A plaint will not be bad as contravening this section, because it prays for a decree in favour of all the plaintiffs on certain allegations, or in the alternative in favour of one of them. 28 M. 500. See also 29 M. 50; 26 M. 647. A suit is not liable to be dismissed because the plaintiff claims in the alternative over the same plot of ground rights—(1) of ownership, and (2) of easement. 34 C. 51 (F.B.). Where a plaintiff joins as defendant a person who ought to have been joined as plaintiff, the suit should not be dismissed merely because plaintiff fails to show that the person so joined refused to appear with him as plaintiff. 24 A. 226. See also 29 M. 302; 26 M. 649 (F.B.). The Political Agent and



2. Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient.

Power of Court to order separate trials.

3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise.

Who may be joined as defendants.

#### NOTES.

Superintendent of a State cannot sue for the recovery of property belonging to the State. 2 A. 690. *Secretary of State* is not necessary party to a suit for setting aside sale under Punjab Excise Act, section 60. 96 I.C. 927 (1) [25 C. 833 (P.C.), Foll.].

O. 1, R. 2.—See 18 I.C. 181; 21 I.C. 438.

O. 1, R. 3: SCOPE OF.—1928 B. 91=30 Bom.L.R. 162. This rule applies to joinder of causes of action as well as joinder of parties. 33 Bom.L.R. 1291 following (1921) 2 K.B. 1 and 55 C. 164. See also 134 I.C. 689=33 Bom.L.R. 624=1931 B. 330; 45 C. 111=21 C.W.N. 794; 41 C. W.N. 27=1936 C. 650. Before a plaintiff can join several defendants in the same suit, both the conditions laid down in the rule must be fulfilled. Under O. 1, R. 3, a plaintiff can in the same suit combine distinct causes of action against several defendants provided that the relief claimed arises from a series of acts or transactions and that there is a common question of law or fact arising in the suit. 144 I.C. 202=1933 M. 622. The plaintiff in order to avail himself of the provisions of this rule, has to satisfy two conditions: (1) that the right to relief alleged to exist in him arises out of the same act or same transaction, and (2) that the suit is of a character that if separate suits were instituted against the defendant any common question of law or fact would arise. Both these conditions must co-exist, the two conditions not being in the alternative. 1930 A.L.J. 99=123 I.C. 324; 1934 S. 176; 1933 P. 653. See also 151 I.C. 257=60 C.L.J. 199=1934 C. 405. This rule must be read with Rr. 9 and 10 (2). 27 C. 493, 497. The general principle regarding the joinder of defendants would seem to be that, there must be a cause of action in which all the defendants are more or less interested, although the relief asked against them may vary; and that separate causes of action against separate defendants cannot be joined in one action. 31 B. 516; 49 M. 836. (See also Rr. 5 and 7.) R. 3 relates to a joinder of parties and it assumes the existence of a suit in a proper forum, the Court having jurisdiction to try the suit. 49 C. 895=27

C.W.N. 82. This rule and R. 3 of O. 11 must be read together. 5 A. 163 (170) (F.B.); 11 A. 33. See also 1 C.W.N. 300; 29 C. 257; 8 C. 238 (245); 25 B. 606; 27 B. 41; 12 I.C. 357. Requirements of the rule. 77 I.C. 1028.

APPLICABILITY OF R. 3, CONDITIONS FOR.—See 49 M. 836=51 M.L.J. 194 (F.B.); 1938 Rang.L.R. 397=1938 Rang. 420. Different mortgages on same property to same person by different mortgagors—Single suit on both joining both mortgagors. See 1937 N. 99.

WHO ARE PROPER PARTIES.—If a person has a right to defend the suit, it is the same thing as saying that he is a necessary party. 146 I.C. 72=1933 M. 664=65 M.L.J. 290. Creditors are proper parties to a suit by sons against a Hindu father for partition and for declaration that the debts contracted by father were not valid and binding on the family. 45 M. 194=42 M.L.J. 97. Where the sons of a Hindu father sued him and his creditors and alienees for a declaration that the father's debts are immoral debts and hence not binding on them, the suit is not bad for misjoinder of defendants and causes of action, for the several alienations made by the father constitute 'series of acts or transactions' and they are the same series of acts or transactions because, as alleged by the plaintiffs, they were all vitiated by one circumstance, namely, that they were incurred for immoral purposes. This feature put all debts in one category, and the successive borrowings formed one series of acts or transactions. O. 1, R. 3 contemplates not only joinder of defendants but also causes of action. O. 1, R. 5 is to be read with R. 3 and hence it is not necessary for every defendant to be interested in all the reliefs in suit. 1938 N.L.J. 210=A.I.R. 1938 Nag. 461. A single suit against all tenants, where every one of them removes crops on the land and when conspiracy is neither alleged nor proved, is bad for misjoinder of causes of action. 24 I.C. 813=4 L.W. 399. Government is a necessary party to a suit by mirasdars for declaration that the right of fishery leased out by Government to *grammattars* belonged to them. 38 I.C. 100. So also to a suit by a person claiming certain lands which had been resumed by Government and settled



## NOTES.

with another party. 11 Bom.L.R. 118 (F.B.). See also 3 M.H.C.R. 134; 15 M. 350. Only the person who prosecutes the plaintiff is liable in an action for malicious prosecution. 12 M.L.J. 389. A suit to obtain a declaration that the plaintiffs possess certain rights in the *Shamlat* can be maintained only if all the proprietors have been impleaded as parties. 151 I.C. 225=35 P.L.R. 420=1934 L. 366. In suit for contribution, all the parties liable for contribution are proper parties. 15 M.L.J. 24. In administration suit a person who applies to be made a party defendant as heir of the deceased may be added as a party to avoid multiplicity of suits. 5 R. 159=103 I.C. 22. Where a joint family business is adjudged insolvent and properties vest in the Official Assignee and a widow who has a right of maintenance sues the Official Assignee to enforce her right in the property in his hands by challenging the necessity for incurring the debts, the creditors are also necessary parties. And such a suit lies only with the permission of the Insolvency Court. 1933 L. 901. In a suit upon a lost cheque which has been endorsed over to a third person, the drawer of the cheque is a necessary party. 2 A. 754. The execution of a promissory note and the subsequent guarantee of the debt on that promissory note are a series of transactions within the meaning of O. 1, R. 3. Hence in a suit on a promissory note the subsequent surety can be joined with the co-executants of the promissory note. 171 I.C. 527=A.I.R. 1937 Rang. 197. All members of a *tarwad* are necessary parties to a suit by one member against the *karnavan* for enhanced maintenance. 7 M. 428. Suit on mortgage—Co-heir of mortgagee admitting payment and claiming independent title to give valid discharge—Joinder as defendant not improper—Questions of title may be gone into in a mortgage suit for giving full relief. 26 N. L.R. 359. In suit for settlement of accounts, the plaintiff's plea was that the defendant was his agent and that a sum of money was due from him on accounts and the defendant's plea was that the accounts had been settled with the plaintiff's brothers who were partners of the firm with the plaintiff. The plaintiff applied to implead the brothers but this application was rejected by the lower Court as being multifarious. *Held*, that the whole question between the parties belonged clearly to the same set of transactions and the plaintiff had a right to join the brothers as parties if he wished to do so, and that there was no multifariousness. 1933 A. 957. See also 1933 A. 147.

WHO ARE NOT NECESSARY OR PROPER PARTIES.

—The allegations in the plaint alone should be looked into in order to come to a finding whether a certain defendant is or is not a

necessary party. 47 L.W. 760=A.I.R. 1938 Mad. 329. To a suit between rival claimants to an occupancy holding, the landlord is not a necessary party. 70 I.C. 958=1923 A. 11 (2). See also 104 I.C. 845. In a suit by a tenant of *Ghatwali* land against his landlord, the Secretary of State is not a necessary party. 35 I.C. 788. In suit for a dissolution of partnership sub-partners are not necessary parties and any provision in the decree concerning them is unenforceable. 4 L.W. 10=34 I.C. 543. In suit between landlord and tenant for rent, a third person, who once claimed to be the rightful owner, need not be made a party. 50 I.C. 908. In suit for the administration of an estate, debtors of the estate are not necessary parties. 24 L.W. 425=1926 M. 1110. The receiver of the property of a party to litigation is not a necessary party if no attempt is made thereby to interfere with the right of the receiver to the property entrusted to his care, and especially so when the property covered by the suit is not in the possession of the receiver at the time of the suit. 38 C.W.N. 996. In a suit to establish *easement* owners of servient tenement not resisting plaintiff's right are not necessary parties. 96 I.C. 665=1926 C. 1201. But every person who resists or denies plaintiff's right is a necessary party. 1936 C. 534. There is no justification for the view that all persons interested, no matter what the nature or character of their respective interests may be, are necessary parties. The general rule is that all owners of the servient tenement as regards which there is a cause of action and over which the easement is claimed should be made parties. For instance, if a co-owner is left out, the decree would be infructuous. The same is the case where persons having a possessory interest are not impleaded. 60 C. 1072=1933 C. 882. See also 163 I.C. 630=1936 R. 241. The vendor is not a necessary party to a suit for pre-emption. 26 A. 549. To a suit to enforce a mortgage persons claiming under a title adverse or paramount to the mortgagor and mortgagee are not proper parties. 33 C. 425. A question of paramount title ought not to be agitated in a mortgage suit, since it introduces a different cause of action, in which only some of the defendants are likely to be substantially interested. 59 C. 548=138 I.C. 671=1932 C. 512. In a suit by the vendee of mortgagee rights on the mortgage, to which both the mortgagor and the original mortgagee are made parties, common questions of fact and law do arise and the suit is not barred by the provisions of O. 1, R. 3. In such a suit, the original mortgagee may be impleaded and the plaintiff is entitled to ask for a relief against him, if he failed to obtain a decree against the mortgaged property. Such a suit could not be said to be either premature or bad for multifariousness. 1940 O. W.N. 807. A decree for damages for



Court may give judgment for or against one or more of joint parties.

4. Judgment may be given without any amendment—

(a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to ;

(b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

Defendant need not be interested in all the relief claimed.

5. It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.

6. The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable

Joinder of parties liable on same contract.

on any one contract, including parties to bills of exchange, hundies and promissory notes.

#### NOTES.

breach of contract against one defendant and a decree for damages in tort against another defendant in respect of damages arising out of the same transaction can be passed in the same action. Defendants against whom damage is claimed on these two causes of action can be joined in the same suit. O. 1, R. 3 covers such a case and there is no misjoinder of defendants. 1938 Rang.L.R. 303=1938 Rang. 185 (S. B.). See also 1940 P. 24. The Secretary of State is not a necessary party to set aside a sale for arrears of revenue. 9 C. 271. See also 11 P. 701. (14 C.W.N. 606; 1 I.C. 313, Foll.) But he would be a necessary party in a suit relating to *act of state*. 11 M.I.A. 517. The Registrar is not a necessary party to a suit to compel registration of a document. 5 C. 445; 8 B. 269. In a suit for a partition of joint family property mortgagees are not necessary parties. 5 C. 582. An action for slander cannot be brought jointly against several defendants. 15 Bom.L.R. 161. In a suit, under O. 21, R. 63; the different purchasers of the attached property may be joined as defendants. 13 M.L.J. 479. As to suits against a number of alienees to recover family property, see 16 A. 279; 7 M.H.C.R. 290. The drawer and acceptor of bills of exchange can be joined as co-defendants in a suit brought by the holder of such bills. 3 C. 541. A suit under section 73, sub-section (2) can be instituted against a number of decree-holders to whom assets have been wrongly distributed. 13 C. 159. A suit for declaration of title, mesne profits and possession of the property, purchased by different sets of defendants in different lots in auction sale, is bad for multifariousness. 40 A. 7=42 I.C. 856=15 A.L.J. 809. A suit by the assignee of a bond against the obligor, and in the alternative against the assignor, is not bad. 16 M.L.J. 17 (Recent Cases). A reversioner's suit for possession of properties from several alienees of a widow is not untenable for multifariousness. 36 A. 406=12 A.L.J. 509. A suit for possession on the ground of inheritance can be proceeded against a number of different alienees. 59

P.R. 1918=44 I.C. 549 (33 B. 298; 29 C. 871, Foll.). A claim to direct a trustee to render accounts of trust property for a certain period may be joined with a claim against the trustee and others to render accounts of trust property for another period. 9 M.L.T. 233=9 I.C. 565. (27 M. 80; 29 M. 50; 31 M. 252, Ref.) Strangers to the trust are not proper or necessary parties to a suit under section 92, for the administration or regulation of the trust. 10 R. 342=140 I.C. 317=1932 R. 132. On this rule, see also 33 Bom.L.R. 1291 (Suit for specific performance).

PRACTICE AND PROCEDURE.—The Court has the power to dismiss a suit for multifariousness but its power should generally be exercised with a liberal discretion. O. 1, R. 3 is the provision governing the question of multifariousness; it applies to joinder of cause of action as well as joinder of parties. The question whether joinder is proper or not has to be determined with reference to the facts of each case. 57 M. 1031=1934 M. 367=66 M.L.J. 451. Where plaintiff is obstructed from worshipping the village deity by some of the villagers, and he impleads only such villagers as defendants in the suit and not all the villagers, the suit is not bad for non-joinder of all the villagers and a decree can be passed against the person so impleaded; but he has to take the risk that obstructions may come from some other person who is not bound by the decree. 145 I.C. 1014=38 L.W. 333=1933 M. 726.

O. 1, R. 4.—Where trial Court found that one of the defendants and not the plaintiff was entitled to the suit money and transposed the defendants into the array of plaintiff, such a procedure was in accordance with the rule. 105 I.C. 473=1927 O. 484. Suit to recover rent—Transferee and transferor of property joining as plaintiffs—Prayer for decree in favour of transferee alone—Rent prior to date of transfer belongs to transferor but cannot be decreed in his favour without a prayer to that effect—Plaint can be amended. 30 Bom.L.R. 1588=1929 B. 51.

O. 1, R. 5.—O. 1, R. 5 is to be read with R. 3. 1938 N.L.J. 210=1938 Nag. 461.

O. 1, R. 6.—The drawer and acceptor of bills of exchange can be joined as co-defen-



7. Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

When plaintiff in doubt from whom redress is to be sought.

8. (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

One person may sue or defend on behalf of all in same interest.

#### NOTES.

dants in a suit brought by holder of such bills. 3 C. 541. *See also* 3 B. 182. The drawer is a necessary party to a case based on a hundi. 25 I.C. 881=243 P.L.R. 1914. It is not incumbent on a person dealing with partners to make them all defendants in suit for recovery of money due by the firm. 21 M. 256. Where several persons are jointly and severally liable for a single liability, all of them are not necessary parties to a suit against some of them only and they may not be added even as "proper" parties when the suit can be decided without them and no multiplicity of suits would arise. 1934 Pesh. 94.

**O. 1, R. 8: SCOPE OF RULE.**—The principle of a representative suit is to prevent a defendant from being vexed and molested by other similar suits by other persons of a particular body. Personal service cannot, obviously, be made, on non-existing persons and it is only when such existing persons are numerous that there may be another form of service such as public advertisement. Hence O. 1, R. 8 deals with persons in existence at the time the suit is brought and is to prevent an actual existing danger, namely the bringing of suits by such persons and not merely a possible future danger which may never mature, namely, the coming into existence at some unknown period of persons who become creditors of the defendant in that suit. 15 Luck. 503=1940 O.W.N. 285=A.I.R. 1940 Oudh 200. The rule is merely an enabling rule and does not prevent a representative suit being brought in any other manner that the law permits. 94 I.C. 47=28 Bom. L.R. 309=1926 B. 179. *See also* 60 I.A. 278=56 M. 657=65 M.L.J. 87 (P.C.); 150 I.C. 364=58 C.L.J. 534=1934 C. 345. R. 8 does in no way debar a member of a community from maintaining a suit in his own right, although the act complained of may also be injurious to the whole community. 60 I.A. 278=56 M. 657=37 C.W.N. 853=1933 P.C. 183=65 M.L.J. 87 (P.C.). The rule requires that the Court should exer-

cise a judicial discretion in permitting some definite person or persons to sue or be sued on behalf of all the persons interested. 17 C. 906 at 910. *See also* 10 P. 568=133 I.C. 463=1931 P. 418. This rule is only intended to enable some of a class of persons (*e.g.*) shareholders of a company to sue on behalf of all of them. It is not intended to enable individuals to sue on behalf of the general public in respect of an encroachment on a public highway. 10 P. 568; 9 M. 463. O. 1, r. 8 is merely permissive and is intended to provide a remedy for cases in which it might be difficult or impossible to implead all the persons it is sought to affect. 63 I.C. 963=13 Bur.L.T. 183. O. 1, r. 8, C.P. Code, is subordinate to O. 34, r. 1. 36 I.C. 542=1 Pat.L.J. 468. The permission need not be express. 101 I.C. 738=1927 C. 608. An order for representation can be made even when a party objects so to represent. 101 I.C. 738=1927 C. 608. Even when some of the plaintiffs chosen to represent a community go over to the defendant's side and admit the defence, the representative nature of the suit is not altered. 1928 C. 741 O. 1, r. 8 if controls section 11, Expl. (6). 54 M. L.J. 8 (F.B.). O. 1, R. 8 has been enacted for the benefit of the defendants only to this extent, namely, to prevent multiplicity of suits. 27 L.W. 212.

**APPLICABILITY OF RULE.**—For principle governing representative action, *see* 27 L.W. 212; 5 P. 539=94 I.C. 433=1926 P. 321. O. 1, R. 8 cannot be applied unless the plaintiffs truly represent the persons whom they seek to represent. Where in a suit by certain persons claiming to be representatives of a large body of persons entitled to be in occupation of the property in suit, varying legal claims are put forward, some claiming to be owners, some to be permanent tenants, some to be tenants entitled to certain benefits under the City Tenants' Protection Act and others having no other title than that of being mere trespassers, the Court will not allow the various plaintiffs to continue the suit, because they cannot be said truly to



(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit.

LOC. AM.—[CALCUTTA]. O. 1, R. 8.—In sub-rule (1) of O. 1, R. 8 for the first sentence substitute the following:—

“Where there are numerous persons having the same interest in one suit, the Court may direct that one or more such persons may sue or be sued, or may defend in such suit, on behalf of, or for the benefit of, all persons so interested.”

#### NOTES.

represent the whole body of occupants, unless they reduce themselves to the level of those among the occupants who have the weakest case to put forward, i.e., unless the plaintiffs describe themselves as trespassers and nothing else, the Court will not be justified in granting permission to them under O. 1, R. 8. 49 L.W. 165=A.I.R. 1939 Mad. 428. The provisions of O. 1, R. 8, are applicable to a suit brought on behalf of a panchayat of a village. If in such a suit all the members of the panchayat are not upon the record, and those who are upon the record have not obtained permission under O. 1, R. 8 to represent the other members of the panchayat who are interested in the suit, the suit is liable to be dismissed. I.L.R. (1940) Kar. 190=A.I.R. 1940 Sind 63. O. 1, R. 8 is only an enabling section and it does not debar some of the members of a community from maintaining a suit in their own right; but it may not affect persons who are no parties to it. I.L.R. (1939) All. 754=1939 A.L.J. 821=A. I. R. 1939 All. 586. See also 44 C. W. N. 1029. Rule 8 is an enabling rule of convenience prescribing the conditions upon which persons when not made parties to a suit may still be bound by the proceedings therein. For the section to apply the absent persons must be numerous; they must have the same interest in the suit, which so far as it is representative, must be brought or prosecuted with the permission of the Court. On such permission being given it becomes the imperative duty of the Court to direct notice to be given to the absent parties in such of the ways prescribed as the Court in each case may require; while liberty is reserved to any represented person to apply to be made a party to the suit. The obtaining of the judicial permission and compliance with the succeeding orders as to notice are the conditions on which the further proceedings in the suit become binding on persons other than those actually parties thereto and their privies. 60 I.A. 278=56 M. 657=37 C.W.N. 853=1933 P.C. 183=65 M.L.J. 87 (P.C.); 44 M.L.J. 116; 151 I.C. 225=35 P.L.R. 420=1934 L. 366. It is a rule of convenience founded on the old Chancery practice to prevent delay, expense and multiplication of suits to establish the same right. The scope of a suit under the rule is essentially different from that of a suit to enforce a claim based on a general right, but in an individual and personal character. Plaintiffs derive their authority to represent others of the class

from the Court. 39 C.W.N. 303=157 I.C. 224=1935 C. 413. See also 17 Pat.L.T. 926=49 L.W. 664 (as to maintainability of a representative suit under this rule for damages for tort). The rule applies only to cases where many persons are jointly interested in obtaining relief, and not to cases in which an individual right has been violated. 7 A. 178 (F.B.). R. 8 is applicable even when the dispute is between two groups *inter se* of the same caste or body. The rule only requires that there should exist a common interest and a common grievance. The rule also allows representation on both the sides in the same suit. 156 I.C. 956=41 L.W. 574=1935 M. 542. The rule applies not only to concurrent interests but also to similar ones, though distinct. 15 I.C. 399=1912 M.W.N. 105. See also 98 I.C. 553=1927 A. 96. What O. 1, R. 8, contemplates is that the plaintiff or plaintiffs must have a common interest with those whom he or they claim to represent. All that is necessary is that there must be a common interest and a common grievance. 1939 M.W.N. 458=A.I.R. 1939 Mad. 751. Where numerous members of a caste seek to enforce rights as against strangers or as against certain other members of the caste, r. 8 applies. 64 I.C. 618; 156 I.C. 956=41 L.W. 574=1935 M. 542. O. 1, r. 8 does not draw a distinction between cases (1) in which the public or a large part of the public, are interested in the subject-matter of dispute and some persons sue, or sued, on behalf of this indeterminate body; and (2) cases in which the persons interested are named in the record and only some of them have been permitted to sue or defend the suit as a matter of convenience, because after an order under O. 1, r. 8 has been passed, the only effective parties to the suit or appeal are the nominees of the Court and not the other persons interested even though their names are allowed to remain on the record. I.L.R. (1940) Lah. 199=A. I. R. 1939 Lah. 572. It is well settled that where a suit is brought on behalf of or against an association or an unregistered body, no one member thereof can alone sue or be sued. The suit must be brought by or against all the members thereof. A decree passed against one of the members will not be binding upon the unregistered body unless the procedure laid down by O. 1, r. 8, has been followed. If that procedure is not followed, the result of the suit has no binding effect on those who are not on the record. An objection as to the procedure under O. 1, r. 8



## NOTES.

not having been followed is not an objection as to non-joinder, or misjoinder of parties but goes to the root of the case. The prejudice is obvious if all the members of an association are made bound by a decree although they were never either parties to the suit or properly represented by some one else. 15 Luck. 253=185 I.C. 330=A.I.R. 1940 Oudh 129. A Shamlat Committee is not a legally constituted corporation either by prescription or by any other operation of law. It is a kind of representative body of the khewatdars of a village. Before a suit in respect of the lands in the khewat could be brought all the khewatdars must join together for that purpose. The course to be followed is set out in O. 1, r. 8. 1941 A.M.L.J. 14. A representative suit on behalf of the inhabitants of a group of contiguous villages the object of which is to restrain the discharge of surplus rain water from the defendant's mouza to the plaintiffs' lands in those villages which are at a lower level, is maintainable under the provisions of O. 1, R. 8. 74 C. L.J. 95. The term "numerous parties" does not mean that the suit should be on behalf of an ascertained or ascertainable body of persons. (20 C. 307, Not. Foll.). 143 I. C. 742=1933 L. 749. There can be no hard and fast rule as to how many persons should represent the public or the rest of the class of the persons of the same interest. Three persons held to be sufficient. 145 I.C. 387=14 Pat.L.T. 361=1933 P. 302. One or two persons can sue in respect of maladministration of property belonging to the community. 94 I.C. 47=1926 B. 179. A suit for a declaration that a certain pathway was a public one, can be maintained with the permission of Court under R. 8. 69 I.C. 910=25 C. W.N. 587. See also 62 C. 692=39 C.W.N. 590=61 C. L. J. 182; 17 Pat. L. T. 842; (1938) 2 M. L. J. 148. A representative suit would lie as much in respect of a declaration as for an injunction. But the law is quite clear that the procedure pertaining to representative suits is inapplicable to action of debt to money claims or its liabilities in contract or in tort. 1938 M. W.N. 740=48 L.W. 109=A.I.R. 1938 Mad. 755=(1938) 2 M.L.J. 148. A suit for a declaration that there is no public right of way over the lands in suit belonging to the plaintiff is not bad although members of the public have not been impleaded in the way contemplated by O. 1, R. 8, when according to the plaintiff the defendants alone are interested in opposing or resisting his rights. Whatever conclusion the Court may come to in the case, the decision can be binding only as between the parties to the suit. Other members of the public not being represented will not be affected one way or other. 44 C. W.N. 1029. See also 1939 All. 586. Suit under O. 21, R. 63, by decree-holder—Prayer for declaration of bogus character of sale deed and for setting aside the same as a fraud

on creditors—Leave of Court to sue on behalf of all creditors is essential. See 1940 M. 789=51 L.W. 608=(1940) 1 M.L.J. 872.

APPEALS.—Principle of R. 8 can be given effect to in a proper case by the appellate court. But the appellate Court will not readily take action if an application under the rule had not been made in the trial Court, or if made, had been rejected. 132 I.C. 657=1931 L. 610. Representative suit—Omission to obtain sanction of Court—Objection to frame of suit not raised in lower Court cannot be sustained in appeal. 8 O.W.N. 722=1931 O. 375. When a suit is brought in a representative capacity after obtaining the permission of the Court under R. 8 then the representatives appointed by the Court are the only parties to the suit. And when such persons compromise the suit and the compromise is given effect to by the Court, others cannot appeal from such decree. 1935 L. 33=157 I.C. 733.

ARBITRATION PROCEEDINGS.—The provisions of this rule apply to an application under S. 14 of the Arbitration Act to set aside an award on the ground of misconduct of the arbitrator. The Court has power to grant leave under O. 1, R. 8 to a petitioner applying under S. 14, Arbitration Act. A petition under S. 14 is one which can be heard and tried as a suit. 60 B. 645=38 Bom. L.R. 380=1936 B. 259.

CHANGE IN LAW.—The word "persons" has been substituted for the word "parties" so as to give effect to the opinion expressed in 9 C. 604.

MEANING OF TERMS.—The "numerous persons" mentioned in the rule mean persons capable of being ascertained. The whole Hindu community is incapable of being ascertained and a suit on their behalf if relating to any public trust, can only be instituted under Ss. 91 and 92. 20 C. 397, 407. See also 9 M. 463; 33 C. 905; I.L.R. (1940) Lah. 199=42 P.L.R. 731 (as to who are or are not parties to suit). Where persons are not among those who have been appointed by the Court to defend a suit under O. 1, R. 8 on behalf of any class and they have not applied under sub-R. (2) of R. 8 to be impleaded as defendants in their own name, they are not parties to the suit in the real sense of the term and their absence from the record is wholly immaterial. A I.R. 1939 Lah. 572.

PERMISSION WHEN TO BE OBTAINED.—Permission may be obtained before the commencement of the suit or after its commencement. 21 B. 784 (F.B.); 22 A. 269; 23 M. 29; 25 M. 399; 21 C. 180 (188). See also 29 C. 100; 17 C. 906, 910. The permission may be given even after the filing of the suit. 47 B. 809=25 Bom.L.R. 689=1923 B. 305; 105 I.C. 113. See also 101 I.C. 200 (2)=1927 R. 134 (1). The permission to allow the plaintiffs to bring a suit in a representative capacity may be inferred from the pro-



## NOTES.

ceedings in the trial Court. 143 I.C. 742=34 P.L.R. 608=1933 L. 749. It is not necessary that all the persons having a common interest should agree before one of them should be allowed to bring a suit as their representative. The mere fact that a member of a society objects to the institution of a suit does not show that he has not the same interest as other members in the suit or that it is not for his benefit as such member. 1934 R. 347. Leave to file a suit may be granted on behalf of a whole community or body of persons though some persons object to it. 45 I.C. 423=8 L.W. 160. No person is obliged to have his name added as plaintiff in a suit without his consent, as if the suit is improper, he might be made liable for costs. In such a case the proper course is to make him a *pro forma* defendant. 1934 R. 347. Before instituting a suit under O. 1, R. 8 leave of the Court must be obtained and the requirements of the rule must be complied with before the suit can be proceeded with and unless this is done the suit must be dismissed. See 1929 A. 806. But its provisions may be complied with subsequent to the filing of the suit and when that has been done the suit cannot be dismissed. 44 C. 258=21 C.W.N. 1144. Once the permission of the Court had been obtained, further permission of the Court of appeal is not necessary. 51 I.C. 437=46 P.R. 1919; 101 I.C. 738=1927 C. 608.

DEATH OF ONE OF THE PARTIES.—When the authority is conferred to more persons than one, they in a body represent the class; and when one of such persons dies, his legal representative cannot come in his right of succession. If he falls within the class, he can come only by obtaining the permission of the Court to represent the class or under R. 8 (2). 39 C.W.N. 303=60 C.L.J. 556=1935 C. 413. See also 17 Pat.L.T. 926. Representative suit—Death of one of the parties—Procedure—Heirs of the deceased person not competent to continue suit—Proper procedure is for the remaining parties to apply to the Court for directions as to whether the remaining party is sufficient, or whether it is necessary, whether additional parties who need not necessarily be the legal representatives of the deceased person should be joined. 54 M. 527=1931 M. 452=61 M.L.J. 135. Two of the defendants out of the twelve representatives appointed under O. 1, R. 8, died *pendente lite*. Held, that the remaining representative defendants should have applied to the Court for directions as to whether they should conduct the case on behalf of all the defendants as before or whether any other persons should be added. 190 I.C. 112=A.I.R. 1940 Lah. 272. See also 54 M. 770=132 I.C. 289=60 M.L.J. 135 (On death of a plaintiff, suit does not abate—Any person interested on whose behalf suit was filed may apply to be made a party—Art. 181,

Limitation Act, applies to such an application); 1 L. 582; 53 C. 844; 9 L.W. 166; 59 C. 961=55 C.L.J. 8=1932 C. 275.

CHANGE IN PERSONNEL OF COMMITTEE.—In a suit against a school, all members of the managing committee on date of suit were impleaded. A member who came into the committee subsequently owing to a change in the personnel of the committee was added as a party only long after the time in the appeal. Held, that O. 1, R. 8 did not apply to the case and that as the Committee stood in law for the decree against them binds the school irrespective of the change in the personnel of the committee. 37 C.W.N. 495=1933 C. 329=60 C. 794.

NOTICE.—Notice under this rule is required and the provisions of the rule are mandatory. 47 B. 809=1923 B. 305. The Court is bound to give notice at the plaintiff's expense of the institution of the suit to all such persons whom the plaintiffs purport to represent either by personal service or by public advertisement as the Court may in each case direct. 145 I.C. 387=14 Pat.L.T. 361=1933 P. 302. The issue of a proper notice and its service either personally or by public advertisement on the persons concerned is an indispensable preliminary to the trial of the suit under this rule. If there was no proper notice, the irregularity vitiates the entire proceedings in the lower Court and cannot be condoned under S. 99. The insertion of a notice in a newspaper published in English and having little or no circulation among the class of persons to which the members of the Sabha belonged could not be said to be effective service in accordance with the provisions of this rule. 143 I.C. 742=34 P.L.R. 608=1933 L. 749. Notice must include the names of the persons who have been permitted to represent others. 17 C. 906 (910). Even a defective notice will bind those who have appeared and contested the suit. 101 I.C. 738=1927 C. 608. Even where plaintiffs claimed a right for themselves as well as for others, but took no notice as ordered by Court, the suit can be decreed at least, so far as the plaintiffs on record are concerned. 101 I.C. 500=8 Pat.L.T. 267=1927 P. 221. There is no warrant in the Code for the suit to be dismissed especially by the appellate Court on the ground that the notice under R. 8 was defective. The proper course would be for the appellate Court to send the case back to the trial Court with direction to take up the proceedings from the state at which it ought to have issued the notice. 143 I.C. 742=34 P.L.R. 608=1933 L. 749. A president of a community authorised to file suits cannot sue in his own name and notice under R. 8 to all the members of the community must be given. Permission also is necessary under R. 8. 46 B. 132=1922 B. 109. See also 101 I.C. 375=1927 M. 666.

ILLUSTRATIVE CASES.—One member of an unincorporated association cannot sue in damages on behalf of the other members



## NOTES.

where all such members are alleged each to have suffered damage by reason of the publication of the same libel nor can he maintain such a suit on behalf of the incorporated association by subsequently getting it registered. 1930 R. 177. See also 54 M. 527=1931 M. 452=61 M.L.J. 135 (representative suit relating to declaration of right to communal land, *e.g.*, *Kalam puramboke*). The Mahomedan Association of Meerut cannot institute a suit in its own name by its Secretary. The Association should follow the provisions of this rule. 6 A. 284. See also 49 C.L.J. 357=1929 C. 445 (Brahmo Samaj); 1929 M. 633 (a trading committee). But see 52 C.L.J. 54=59 M.L.J. 134 (P. C.). In a suit by a junior member of a Malabar tarwad to cancel certain mortgages executed by their *karnavan*, all members of the tarwad should be joined actually or constructively under this rule. 10 M. 322. See also 10 M. 79; 1929 M. 451. But see 2 M. 328. Fishermen in a village who want to establish their right to fish in a creek, can proceed under this rule. 12 B. 221. On this rule, see also 11 C. 213; 11 C. 33; 20 C. 810 (816); 19 B. 391; 22 B. 646; 22 B. 729; 23 M. 99. Rent suit—Rival claimant to tenant's right—He ought to be impleaded. 1930 P. 592. A mortgagee is not a necessary party to a *partition suit*, provided the question of the mortgagor's interest is not in controversy. 134 I.C. 307=35 C.W.N. 296=1931 C. 594. O. 1, R. 8 is not applicable to suits under S. 92, it cannot therefore be said that the procedure laid down in O. 1, R. 8 must be followed in suit under S. 92. 43 Bom.L.R. 706. See also 19 Pat. 208 (Suit under S. 91, C.P.C.—Suit in respect of obstruction to village pathway—S. 91, C.P.C., does not override the provision of O. 1, R. 8 even in the case of a public nuisance). See 19 Pat. 208=1940 P.W.N. 829=1940 Pat. 449. See also (1939) 2 M.L.J. 920=1940 Mad. 81. Religious endowment—Right to make trust in favour of idol derived by defendants—Procedure. See 138 I.C. 433=34 Bom.L.R. 415=1932 B. 305. Where the plaintiff brought a suit on a promissory note executed by five persons who, he alleged, were managers appointed by the community and invested with powers of borrowing and dealing with the common property, it is open to the Court to allow the defendants to be sued as representatives of the community. The question, if the managers were competent to contract the debt or bind the common property being an issue in the case, no substantive rights of those who have not been impleaded are affected by this order. 136 I.C. 315=1932 M. 163.

EXECUTION OF DECREES IN SUITS UNDER THIS RULE.—As to how decrees in suits instituted under this rule are to be executed, see 14 M. 57; 12 M. 356. An injunction in cases falling under R. 8 does not bind persons not parties on record. 36 M. 414=22 M.L.J. 109=12 I.C. 1006. Where a

plaintiff is allowed to represent the public, a judgment by consent will not bind the public, even if the consent was not purchased and *a fortiori* if such consent was purchased. 23 I.C. 72=26 M.L.J. 315. A private individual cannot obtain a declaration that a right is a public one, but he can sue for damages for injury sustained by him in the exercise of his privileges connected with a public right. 44 I.C. 367=8 L.W. 377. An individual worshipper can sue anybody interfering with his right to worship in a Mahomedan mosque. 35 A. 197. The devotees of a *mutt* have a sufficient interest under r. 8 to maintain a representative suit. 41 M. 124=33 M.L.J. 367. A *mutwalli* of a *waqf* in respect of a mosque need not obtain the permission of Court to maintain a suit on behalf of the trust. 63 I.C. 171. A reversionary suit to set aside an alienation is a representative suit. 17 I.C. 101=8 N.L.R. 113. Suit under r. 8—Provisions of section not complied with—Decree passed by Court—Same binding on actual defendants before Court but not on community. 7 P. 197=9 Pat.L.T. 113. Where a suit is not properly a representative suit, a Court cannot adjudicate upon a public right claimed on behalf of a community. 42 I.C. 543. Where a person was permitted to represent the public and he knew of it even though he did not contest the suit as representing the public, the public will be deemed to have been well represented. 101 I.C. 738=1927 C. 608. The consent of defendants on the record is not necessary to enable a Court to allow a plaintiff to sue persons as representing themselves and others, having the same interest in the subject-matter of the suit. 36 M. 418. Suit against trespassers for recovering land can be brought by one of several co-owners on behalf of all. 37 I.C. 384. Addition of plaintiffs after decree, if competent. 72 I.C. 284. Leave to defend granted on behalf of a number of defendants—Effect of—Death of respondents—Legal representatives to be impleaded in time. 1926 L. 31.

PROCEDURE.—Where Court proceeded to act *suo motu* under R. 8 without being moved by the plaintiff to that effect, *held*, the procedure was misconceived. 138 I.C. 509=33 P.L.R. 221. Permission granted under R. 8—Subsequent objection to representative suit by some other members of the community—Proper procedure is for the Court to allow those persons to be brought on record under R. 8 (2) and not to dismiss the suit. 135 I.C. 806=33 Bom.L.R. 1575=1932 B. 65. Representative suit—Suit against villagers—Decree passed—Appeal—Death of one appellant and withdrawal by others—Continuance of suit—Procedure. In such a case Court ought to enquire whether the parties that remained on record were competent to represent the whole village and if it thought they were competent it could proceed with the appeal after expressing that opinion. If however it thought that some more persons were necessary to repre-



9. No suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

## NOTES.

sent the village it should give an opportunity to the particular party to supplement the existing number by the addition of other persons according to the directions of the Court. 150 I.C. 26=1934 M. 202 (2)=66 M.L.J. 175. See also 17 Pat.L.T. 926; 39 C.W.N. 303. A suit by certain persons on behalf of the villagers of a village for a declaration that the suit property is Devadaya inam land belonging to a temple in the village, and that certain alienations thereof by the defendants, pujaries, are void and not binding on the temple and for a permanent injunction restraining the alienees from bringing the property to sale in execution of a mortgage decree obtained by them, can be maintained under O. 1, R. 8, apart from the provisions of S. 92. The existence of a more effective remedy is obviously no answer to the suit and cannot justify its dismissal. 50 L.W. 658=1939 M.W.N. 1137=1940 Mad. 81=(1939) 2 M.L.J. 920. See also 43 Bom.L.R. 706. Where one of the plaintiffs permitted under O. 1, R. 8 to bring a suit on behalf of a proprietary body intimates to the Court that he does not wish to prosecute the suit, the proper course for the Court to follow is to decide whether it will permit the remaining plaintiff or plaintiffs to continue to prosecute the suit, or whether it will insist upon the original number, in which case it should notify to the members of the proprietary body so that they may authorise another person to conduct the case on their behalf as a co-plaintiff. (54 M. 527, Foll.) 39 P.L.R. 407=A.I.R. 1937 Lah. 601. Frame of suit by plaintiff in representative capacity for declaration of right of fishery against defendants in representative capacity—Direct claim by plaintiff against defendant for damages for actual trespass and for injunction against further trespass can be joined. 5 C.L.T. 35=1940 Pat. 24. See also 1938 Rang. 185=1938 Rang. L. R. 303 (S.B.). Frame of suit under T. P. Act, S. 53, to avoid fraudulent alienation—Objection in appeal. See 1935 R. 275.

**COSTS.**—The object of instituting a representative suit under R. 8 is to create the bar of *res judicata* by reason of Expl. (6) to S. 11. But in any case the persons whom the plaintiff represents cannot be saddled with the costs of the suit if the plaintiff should fail to win his case. 155 I.C. 236=1935 O.W.N. 471=1935 O. 369.

**REVISION.**—Where an application under R. 8, sub-R. (2) has been made *mala fide*, apparently with a view to defeat the claim against a *quondam* trustee in respect of a public trust the order of the Court dismissing application is not liable to interference by High Court under S. 115, notwithstanding the fact that the reasons for the order

were not correct. The powers under S. 115 are intended to be exercised with a view to sub-serve and not to defeat the ends of justice. 144 I.C. 904=1933 A. 154.

**ABATEMENT.**—In a representative suit under this section, death of some of the plaintiffs would not result in the abatement wholly or in part of the suit. 146 I.C. 841=34 P.L.R. 1035=1933 L. 654; 150 I.C. 26=66 M.L.J. 175=1934 M. 202.

**O. 1, R. 9: SCOPE OF THE RULE.**—R. 9 is confined to cases where the Court can deal with the matter in controversy with regard to the rights and interests of the parties actually before it. 52 I.C. 18; 95 I.C. 856=24 L.W. 181=1926 M. 806. This rule pre-supposes that there are certain parties properly before the Court and certain other necessary parties are not before the Court. It has no application to a case where there is no party on the one side present in Court at all. 9 L. 375=1928 L. 375. R. 9 does not do away with the necessity for bringing a necessary party on the record. If a necessary party is not on record the proper course is to apply to have him joined. If he is not brought on record at all, or if when he is brought on record the suit as against him is barred by limitation, the suit will be dismissed, especially where the defendant has taken the objection even at the earliest possible moment and the plaintiff has not asked for amendment of the plaint for bringing on record such party. 1936 C. 193. See also 62 C. 324=1935 Cal. 269. O. 1, R. 9 lays down the general principle that a suit shall not be dismissed merely because of the non-joinder of some person necessary to suit; but admittedly an exception has been made by the Courts to those cases in which the plaintiff has persisted in two or more Courts in not adding the necessary party, even when he was given an opportunity to do so. It cannot be said that there is any rule of thumb by which a Court can say whether the plaintiff shall be allowed to add a party at a late stage or not. O. 1, R. 9 is still the rule to be applied at any stage of a proceeding, and a plaintiff should only be refused that equitable relief when his conduct has been such as to disentitle him to it. Nor will the Courts lightly dismiss a plaintiff's suit unless his conduct has been such that he does not deserve the consideration of the Courts. If he has behaved in a fair and straightforward manner and the adding of a party would not unduly prejudice the defendant, his suit should not be dismissed because of some technicality such as the adding of a party even if it be at a very late stage of the litigation. 45 L.W. 648=A. I.R. 1937 Mad. 520.

**NON-JOINDER OF PARTIES—IF FATAL—RULE AND THE EXCEPTIONS STATED.**—The general



## NOTES.

rule is that no suit shall be defeated by reason of nonjoinder of parties, and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. There is an exception to this general rule, *viz.*, that a Court will refrain from passing a decree which would be ineffective and infructuous. The inability of the Court to pass an effective decree, when all the parties interested in the subject-matter of the suit are not before it, may be due either to the nature of the action or to the nature of the interest that the person, who is not made a party to the action, has in the subject-matter of this suit. An illustration of the former class of cases is furnished by suits for partition or dissolution of partnership and rendition of accounts. An illustration of the latter class of cases is furnished by suits with respect to some property belonging to a joint Hindu family when all the coparceners are not made parties. But these rules have no application to cases in which the interest of the person, who has not been impleaded as a party in the subject-matter of the suit, is ascertained or ascertainable, as in such cases the decree, while binding the interests of the persons who are parties to the decree, cannot adversely affect the separate and distinct right of the person who has not been made a party to the suit. 152 I. C. 1008=1934 A.L.J. 1006. In cases of misjoinder or nonjoinder of parties, R. 9 provides against the dismissal of the suit. The only course open to the Court under such circumstances is formally to *call upon the plaintiff to make his election* and confine the suit to one set of defendants. 142 I.C. 542=15 N.L.J. 111. In a suit against the *legal representatives* of a deceased debtor, it is sufficient if the plaintiff sues those persons whom he considers to be the legal representatives after enquiry. If such persons are sued, the suit is a good one and the decree will be effective to the extent of the property of the deceased which has reached their hands. A suit of this nature cannot be defeated by reason of the fact that some of the legal representatives have not been impleaded though the legal representatives who are not impleaded will not be bound by the decree. 35 P.L.R. 598=1934 L. 657. Where a suit is instituted against a trustee, all the trustees should be impleaded. If not, no decree can be made against any of the trustees. R. 9 which provides that no suit can fail for non-joinder of parties does not mean that only one trustee may be sued in contravention of O. 31, R. 2, and a decree passed against the trustee singled out for the suit. 55 A. 687=1933 A.L.J. 1933.

**APPLICATION OF RULE.**—R. 9 applies to a mortgage suit as well as to other suits. 54 C.L.J. 113=134 I.C. 1068. *See also* 1940 O.A. 191=1940 O.W.N. 209; 36 C.W.N. 1138; 148 I.C. 903=11 O.W.N. 524=1934 O. 220. In the case of mortgage suits R. 9 is con-

trolled by O. 34, R. 1. 60 C. 777. *See also* 1934 O. 220. Though a Court has a power to join a party under O. 1, R. 9 it cannot join a party, which the litigant in whose interest the joinder is to be made refuses to have the necessary parties joined. 1940 N. L.J. 151. The provisions of O. 1, R. 9 are clear enough and make it incumbent on the Court to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. It may be that a Court would in certain exceptional cases refrain from passing a decree in favour of a plaintiff when it finds that all the parties interested in the subject-matter of the suit have not been impleaded. But this rule can have no possible application to a case in which on account of the death of the other party jointly interested with the plaintiff, though it occurred during the pendency of the suit, the plaintiff has become the only person, when the case is taken up for trial, entitled to the relief claimed. Courts can take notice of events happening after the institution of the suit and at times it is essential for the Court to do so in order to avoid a further unnecessary litigation and to do complete justice between the parties. A. I. R. 1940 Mad. 412=(1940) 1 M.L.J. 240.

**CONSTRUCTION.**—Rr. 9 and 10 should be construed together. 39 I.C. 160=5 L.W. 207. R. 9 does not do away with the obligation to bring a necessary party on the record. 20 I.C. 262. The rule amounts to a direction to the Court not to dismiss a suit on the ground of nonjoinder. 21 M. 373 (382). *See also* 11 A. 104; 26 M. 647; 28 B. 94. But *see* 44 C.L.J. 557=99 I.C. 901=1927 C. 238.

**WHO ARE NECESSARY PARTIES.**—Under R. 9 a person who is a necessary party to a suit is a necessary party to the appeal. 3 Pat. L.T. 456=66 I.C. 780. In a suit for a declaration of an easement right to dam up a stream, the riparian proprietors are proper parties. 26 M.L.J. 385=24 I.C. 547. Plaintiff brought a suit to eject the defendant from a site and to remove a pial erected by him thereon. The plea of defendant was that the land belonged to the Municipal Council, that he put up a pial with its permission and that Municipal Council was a necessary party to the suit. The trial Court held that, as plaintiff claimed the suit property as his, it was unnecessary to implead Municipality on the contention of defendant. *Held*, that Municipality was a necessary party to the suit and not having been made one, in spite of objection taken from the start, the suit must be dismissed. (Case-law reviewed.) 146 I.C. 72=1933 M. 664=65 M.L.J. 290. Suit for recovery of *khas* possession—Dismissed as against minor defendants for steps not being taken to have proper guardians on record—Suit not maintainable against other defendants in the absence of minor defendants who are necessary parties. 33 C.W.N. 742=1929



## NOTES.

C. 669. Suit for specific performance against father—Son impleaded as having joined father in alienating the property in breach of contract to sell—Son is a necessary and proper party. 33 C.W.N. 687=1929 C. 667. See also 36 C.W.N. 1138. R. 9 does not apply to an appeal in a case where the defect has been brought to the notice of the party concerned from the very outset of the proceedings, and he has had ample opportunity of remedying it in the previous stages which, however, he failed to avail himself of. 35 C.W.N. 977=1931 P. C. 229=61 M.L.J. 294 (P.C.). See also 1933 L. 93=145 I.C. 178=20 N.L.J. 65. Partnership—Suit for accounts—Non joinder of one partner—Subsequent joinder as *pro forma* defendant after limitation—Dismissal of whole suit not proper. See 1937 A.L.J. 571=1937 All. 502.

WHO ARE NOT NECESSARY PARTIES.—In a suit by one of the several heirs of a deceased Muhammadan to recover her share in the property left by the deceased, the other heirs are not necessary parties. 20 I.C. 658=11 A.L.J. 619. See also 44 C.L.J. 293=99 I.C. 177=1927 C. 237. On this point, see also 144 I.C. 753=1933 P. 259. Suit by a manager of a joint Hindu family does not necessarily fail, because of his omission to implead other members of the family in the suit. 34 A. 572. Grandsons of a member of a joint Hindu family are proper though not necessary parties to a suit and a suit by a stranger is not defeated by mere non joinder of the grandsons where all the sons have been already made defendants. 1930 S. 147. As regards non-joinder, the objection as to procedure to be followed is disposed of by the application of S. 99. 42 M.L.J. 133=1922 M. 317.

PARTITION SUIT.—Grandsons not necessary but proper parties. 67 I.C. 156=3 Pat.L. T. 238; nor a mortgagee. 35 C.W.N. 296=1931 C. 594.

SUIT BY MANAGER OF JOINT HINDU FAMILY.—It is not the form in which the manager sues which determines his capacity to sue on behalf of the joint family but the fact that nobody except him has the right to interfere in the business of the joint Hindu family or to give a discharge or a receipt for a debt due to or from that joint family which confers the capacity on the manager. It is a question of fact whether he is the manager or not and not the form in which he sues which determines the question. It is not necessary that the manager must sue as such in order to bind, or to be capable of suing on behalf of, the joint family. Where a suit for recovery of money due to a joint family which was instituted by the manager along with some other members of the family was dismissed for nonjoinder of a grandson, *held*, that the suit as brought by the manager was properly framed and that it should not have been dismissed (Case-law discussed.) 12 L. 428=133 I.C. 116=1931 L. 559.

EFFECT OF NONJOINDER.—A suit cannot be defeated for nonjoinder of parties. 25 I. C. 480=3 P.R. 1915; 1929 A. 439, nor of causes of action. 25 I.C. 438=19 C.L.J. 316. See also 15 R.D. 657; 14 I.C. 35=9 A.L.J. 410. Once a multifarious suit is allowed to proceed to trial and results in a decree, without the procedure for amendment prescribed by O. 1, R. 9, being followed, the defect of multifariousness is considered to have been waived. 187 I.C. 49=20 Pat. L. T. 889=A. I. R. 1940 Pat. 145; see also 1939 All. 235=1939 A. L. J. 123. O. 1, R. 9, is wide in its scope and is subject to no qualification whatever. No suit whatever is to be defeated by the non-joinder of parties, and in every suit the Court is to proceed to do justice as between the parties thereto, no matter if there has been non-joinder. It is for the Court to decide in each case, whether it is possible to do justice as between the parties despite non-joinder. The answer to the question as to whether the suit falls to be dismissed in case of non-joinder because it is barred by limitation as against the party not impleaded, must depend on the facts and circumstances of each case. 1939 A.L.J. 123=A.I.R. 1939 All. 235. A Court should not dismiss a suit for non-joinder of necessary parties, but should add them, of its own motion, or direct the plaintiff to do so. 63 I.C. 548; 10 I.C. 212. A Court should not dismiss a suit for non-joinder or misjoinder where plaintiff by amendment can remedy the defect. 41 I. C. 615=21 C.W.N. 939; 1930 A.L.J. 247=122 I.C. 597 (2); 1930 R. 295. The plaintiff should be given an opportunity to amend it. 10 I.C. 737=7 N.L.R. 43. Or elect to confine the suit against one set of defendants or one set of causes of action. 15 N.L.J. 111. Where a plaintiff is ordered to add necessary parties and he refuses to do so, Court can dismiss the suit. 63 I.C. 548=19 A.L.J. 525. An appeal cannot be dismissed for nonjoinder of parties. 32 I.C. 749. But see 44 C.L.J. 557=99 I.C. 901=1927 C. 238. Where there is a misjoinder of either plaintiffs or causes of action, proper course is to return the plaint for amendment and not to reject it. 18 I. C. 181=5 Bur.L.T. 234. A suit for declaration of title to land entered in the Survey Khatian as ghair mazrui is not bad for non-joinder of parties, if the general public are not made parties to it. 72 I.C. 634=1922 P. 447. Court can decide question of misjoinder or nonjoinder in so far as the parties are actually before it. 13 I.C. 123=16 C.W.N. 639. Whether the entire mortgage suit is to be dismissed for impleading a puisne mortgagee beyond limitation time, see 101 I.C. 775=1927 A. 488; 1939 A.L. J. 123=1939 All. 235.

PLEA BY WHOM TO BE RAISED.—Plea of non-joinder of others as plaintiffs can be raised only by the defendants who have an interest in the subject-matter of the suit and not by



10. (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

## NOTES.

those found subsequently not to have any interest therein. 22 I.C. 129.

**SECOND APPEAL.**—High Court cannot make any person a party in second appeal, when he was not a party in the lower appellate Court. 37 A. 57. Plea of nonjoinder cannot be raised in second appeal for the first time. 1930 R. 295=129 I.C. 508. The expression "all questions involved in the suit" can only be questions as between parties to the litigation. (*Ibid.*).

**REVISION.**—Where an application under R. 8, sub-R. (2) has been made *mala fide* apparently with a view to defeat the claim against a *quondam* trustee in respect of a public trust, the order of Court dismissing the application is not liable to interference by High Court under S. 115, notwithstanding the fact that the reasons for the order were not correct. The powers under S. 115 are intended to be exercised with a view to subserve and not to defeat the ends of justice. 1933 A. 154=144 I.C. 904.

**PRACTICE.**—Where in a suit for rent proper parties are not added, Court should give an opportunity to bring them on record and not dismiss the suit. 15 R.D. 657. See also 15 N.L.J. 111.

**BURDEN OF PROOF.**—Where a party to a suit contends that the suit is defective for want of parties, the party that puts forward this point has to show which, if any, of the parties are absent from the record. 1934 P. 44.

**O. 1, R. 9 and O. 34, R. 1: MORTGAGE SUIT.**—It is not correct to say that O. 1, R. 9 is subordinate to O. 34, R. 1. The rule laid down in O. 34, R. 1 is merely a rule of procedure enacted with the object of avoiding multiplicity of suits. The combined effect of O. 1, R. 9 and O. 34, R. 1 is that all persons whose rights and interests may be adjudicated upon and determined in a mortgage suit ought to be added as parties, but the failure to add one or more such persons cannot have the effect of defeating the suit, if the Court, in their absence, can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. Whether the Court can do so or not must depend upon whether the presence of those not added is essential to enable the Court to adjudicate on the rights and interests of those actually before it. If no decree can be passed without affecting the rights of absent parties, the suit cannot proceed in their absence and must be dismissed. Otherwise the suit can proceed and the Court can determine the mat-

ters in controversy between the parties actually present, though the other parties might properly have been added as parties to the suit. Since it is beyond controversy that any one of several co-mortgagors can redeem a mortgage, the omission to implead some of the proprietors interested in the equity of redemption as parties to a suit for redemption of the mortgage is not fatal to the suit, when the presence of those persons is not essential to enable the Court to decide the matter in controversy in suit. 18 Pat. L.T. 289=A.I.R. 1937 Pat. 414.

**O. 1, R. 10: SCOPE OF RULE.**—Clause (2) of R. 10 cannot be read as requiring that all persons who have or claim to have or are likely to have any sort of right, title or interest in respect of any portion of the subject-matter of a suit should be made parties. 1926 M. 836=95 I.C. 214. See also 59 C. 329=138 I.C. 104=1932 C. 448. Where a person applies to be made a party the Court ought to see whether there is anything which cannot be determined owing to his absence or whether he will be prejudiced by his not being joined as a party. 116 I. C. 137 (2)=1929 M. 291. "Questions involved in the suit" refer only to questions between parties to the suit. Further, they refer only to questions as between plaintiffs and defendants, and not to questions which may arise between co-plaintiffs or between co-defendants *inter se*. 158 I.C. 814=1935 S. 194. Even in cases where the application for addition or substitution of parties does not fall within the language of the rules of the Code, Courts have power to pass necessary orders for the addition or substitution of parties. 55 A. 825=1933 A.L.J. 1512=1934 A. 40. See also I.L.R. 1939 Bom. 503=(1939) 2 M.L.J. 366 (P.C.); 21 Pat. L.T. 329. Court can impose terms on a person who seeks to be added as a party to the suit. Court can also allow a party to be added on the condition that he can only intervene at a particular stage in a suit and cannot question an order passed before he applied to the Court. 1931 C. 580=58 C. 801=35 C.W.N. 122. R. 10 draws a distinction between two classes of persons, namely, persons who ought to have been joined and persons whose presence is necessary to enable the Court to completely and effectively adjudicate upon and settle all questions involved in the suit. The first part deals with *necessary* parties, the second with *proper* parties. Even against the plaintiff's consent a new party may be impleaded as a defendant and he may be so added though he may thereby be in a position to



(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as

Court may strike out or add parties.

may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

#### NOTES.

counter-claim against the plaintiff. 29 L. W. 753=118 I.C. 780=1929 M. 443. See also 1934 P. 106. Order 1, R. 10 (2) is wide enough to give a Court power to add any person, i.e., whether already a party or not, so as to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit. 59 I. C. 233=12 L.W. 25; 24 L.W. 738=51 M.L. J. 148; (1939) 2 M.L.J. 366 (P.C.); 1939 Bom. 188; 21 Pat.L.T. 329. A Court has large discretion under the rule and any attempt to diminish that discretion ought to be deprecated (circumstances justifying joinder of plaintiffs discussed). 105 I.C. 114=53 M. L.J. 264; also 29 Bom.L.R. 418=103 I.C. 225=1927 B. 424. As a general rule a plaintiff cannot be added without the consent of the existing plaintiffs more so in the case of substitution. A simple rent suit cannot by adding of parties be converted into a title suit. 45 C.L.J. 146=101 I.C. 527=1927 C. 340. See also I.L.R. (1939) Bom. 232=1939 Bom. 188. Court has no power to join a person as a co-plaintiff, who is a stranger and has no personal interest in any of the reliefs claimed by the plaintiffs. 120 I.C. 517=1930 S. 73. Where the prayer for *khas* possession is not maintainable by reason of the fact that all the persons who should have joined as plaintiffs in the suit were not on record, Court should not allow an amendment of the plaint so as to enable some of the parties to claim joint possession. 145 I.C. 170=37 C.W.N. 138=1933 C. 498. Joinder of party after preliminary decree in mortgage suit. See 49 A. 664=25 A. L. J. 369; 17 N.L.J. 266; 1935 R. 23. As to the scope of the rule in general, see 50 M. 34 (P.C.) (addition after limitation). See 60 M.L.J. 229 (Case of addition in a suit for partition in a Hindu joint family). R. 10 covers the case of an application made to implead as parties to a suit the legal representatives of a deceased defendant (wrongly impleaded as such) in their individual capacity and not as such legal representatives. 32 I.C. 320. Scheme suit—Addition of party defendants—Whether permission of Government Advocate necessary. 5 R. 263. See also 133 I.C. 823=1931 B. 388. The rule covers a case where a major is wrongly assumed as a minor and the suit is brought by a next friend. 41 I. C. 510=40 M. 743. R. 10 refers to any stage short of decree. 39 I.C. 849=13 N. N. R. 69. Suit is to be dismissed in entirety where a necessary party is added after

period of limitation. 100 I.C. 859=1928 L. 33; 1929 C. 591. See also 104 I.C. 526. In a suit for dissolution of partnership and accounts, a person who was not in partnership as a member of the firm, but possibly in a superior partnership of which he was one side and the whole firm as a suit was on the other side, is not a necessary party. 31 C.W.N. 857=1927 P.C. 70=53 M.L. J. 245 (P.C.). Where the suit is not for partition of the properties between all the alleged coparceners *inter se* but what is prayed for is a division between the two branches of the family, the really necessary parties are the heads of each branch of the family. It is not obligatory on the plaintiff to implead all the members of the two branches. 1932 L. 641.

ADVOCATE-GENERAL—PROPER PARTY.—Per Gwyer, C.J.—It can but rarely happen, in cases between private persons involving the constitutional validity of a statute, that an Advocate-General is a 'necessary' party. He is a proper party in the sense that without him the Court cannot effectually and completely adjudicate upon and settle all questions involved in such cases, and where the executive authority of the province is likely to be affected by the decision. It by no means follows that because the Advocate-General of a province has been permitted to be placed on record as an intervener he is also entitled to prefer an independent appeal to the Federal Court.

Per Sulaiman, J.—In a suit between a landholder and his tenant, the Provincial Government cannot be considered a necessary party at all. But when in such a suit the validity of an Act of the Provincial Legislature is in question, the adjudication would affect a large section of the public and the Provincial Government would be indirectly interested in such an adjudication. Where the Provincial Government has been made a party in the High Court in the absence of any restriction in the language of S. 205 of the Government of India Act and in view of the fact that an appeal lies even on a constitutional question alone without raising any other ground, it cannot be held that the Provincial Government who were a party in the High Court have no right of appeal at all to the Federal Court.

Per Varadachariar, J.—The Indian C.P. Code does not contemplate an 'intervention' by the Advocate-General as distinguished from an addition of the Advocate-General or the Government as a party. When either of them has been impleaded as a party with



(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary,

Where defendant added, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

### NOTES.

a view to give them a hearing, the Court would fail to give full effect to the language of S. 205 (2) of the Constitution Act, if it should hold that notwithstanding such joinder as a party, the Advocate-General or the Government had no right to prefer an appeal. The right of appeal being a creature of the statute, the right of one who is within the terms of the statute cannot reasonably be denied when, even on the broader ground of interest in the litigation, it is conceded that he is sufficiently interested to justify his claim being heard. 45 C.W.N. (F.R.) 27 = 1941 O.W.N. 297 = (1941) 2 M.L.J. (Sup.) 65 = A.I.R. 1941 F.C. 16.

**APPLICABILITY.**—Under r. 10 a person may be added as a party to a suit in the following two cases: (1) When he ought to have been joined as plaintiff or defendant, and not so joined, or (2) when without his presence, the question in suit cannot be completely decided. Where by allowing a person to be impleaded as a party the nature of the suit will be altered the application should not be allowed. 158 I.C. 814 = 1935 S. 194. See also 50 L.W. 777 = (1939) 2 M.L.J. 872 = A.I.R. 1940 Mad. 225. The rule does not apply to the case of substitution, dismissal, or addition of parties, in divorce proceedings. 30 C. 489; see 6 C. 370. The existence of a valid plaint or memorandum of appeal is a *sine qua non* for the application of the provisions of R. 10 (1). 148 I.C. 241 (2) = 1934 N. 55. The rule applies to suits under S. 92. The son of a hereditary trustee can be made a party to a suit for the removal of a hereditary trustee. 6 L.W. 9 = 38 I.C. 133 = 1917 M.W.N. 550. See also 1937 N. 121 (Son in joint Hindu family). Where a person, who has wrongly filed a suit in his name, does not desire to clothe himself with a right to sue, but by an application he expressly divests himself of any claim and prays for the substitution of a person who has a cause of action, admitting that he himself has none, the case clearly falls within R. 10. 150 I.C. 895 = 1934 N. 159. Court has no power to add parties after the passing of a preliminary decree in a suit for partition although the parties sought to be added might have been proper parties if joined before. The words "any stage of the proceedings" in R. 10 (2) mean proceedings not concluded by a decree. 17 N.L.J. 266. See also 1937 P. 49 (Application by necessary party after passing *ex parte* decree allowed).

**"AT ANY STAGE."**—The power given by the rule ought to be exercised before the first hearing of the case. 6 C. 370; 166 I.C.

794 = 18 Pat.L.T. 278 = 1937 P. 49; 17 N.L.J. 266. But see 27 B. 157; 39 I.C. 849 = 13 N.L.R. 69; 1939 Pat. 397. An order directing a party to be added can be made before the suit terminates. 32 C. 483. See also 17 N.L.J. 266 = 1935 N. 64. A Court has a discretion to order the addition of necessary parties at any stage of the proceedings, and plainly this discretion always ought to be exercised when its exercise will tend to finality of the litigation. Parties can be added to a suit after a preliminary decree therein has been passed. 154 I.C. 465 = 1935 R. 23. See also 40 C.W.N. 1173 (even after final decree in mortgage suit).

**PARTY WHEN TO BE ADDED.**—Under R. 10, Court may, at any stage of the proceedings, order the addition of any person as party to the suit. 35 B. 393. It authorizes the Court to make an order for transfer of a party from the category of defendant to that of plaintiff at any stage of the proceedings. 24 C.W.N. 110; 105 I.C. 473 = 1927 O. 484; 97 I.C. 1023. See also 1937 M. 529 = (1937) 1 M.L.J. 672. Where several disputes arise out of one subject-matter, all the parties interested in such disputes should be brought before the Court and all questions in controversy between them should be completely settled in that action. 50 L.W. 494 = 1940 M. 69 = (1939) 2 M.L.J. 551. A person who would be represented by a party on the record and bound by the decision against that party is entailed to be impleaded under R. 10, Cl. (2), to protect his interest. 44 M.L.J. 322 = 1923 M. 521. A party may be added on his own application. 13 C. 90. It is not desirable to add or substitute as parties persons whose right to sue has already become time-barred. 25 A.L.J. 991. A substitute can only be added to enforce a single right pleaded in a suit and not to bolster up a suit by pleading his own individual right. 120 I.C. 517 = 1930 S. 73. Person financing litigation is not a necessary party. 68 M.L.J. 236. The mere fact that a person might be affected by the result of the suit, whether by dismissal after contest or by a collusive withdrawal, is no ground for allowing him to be added as a plaintiff in the suit. 41 L.W. 126 = 1935 M. 394 = 68 M.L.J. 236. Suit for damages for rashly driving motor car—Employer added as a party defendant—Defence that some third person was the master—Amendment of plaint so as to add such third party might be granted. 30 Bom.L.R. 162 = 1928 B. 91. See also 148 I.C. 909 = 11 O.W.N. 630 = 1934 O. 347. Firm—Sole proprietor filing



## NOTES.

suit in firm name—Objection to form of suit—Amendment. 134 I.C. 1200=1931 C. 770. Rights of party added under R. 10 (2) are safeguarded by Limitation Act, S. 22. 55 I.A. 7=6 R. 29=54 M.L.J. 88 (P.C.). See also 1937 All. 502. Where judgment-debtor appellant became insolvent pending appeal to set aside an auction sale and the Official Assignee elected not to prosecute the appeal, *held*, that a mortgagee from the judgment-debtor who had not taken any steps to assert his rights till that stage could not be allowed to step in and prosecute the appeal. 32 C.W.N. 304. Suit filed in the name of Chairman of District Board—Amendment in appeal allowing substitution of District Board as plaintiff—Permissible. 32 C.W.N. 396. A general question which is of interest to the whole community cannot be effectually and completely adjudicated and settled in a suit by adopting the expedient of joining a member of that community to the suit as a plaintiff. 120 I.C. 517=1930 S. 73.

MISDESCRIPTION.—A suit for rent had been brought against the proper person who was misdescribed owing to his own action in giving his son's name instead of his own when he rented the premises and who had since been refusing to receive the summons on the ground that he was not the proper person. He was the proper person against whom the decree had been rightly made. On an application in execution proceedings to bring on record the real judgment-debtor's name, *held*, that the record could be corrected by virtue of the powers under S. 151 if not under O. 1, R. 10. 144 I.C. 903=35 Bom.L.R. 365=1933 B. 200. O. 1, R. 10 on a plain reading contemplates that a suit should have been filed in the name of a wrong person irrespective of whether he is a living or a dead person. Such a defect is capable of being cured, if the mistake is shown to have occurred in good faith and provided that in permitting the amendment no injustice results to the defendant. 175 I.C. 911=1983 Nag. 458. A suit brought in the name of a non-existing or non-juristic person can be allowed to be rectified by way of amendment. 20 N.L.J. 65=1937 Nag. 173=I.L.R. (1937) Nag. 514.

SUIT AGAINST A DEAD PERSON.—A suit against a dead person is a nullity and no question of adding a party arises. 6 L.W. 359=33 M.L.J. 418. See also 1937 Sind 92=31 S.L.R. 406=168 I.C. 784; 1938 Nag. 458; 1937 S. 47=168 I.C. 860. A plaintiff cannot claim the benefit of the institution of a suit against a dead person for the purpose of extending the period of limitation against his heirs. 47 I.C. 894=5 O.L.J. 596. Though suit in the name of a dead person as sole plaintiff cannot be amended a suit in the name of two plaintiffs one of whom is dead, it can be amended. 104 I.C. 623=1927 C. 880. The words "wrong person" appearing in R. 10 cannot be construed to

mean a "dead person". 148 I.C. 241 (2)=1934 N. 55.

TRANSPPOSITION OF PARTIES.—A Court can make a transposition of parties. 34 I.C. 186=20 C.W.N. 752; 32 C. 483; 97 I.C. 1023; 1927 O. 484=105 I.C. 473; (1937) 1 M.L.J. 672; 24 C.W.N. 110; 50 L.W. 494= (1939) 2 M.L.J. 551; 52 L.W. 828=(1940) 2 M.L.J. 918. But it cannot transpose a defendant to the array of plaintiffs without the party's consent and in the absence of an application to that effect. 58 C.L.J. 240. R. 10 is in the widest possible language and transposition of a defendant to the side of the plaintiff should be adopted in all cases where it is necessary for the complete adjudication upon the question involved in the suit and to avoid multiplicity of proceedings. (1932 Pat. 346, Ref.) 160 I.C. 149=1936 P. 107. See also 1939 Mad. 467; 1940 O.W.N. 1007=1940 A.W.R. (C.C.) 431; 21 Pat.L.T. 329; 1940 Cal. 284=44 C.W.N. 589. It is no good reason for refusing the transposition of a *pro forma* defendant into a plaintiff that the effect would be to assist the plaintiff, nor is it necessary before making an order under R. 10 to determine whether the suit as constituted is bad. The transposition cannot also be disallowed on the ground that it would affect limitation since the object of S. 22 (2) of the Limitation Act is to provide for cases of this nature. 14 Pat.L.T. 252=1933 P. 239. In a *partition suit*, the Court can make a defendant a plaintiff and continue the suit. 45 B. 983=23 Bom.L.R. 391. Where in a *suit on a promissory note*, the plaintiff alleged that he was the real beneficiary and that the holder who was impleaded as a defendant was a mere benamidar for the plaintiff, and for the purpose of giving a valid discharge, the holder desires to be transposed as a plaintiff, the Court ought to allow him to do so, even if the transposition is applied for a date when a suit by the holder would be barred. The provisions of S. 22 (1) of the Limitation Act are inapplicable to a case of transposition of parties. 11 P. 616=140 I.C. 572=1932 P. 346 (9 Pat.L.T. 288, Diss.) Joinder of *pro forma* defendant after limitation is no ground for dismissal of whole suit. 1937 A.L.J. 571=1937 All. 502. In a suit on a pronote in the name of the son by the father of the payee, the note having been allotted to the father in a partition between the father and son, the son having been impleaded as a party defendant, *held*, that the case was a fit one in which the Court should exercise its powers under R. 10, in appeal, and transpose the defendant son as a plaintiff-appellant and that the suit should not fail for want of an endorsement by the son in favour of the father. 36 Bom.L.R. 807=1934 B. 356. As to the object of transposition of parties, see 58 I.A. 229=1931 P.C. 162=61 M.L.J. 632 (P.C.); (1939) 2 M.L.J. 551=A.I.R. 1940 M. 69. Withdrawal



## NOTES.

of part of claim by the plaintiff—Transposition of some of the defendants as parties can be ordered. 12 L.W. 563. In *administration suits*, a person originally arraigned as a defendant can be made plaintiff to claim his shares. 1918 M.W.N. 929=9 L.W. 79=49 I.C. 130. The *appellate Court* has the power to transpose a respondent to the category of appellants in order to further the ends of justice. 44 C.L.J. 243=1927 C. 37. See also 1930 A.L.J. 926.

**STRUCK OUT.**—Where no cause of action is mentioned against a party to a suit and no relief is claimed against him it will be improper and unnecessary to retain him and he may be struck off from the suit. 133 I.C. 507=61 M.L.J. 563. See also 39 P.L.R. 342=1937 L. 67. When O. 1, R. 10 provides that the Court may strike out the name of a party who has been improperly joined as plaintiff or defendant, these words have reference to the suit as framed. It was never intended that the claim of a necessary party should be first tried and that his name should then be struck off the record on the ground that his claim ought to be dismissed before any decree has been passed. Such a procedure can only lead to multiplicity of proceedings. See 40 P.L.R. 805=1938 L. 799. When a Court makes an order striking the names of certain persons off the record, it is immaterial whether their names are actually removed or not. 32 C. 315 (P.C.). An order striking out a defendant from the record cannot be made after the first hearing. 18 A. 53; 20 M. 360 (362). An order striking off the names of a party is appropriate to cases of actual misjoinder under R. 10, and not to cases of voluntary abandonment by a plaintiff of his claim against a particular defendant, where the proper order to pass is an order of dismissal. 1934 L. 737. Where a cause of action against a defendant is specifically pleaded and a distinct relief has been claimed against him, order directing the removal of his name from the array of the parties is in substance although not in form a decree; because the effect of the order is the refusal to grant the relief to plaintiff which he had prayed for. The proper remedy for the party aggrieved from the order is to file an appeal from it and not an application in revision under S. 115. 131 I.C. 548=1931 A. 333 (2).

**POWER OF COURTS TO PASS ORDERS UNDER RULE.**—Nothing in the Code affects the inherent power of Court to make such orders as may be necessary for the ends of justice. 35 B. 393. Court has, under R. 10, power to bring on record any person as a party at any stage. 61 I.C. 378=31 Bom.L.R. 476=1929 B. 337. It is open to the Judge in his discretion under O. 1, r. 10 to add as a party to the suit the representative of a person against whom the suit has abated for the purpose of giving effect to the rights of

the parties. 67 I.A. 406=(1941) 1 M.L.J. 594=45 C.W.N. 226=A.I.R. 1940 P.C. 215 (P.C.). Court has power under R. 10 (1) to substitute a right plaintiff in the place of a wrong one, only if the right to sue is not barred under S. 22 of the Limitation Act on the date of substitution. 58 B. 536=36 Bom.L.R. 814=1934 B. 385. Court has no power for addition of plaintiffs after passing of decree. 44 M.L.J. 222. Neither R. 10 nor R. 8 empowers the Court to join a person as plaintiff, who could not have been originally joined. 57 I.C. 784. In a *representative suit* it is not open to the plaintiff to put an end to the litigation by merely withdrawing the suit. He may go out of the suit, but that does not put an end to the litigation where other people are interested in it and have a right to come in and continue it. Thus where a trustee brings a suit for the benefit of the beneficiaries and then wants to nullify the result of the litigation, the beneficiary may be properly brought on the record to continue the litigation. Similarly, the junior members of a Malabar tarwad have been allowed to prosecute a second appeal which the head was anxious to compromise. So also where in a suit instituted by the Collector representing the estate of the last male owner under the Court of Wards Act he sued for the recovery of certain properties but subsequently wanted to withdraw the suit, *held*, that the suit was a representative suit instituted for the benefit of the two widows of the last male owner and a reversioner to that estate and that in such a case it was open to the Court to allow the reversioner to be made a party and then to allow the Collector to go out of the suit, if he did not want to prosecute it. 1934 A. 4=1933 A.L.J. 1512. Mortgage suit—Administratrix creating mortgage without sanction of Court—Beneficiaries are necessary parties to mortgage suit. 28 B. L.R. 1360. Person financing the litigation has no right to be impleaded as a party. 41 L.W. 126=68 M.L.J. 236. Suit on mortgage by benamidar—Real owner can be added as party under this rule. 55 M.L.J. 856. As to the object of the rule, see 5 M. 52. See also 9 A. 447 (449); 2 A. 738; 13 M. 32. A receiver cannot be made a party without the leave of the Court appointing him. 30 C. 724. Court can allow a party to be added on the condition that he can only intervene at a particular stage in the suit and cannot question an order or orders passed before he applies to the Court. 58 C. 801=35 C.W.N. 122. Party unnecessarily added at defendant's instance. That party's cost may be made payable by the defendant. 1930 M.W.N. 679. See also 1933 B. 304=35 Bom.L.R. 569. Persons improperly impleaded. The proper course is to strike out their names and not to dismiss the suit as against them. 1930 M. 817=54 M. 81=59 M.L.J. 932 (F.B.).

**POWER OF COURT TO ACT SUO MOTU.**—Under



## NOTES.

O. 1, R. 10 (2) it is not necessary that there should be an application from the parties; the rule, however, does suggest that the Court will not act on its own initiative unless the presence of the party added is necessary in order to settle effectually and completely and to adjudicate upon and settle all the questions involved in the suit. 1938 A.L.J. (Supp.) 9=1938 A.W.R. (B.R.) 97.

PARTY WHETHER CAN BE ADDED IN APPEAL.—A person, if he is not made plaintiff or defendant, in the Courts below, cannot claim to be made a party in appeal. 31 I.C. 27. A necessary party to an appeal should be added before deciding it. 31 I.C. 814. See also 1938 Mad. 329. Application to add his legal representative as parties in an appeal against a dead man is covered by section 153 and O. 1, R. 10. 45 M.L.J. 231; 102 I.C. 710 (2). This rule applies to appeals, but there is no power in the Code to make a party to a suit a co-appellant. 10 R. 227; 2 A. 487; 18 A. 332; 2 A.L.J. 516; 12 M.L.J. 355. But see 1927 C. 880. Where parties are allowed to intervene in an appeal, they should be joined as parties to the suit, and not to the appeal. 12 M.L.J. 355. Appellate Court will not interfere with the trial Court's discretion in changing plaintiff to defendant or *vice versa*. 95 I.C. 171=1926 N. 393. In some circumstances, it may be right and proper that the Court should add as parties to the proceedings, even at the appellate stage, persons who were not amongst the original parties to the suit. But the circumstances must be exceptional and such as renders it really necessary in the interest of the original parties to the suit, that some other persons should be added to the proceeding; so that the matters originally in dispute may be properly adjudicated upon and finally determined as between the original parties to the suit. 59 C. 329=138 I.C. 104=1932 C. 448. See also 180 I.C. 833=1939 Pat. 397; 1939 Mad. 467; 14 Luck. 447=1939 O.W.N. 181=1939 Oudh 102; 31 S.L.R. 486; 38 L.W. 539=1933 M. 806=65 M.L.J. 548. A person who does not consent to be added as plaintiff may be added as a defendant. 7 C. 242. No question of limitation can arise with respect to the Court's power to make an order adding a party defendant to a suit. 12 C. 642 (651); 24 C. 640; 27 C. 540; 17 M. 12. See also 28 B. 11 (18). There is considerable doubt as to whether section 32 of the Code of 1882 authorises the addition of a party to a suit after decree. 42 C. 72=41 I.A. 251 (P.C.). A suit might be continued even where the original plaintiff had no right to sue, provided that the defective institution was due to a *bona fide* mistake. (30 M. 419; 43 M. 707, Rel.); 69 I.C. 413=1923 M. 180 (1). A mistake can be called *bona fide* even if it was made without the exercise of due care and caution, provided it was honestly made. 27 N.L.R. 335. See also 1938 Nag. 458. Valid

but wrong substitution of legal representatives in appeal—Case remanded for fresh decision—Order of remand not a nullity—Application to bring true legal representatives on record before passing of final decree should be granted. 1928 P. 197. See also 1930 M. 930=129 I.C. 469=60 M.L.J. 97. Addition of parties—Remand by appellate Court for the purpose of—Indicating order to be passed by trial Court—Impropriety. 136 I.C. 632=63 M.L.J. 369 (P.C.). Where a suit for sole possession is not maintainable for want of certain necessary parties Court cannot allow the suit to be amended as one for joint possession as such amendment will materially alter the nature of the suit. 37 C.W.N. 138. Persons claiming as adopted son of plaintiff's husband is not a necessary party to a suit on mortgage. 1928 M. 978=113 C. 310. A suit filed by the karnavan of a Malabar Tarwad as such is a representative suit. Consequently where it appears that the Karnavan is not acting *bona fide* in the interests of the tarwad in seeking to withdraw an appeal, it is open to the Court to permit the Anandravans to be added as supplemental appellants before the Karnavan is permitted to withdraw the appeal. In such a case the appeal as originally filed should be taken to be pending till orders are passed on the application for its withdrawal. 34 L.W. 548=61 M.L.J. 549.

PROPER PARTY.—In a suit on a promissory note by an endorsee, an application was put in by the endorser that he should be joined as a co-plaintiff. He alleged that he endorsed the promote to the plaintiff merely for collection; and that the plaintiff was dishonestly claiming that he was a holder for valuable consideration. Held, that as one of the original payees of the promissory note was the applicant and in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit between the plaintiff and the defendants, the applicant was a proper party. He was added as defendant though not added as co-plaintiff. 1934 Sind 182. See also 150 I.C. 670=36 P.L.R. 217=1934 L. 328. The *Secretary of State* is not a proper or necessary party to every suit in which any question is raised with regard to the legality of any statute. 1926 M. 836=95 I.C. 214. See also 51 M.L.J. 148=24 L.W. 738; 1931 C. 580=58 C. 801. Addition of parties—Claim to vacate site against Municipality—Plea of title in Government—Latter—If necessary party—Addition as party justified. (1937) 1 M.L.J. 597. When a *pro forma* defendant becomes on his own application a co-plaintiff, he adopts all the statements made in the plaint which support the cause of action and those statements only. He does not adopt statements made therein which are not essential to the cause of action as stated in the plaint. 41 C.W.N. 501. See also 66 I.A. 210.

BENAMIDAR AND REAL OWNER.—It is open



## NOTES.

to the real owner to apply to be joined in a suit brought by the *benamidar*, after the latter's death. He can be added either under O. 1, R. 10 or section 151. He can be joined at any stage provided the suit brought by the *benamidar* is still pending and provided of course no injustice or inconvenience is caused to the other side. 1941 N.L.J. 293.

**EJECTMENT SUIT.**—Landlord and tenant—Proper parties. 59 C. 739=35 C.W.N. 1132; 129 I.C. 860=1931 C. 76=58 C. 561. See also 139 I.C. 679=1932 M. 688. A suit instituted by an assignee of a bond under an assignment which is void under section 136, T.P. Act, can be said to have been instituted in the name of a wrong person, and where the assignee has acted under a *bona fide* mistake the Court can remove the name of the assignee and order substitution of the name of the assignor as plaintiff under R. 10. 162 I.C. 229=1936 O. W. N. 414=1936 O. 275.

**PROMISSORY NOTES—SUIT ON.**—Where a later promissory note in renewal of an earlier one is found to have been insufficiently stamped and hence inadmissible in evidence the prior promissory note cannot be said to have been merged in or wiped off by the later document. An endorsee of a promissory note which was in renewal of an earlier one brought a suit and when it was discovered that the suit promissory note was inadmissible in evidence, the endorser (the payee of earlier promissory note) who had been impleaded as a defendant can be transferred as a plaintiff and permitted to amend the plaint and continue the suit on the original promissory note. The powers conferred on Courts under O. 1, R. 10 are wide enough to enable the Court to make such an order. [58 Bom. 536 and 39 L.W. 387, dist.] 52 L.W. 828=1941 Mad. 364=(1940) 2 M.L.J. 918.

**MORTGAGE SUIT.**—Under R. 10 (2) Court has power to add parties in two cases only. The first is when he ought to have been joined and has not been joined. In a suit upon a mortgage, the plaintiff is not bound to join everybody who chooses to set up a title to the property unless he chooses. If, then, he is given an option to join them or not and he chooses to exercise that option by ignoring them, it is impossible to say he ought to have joined them. The clause can apply only when he was bound to join them and has not done so. The second case in which a party may be added under R. 10 is when his presence is necessary to enable the Court to make a complete adjudication upon the questions involved in the suit. If a full and final adjudication is possible between the existing parties of all questions involved in the suit, the Court has no jurisdiction to add parties. Further it is often undesirable in a mortgage suit to change its character altogether and convert it into a general

administration suit. 148 I.C. 720=1934 N. 228. See also 7 Cut.L.T. 49.

The Court has ample power under O. 1, R. 10, even after the passing of the final decree in a mortgage suit to order that a person whose presence may be necessary to enable the Court effectually and completely to adjudicate upon the questions involved in the suit be added as a party to the proceedings. If it appears that there is an equitable mortgagee who, under O. 34, R. 1 was a necessary party, and that he ought to be joined as a party, the Court can add him as a party although the final judgment has been passed in the suit. 40 C.W.N. 1173.

**MAINTENANCE SUIT.**—See 1937 M. 338.

**PARTIES TO REDEMPTION SUIT.**—1936 M. W.N. 1184=44 L.W. 563=1936 M. 950=71 M.L.J. 614. Powers of Court—Mortgage suit—Omission to implead interested party—If fatal. 1936 P. 153. Suit on mortgage—Holder of money decree against mortgagor getting receiver appointed in execution—Power of Court to implead him as party in mortgage suit. 40 C.W.N. 974.

**PARTITION SUIT.**—Sale of property in execution of mortgage decree during pendency of suit—Mortgagee-purchaser if proper party to partition suit. 35 C.W.N. 296=1931 C. 594. Where the Appellate Court is of opinion that a certain person is a necessary party and ought to have been impleaded in a partition suit the proper procedure is to remand the case to the Court of first instance with a direction that the Court should implead that person and then proceed to dispose of the case. 190 I.C. 384=A.I.R. 1940 All. 399. Under O. 1, r. 10 (2), the Court has power to add as a party in a partition suit a mortgagee of an undivided share of the property, where the extent of the mortgagor's share is in dispute. There can be no doubt that the addition of the mortgagee as a party in the suit would avoid multiplicity of proceedings. I.L.R. (1940) 2 Cal. 284=44 C.W.N. 589=A.I.R. 1940 Cal. 284.

**POSSESSORY SUIT.**—R. 10 enables the Court to add a third party where it is necessary so to do in order to enable the Court to effectually adjudicate and settle all the questions involved in the suit. In a suit for possession of the subject-matter of a sale, by the purchaser against his vendor and tenant, a third party alleged that the vendor had no right to sell the whole property, and that he was entitled only to a half share and applied to be made a party. He had also filed a suit against the purchaser, the vendor and the tenant claiming half the property. *Held*, that the proper course was to join the third party as a party to the suit for possession by the purchaser, in order that the Court might properly work out the rights as between the parties and avoid possible conflict of decisions. (1929 M. 268 and 5 M. 52, Ref.) 1935 M. 353.

**SCHEME SUIT.**—In a scheme suit under S. 92, C.P. Code, an application by a close



(5) Subject to the provisions of the <sup>1</sup>Indian Limitation Act, 1877, section 22,

### LEG. REF.

<sup>1</sup> See now the Indian Limitation Act IX of 1908, S. 22.

### NOTES.

relation of the creator of the trust should be allowed though he is not a beneficiary under the trust. 1937 O.W.N. 271=1937 Oudh 229.

**SUIT AGAINST FIRM.**—Where a suit was brought in a firm's name which had only a sole proprietor and the defendant had notice at the very outset of this and such proprietor was examined on commission and no objection was taken till the trial was over regarding the maintainability of suit in firm's name. *Held*, that the amendment of plaint by substituting the name of the proprietor for the name of the firm should be allowed as it was only a change in form and not in substance and that the appellate Court could order such amendment in plaint, judgment and decree without ordering a remand to the original Court for rehearing. 159 I.C. 138=1935 R. 240. In a suit against a firm under O. 30, C. P. Code, it is not possible for a person who has not been served with a writ but who apprehends that at some future time the plaintiff will eventually seek to hold him liable in execution proceedings on the basis of partnership, to enter appearance and defend the suit on the merits unless he admits that he is not in fact a partner. But when such person is interested in some way or other in the assets of the firm, and denies that he is a partner in the firm, he can apply to the Court under O. 1, R. 10, and it will be proper for the Court to add him as a party to the suit even in opposition to the wishes of the plaintiff. 40 C.W.N. 677.

**PROCEDURE.**—Where an application is made in a suit under O. 1, R. 10 by certain persons to be brought on record as additional plaintiffs, the Court should dispose it without further delay. It should not keep the application pending till the disposal of the suit and then dismiss the application on the dismissal of the suit itself. Such an *ex post facto* method of disposing of applications of this kind must be condemned unreservedly. 1941 Mad. 79=(1940) 2 M.L.J. 615.

**SETTING ASIDE EX PARTE DECREE.**—Where a suit is decreed *ex parte* and persons entitled to be added as parties to the suit make an application to add them as parties and to set aside the *ex parte* decree, Court should add them as parties and give them an opportunity to set aside the *ex parte* decree. 166 I.C. 794=18 Pat.L.T. 278=1937 P. 49.

**ORDER WHETHER APPEALABLE.**—An application of plaintiff to be added as co-plaintiff cannot be treated as an application under O. 22, R. 10. An order passed under O. 1 is not appealable. See 1939 Oudh 102=14 Luck. 447=1939 O.W.N. 181. An application to be added as co-plaintiffs cannot be

treated as one under O. 22, R. 10. 36 I.C. 919. An order rejecting an application to be made a party is not appealable. 13 C. 100; 2 A. 904. But see 12 M. 489. Order under O. 1, R. 10 does not come within the definition of "decree" in S. 2 (2) and there can be no appeal. 42 M.L.J. 97=45 M. 194.

**APPEAL.**—Where an application is made under O. 1, R. 10 but it is dealt with by the Court also under O. 22, R. 10, an appeal lies against the order on the application. 1937 M. 200=(1937) 2 M.L.J. 279. No appeal lies from an order awarding costs under O. 1, R. 10 (2). 39 P.L.R. 342=1937 L. 67.

**REVISION.**—An order refusing to add a party as a defendant is not subject to revision under S. 115; but the High Court may interfere under S. 107 of the Government of India Act, 1915, if there is a denial of the right of fair trial. 13 C. 90; 4 P. 723=93 I.C. 32. See also 1939 Oudh 102=14 Luck. 447=1939 O.W.N. 181; 41 L.W. 126=1935 M. 394=68 M.L.J. 236. Ordinarily High Court is reluctant to interfere with an order refusing to make certain persons parties to the suit. But where the lower Court instead of addressing itself to the important question, whether the addition of the petitioners as parties was necessary in order to enable the Court to effectually and completely adjudicate and settle all the questions involved in the suit, rejected the petition of the sons of a full sister of the deceased owner of certain properties on the ground that it was opposed by the step-sisters on record, *held*, that the entire responsibility in the matter of adding parties was with the Court and did not depend upon the wishes of the parties on record; the order of the lower Court really amounted to a refusal to exercise a jurisdiction vested in it and that it should be set aside in revision. 148 I.C. 347=15 Pat.L.T. 602=1934 P. 425. The trial Court is vested with wide discretion and where that Court has acted in aid of justice to prevent the suit being defeated upon a more or less technical ground, the High Court would not interfere. 152 I.C. 778 (2)=1934 P. 370.

**ADDITION OF PARTY, WHAT AMOUNTS TO.**—An amendment of the plaint, by leave of the Judge, that the plaintiff is suing in a representative capacity as a shebait, does not amount to an addition or substitution of a new plaintiff within the rule. 28 I.C. 818=19 C.W.N. 1193. In a suit to enforce rights of trust by persons interested in the trust, addition of more representatives out of time, does not bar the suit. 33 A. 272; 25 M.L.J. 452 (17 B. 413, Foll.). But see 43 I.A. 113. See also 9 L.W. 377=50 I.C. 358. A *pro forma* defendant is not known to law. 41 I.C. 468=2 Pat.L.W. 108.

**O. 1, R. 10 (5).**—The proviso applies only as regards limitation. Where a person is



the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

Conduct of suit.

11. The Court may give the conduct of the suit to such person as it deems proper.

12. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court.

13. All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

#### NOTES.

added as party defendant under R. 10 the proceedings should be taken to have commenced against him from the date he was impleaded as party. 50 C.L.J. 208. See also 1930 L. 747; 55 I.A. 7=6 R. 29=54 M.L.J. 88 (P.C.). For other purposes such as calculation of costs, etc., the date on which summons is served will be the starting point. 8 L.R. 79 (Rev.).

**COSTS.**—Where parties are added as defendants at the instance of a co-defendant, and no cause of action is found against them, the proper order to pass is to strike off the names of those defendants, under r. 10 (2), and not to discharge them. When such defendants are struck off under R. 10 (2) as being improperly added, Court can impose such terms as it considers proper and can order the party to pay costs to such defendants. This power of the Court is analogous to its power of adjourning proceedings in which case the Court is empowered to make the defaulting party to pay costs to other party and there is no limitation as to the amount which can be awarded under such circumstances. 39 P.L.R. 342=1937 L. 67.

**O. 1, R. 10 AND O. 6, R. 17.**—Plaint instituted by living persons in name of and verified on behalf of, dead person—Substitution of name of living person not permissible—Gross neglect of plaintiff cannot be condoned. See 1937 Sind 92=31 S. L. R. 406.

**O. 1, R. 11.**—The question of conduct is one of discretion, and the appellate Court will not as a rule interfere. See *Dowbiggin v. Trotter*, 20 W.R. 1024 (Eng.). Suit by one trustee—Death of plaintiff—Co-trustee can be made plaintiff. 40 M.L.J. 208=52 I. C. 560. The word "person" in R. 11 means a party to the suit and a person who is a stranger to the suit cannot be given the conduct of the suit within the meaning of the rule. 106 I.C. 854=46 C.L.J. 530.

**O. 1, R. 13: GENERAL.**—The words "unless the ground of objection has subsequently arisen" have been added to give effect to the rulings in 5 B. 609; 7 C. 603. No person (including a corporate body) can be made a plaintiff without his consent expressly given. 46 P.R. 1911=10 I.C. 515.

**OBJECTIONS AS TO NON-JOINDER WHEN SHOULD BE TAKEN.**—An objection as to non-joinder of parties should be taken before the settlement of issues. The rule applies even in cases where the plaintiff claims a joint right along with others but does not make the latter parties to the suit. 41 C. 527 (25 B. 433, Dist; 25 I.C. 122, Foll.). See also 35 P.L.R. 616=1934 L. 459; 143 I.C. 838=1933 O. 129; 1941 R.D. 733=1941 A.W.R. (Rev.) 687. Objections as to misjoinder and jurisdiction owing to undervaluation, when not raised in Court of first instance are no ground for reversing a decree when they do not affect the merits of the case. 25 I.C. 25. (36 I.C. 780; 17 I.C. 97; 22 M.L.J. 25; 7 M.L.T. 78; 9 M.L.T. 173, Foll.) An objection as to non-joinder cannot be taken for first time in revision before High Court. 46 I.C. 648. See also 13 I.C. 123=16 C.W.N. 639; 25 I.C. 122; 16 B. 119; 10 M. 322; 17 C. 580. Where no objection as to suit being bad for defect of parties has been taken in the written statement, or in the grounds of appeal in lower Court, it cannot be raised in second appeal. 145 I.C. 325=1933 P. 270. When objection to want of parties is not raised by the defendant, it must be deemed to have been waived. But Court can add any one as a party if it thinks it necessary. 3 A.L.J. 474. Where a defendant is permitted to file an additional written statement and he therein raises an objection as to non-joinder, which is later on made the subject-matter of a fresh issue, the provisions of R. 13 are not infringed. 137 I.C. 274=1932 M. 583=62 M.L.J. 154. Where objection as to non-joinder of necessary parties is taken at



## ORDER II.

## FRAME OF SUIT.

1. Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.  
Frame of suit.
2. (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.  
Suit to include the whole claim.

## NOTES.

the very outset and plaintiffs do not implead them, the suit may be dismissed. 1933 L. 93=145 I.C. 178. (1923 M. 337; 61 M.L.J. 294, Ref.).

O. 2, R. 1: OBJECT OF.—The object of this rule is to give effect to the maxim *interest rei publicae ut sit finis litium*. 27 B. 382. See also 9 C. 919; 2 M.H.C.R. 131; 26 M. 760 (763); 28 A. 482 (P.C.); 26 A. 236; 9 C.W.N. 498; 4 C.L.J. 367. The intention of the legislature is that all matters in dispute should be disposed of in the same suit. 25 C. 371; 31 M. 385.

SCOPE OF.—R. 1 has reference mainly to joinder of causes of action rather than to joinder of parties. 25 I.C. 480=3 P.R. 1915. "Subject in dispute", meaning of. See 23 L.W. 13=91 I.C. 660=1926 M. 234. Under this rule and R. 2 plaintiffs must bring their entire claim, and every remedy enforceable in respect of that claim, into Court at once. 9 C. 919; 2 M.H.C.R. 131. But all causes of action need not be joined. 59 I.C. 517. On this rule, see also 132 I.C. 684=35 C.W.N. 307=1931 C. 670; 1935 N. 226 (Holder of two mortgages—Right to sue separately on each); 1940 Mad. 903= (1940) 2 M.L.J. 281.

O. 2, Rr. 1 and 6: PLAINTIFF JOINING IN ONE SUIT TWO INDEPENDENT CLAIMS—DUTY OF COURT TO ASK PLAINTIFF TO ELECT.—Where the plaintiff sues in one suit for a declaration of his title as proprietor in respect of a portion in certain land and for partition of his share after declaration of his title and also sues in the same suit the admitted *raiya*ts of the land, calling upon them to remove a building from his holding and thus joins two claims and causes of action which are absolutely independent and unconcerned with one another, the suit should not be tried in the form in which it is instituted. The Court should ask the plaintiff to elect to proceed with one of the claims. 161 I.C. 695=1936 P. 142.

O. 2, R. 2: SCOPE AND OBJECT OF THE RULE.—This rule must be read with Expl. V of section 11. See 1939 Sind 367. R. 2 is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one action of different causes of action even though they arise from the same transactions. 41 I.A. 142=18 C.

C. C. M.—98

W.N. 617 (P.C.); 38 M. 1162; 45 B. 805; 30 C.W.N. 873=97 I.C. 73=1926 C. 1022; 110 I.C. 554=1928 M. 840=56 M.L.J. 52; 1930 L. 688=122 I.C. 733. See also 1935 L. 156; 1935 L. 842; 1937 O.W.N. 1146. R. 2, when it operates as a bar merely deprives the claimant of his remedy by suit founded on the same cause of action. It cannot have the effect of vesting any right in any of the defendants. 1933 A. 228=144 I.C. 152. See also 161 I.C. 820=1936 R. 167. O. 2, R. 2 does not control section 130, T. P. Act. 18 Pat. 839=21 Pat.L.T. 928=1940 Pat. 170. O. 2, R. 2 covers cases of accidental omission and is not confined to a deliberate omission. A subsequent suit purely to rectify a mistake committed in a prior suit is barred by O. 2, R. 2. 1941 Pat. 37=21 Pat.L.T. 790. A plaintiff is not obliged to put forward in one suit every claim which he may have against the defendant, as the causes of action in such cases may be different, but he must include the whole claim based on the particular cause of action. 1936 N. 268. R. 2 does not bar *per se* a subsequent suit brought on a different cause of action. It only purports to bar suits for claim omitted from former suits and arising from the transaction under which the claim was made in the former suit and splitting up of the reliefs in respect of the same cause of action. It does not require that where several causes of action arise from one transaction, the plaintiff should sue for all of them in one suit. The rule is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction. 161 I.C. 820=1936 R. 167. R. 2 refers to a case where there has been a suit in which there has been an omission to sue in respect of a portion of a claim and a decree has been made in that suit. 45 C. 305=22 C.W.N. 611. Rule requires that every suit shall include the whole of the claim arising from one and the same cause of action and not that every suit shall include every claim or every cause of action arising out of the same transaction. 1929 P. 241=120 I.C. 479. See also 48 C. L.J. 368=1929 C. 93. R. 2 is directed against two evils—the splitting of claims and the splitting of remedies. 1926 L. 509=97 I.



(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

*Explanation.*—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

#### NOTES.

C. 396. The rule only prevents the splitting up of claims and does not bar a subsequent suit on the whole claim against a different person. 18 C.W.N. 129=19 C.L.J. 191; 41 C.W.N. 1179. It does not contemplate claims under separate causes of action as well as claims affecting different defendants. 40 B. 351=18 Bom.L.R. 45; 104 I.C. 820; 1 Luck. 1=91 I.C. 976=1926 O. 77; 161 I.C. 820=1936 R. 167. It bars only those suits where the causes of action and defendants are the same. The dispossession of plaintiff from two properties held under different titles gives rise to two causes of action. 7 A.L.J. 658=50 I.C. 905. See also 25 B. 161; 41 C.W.N. 1179. R. 2 is framed to protect the defendant being twice vexed for one and the same cause. 41 C. 825. This rule does not debar a plaintiff from including in his claim certain additional profits omitted in a previous suit under a misapprehension that the profits were paid annually and not, as was subsequently ascertained to be the fact half yearly. 65 I.C. 585=1923 A. 230. Two reliefs can be joined in the same suit, the parties being the same. 75 I.C. 597=1923 A. 306. Suit to declare a person mutawalli—Declaration of the ownership of the property as an essential part of the plaintiff's claim. 1 Luck. 592=1928 O. 67=109 I.C. 895. The rule does not apply when the prior suit was withdrawn with liberty to bring a fresh suit. 1930 L. 634.

APPLICATION OF THE RULE.—This rule cannot apply to defendants at all and can only apply to plaintiffs. 1933 L. 569=148 I.C. 484. It applies only where the defendant in the subsequent suit was the defendant in the previous suit. It does not apply where the subsequent suit is brought against a different defendant. 47 I.C. 896. See 17 I.C. 434=1912 M.W.N. 1071; 1929 M. 96=116 I.C. 116. O. 2, r. 2 (3) has no application where the cause of action in the subsequent suit is not the same as that in the earlier suit. A suit should include the whole claim with respect to one and the same cause of action, but need not include every cause of action or every claim which the plaintiff may have had against the defendant at the time. 43 P.L.R. 44. O. 2, r. 2 is not

directed to the inclusion in one and the same action of different causes of action even though they arise from the same transactions. A.I.R. 1941 Rang. 118. As to suit on alternative causes of action, see 103 I.C. 888. It applies not only to cases of deliberate relinquishments but also of accidental or involuntary omission. 35 C.L.J. 304=1922 C. 101. Rule does not apply to proceedings in the Revenue Court. 38 A. 302=14 A.L.J. 373; 1927 O. 498. Nor to proceedings under S. 144 of the C.P. Code. 53 I.C. 552; 47 I.C. 47=3 P.L.J. 367. Nor to proceedings in execution of decree. 62 I.C. 507; 19 A. 98 (F.B.); 18 C. 515; 53 C. 582=1926 C. 1019. Nor to a plea raised in defence. 57 I.C. 348 (L.); 7 L. 297=1926 L. 494=96 I.C. 360; 1926 L. 21. Nor to any part of a dismissed claim abandoned in appeal. 54 I.C. 655. Nor to the amendment of plaint by the addition of claim which had been omitted. 45 C. 305=22 C. W.N. 611. See also 52 I.C. 464=84 P.R. 1919. The rule does not apply where the previous suit was not a regular suit, but an application for leave to sue *in forma pauperis* which was rejected. 21 A. 359. Nor where the cause of action for a prior and a subsequent suit in respect of the same property are different. 41 C. 80; 104 I.C. 820. See also 153 I.C. 73=1935 A. 174. A person is not affected by r. 2 if at the time he brought his former suit, he was not in a position to know all his rights. 21 O.C. 307=49 I.C. 54. It cannot be said that the rule has no application to a suit where plaintiff is a minor. 22 M. 309. There is a distinction between splitting of the same cause of action into two or more suits, and instituting different suits upon distinct causes of action. 11 M. 210. On this section, see also 1933 B. 437=35 Bom.L.R. 946. A bar of fresh suit which O. 2, r. 2 creates does not extinguish the right but merely bars the remedy. Therefore, where a mortgagee omits to include in his suit on the mortgage a portion of the mortgaged property but brings the entire property to sale in execution of his decree and purchases it himself, he can rely by way of defence on the security of the portion of the property omitted in the suit in a proceeding brought under S. 51 of the Provincial Insolvency



## NOTES.

Act by the Receiver of the estate of the judgment-debtor who has been adjudicated insolvent, although he is precluded by the provisions of O. 2, r. 2, from filing a fresh suit in respect of that portion. 42 P.L.R. 29=A.I.R. 1940 Lah. 160. See also (1938) 2 M.L.J. 642.

PART ASSIGNMENT OF DEBT.—O. 2, R. 2 has the effect of barring a particular plaintiff from splitting up his cause of action. In the case of a part assignment of a debt, the assignment itself gives the cause of action and the assignee is, therefore, not prevented from maintaining a suit on the actionable claim assigned to him. 43 P.L.R. 439.

MEANING OF THE TERMS.—The word "claim" is treated as something arising out of a "cause of action" and as something distinct from the term "cause of action." 17 A. 535. The claim and the remedy mentioned in this rule have reference to the cause of action litigated in the previous suit. 10 M. 350. It has to be construed with reference to the substance, rather than the form of action. 19 C. 372. The "cause of action" for a suit is the sum total of the facts and circumstances which the plaintiff has to prove in order to entitle him to the relief claimed. 38 A. 217=14 A.L.J. 257; 13 O.L.J. 448=93 I.C. 269.

"CAUSE OF ACTION" includes every fact which it would be necessary for the plaintiff, to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. 16 A. 65 (F.B.). See also 18 A. 131; 184 I.C. 714=1940 P. 76; 1937 Mad. 804; 45 A. 376=21 A.L.J. 267; 1 R. 694=1924 R. 145; 93 I.C. 269=1926 O. 365; 152 I.C. 199=4 A.W.R. 744. "Cause of action" in r. 2 is used more comprehensively than in S. 17. 25 I.C. 579. It does not depend upon the character of the relief prayed for but refers to the *media* upon which a Court is asked to come to a conclusion. 38 B. 444; 60 I.C. 596=1921 P. 125; 52 I.C. 929. It has no relation to the defence set up by the defendant nor does it depend on the character of the relief prayed for. 52 I.C. 929. An event to which no legal effect attaches, cannot enter as an element into the creation of a cause of action. 31 C. 283. Every adjustment of account is a new cause of action. 11 I.C. 540=15 C. W.N. 862. Every alienation by Hindu widow gives a separate cause of action to reversioners. 66 I.C. 455=1922 O. 171. If the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred. 77 I.C. 590. Suits for *kattubadi* due in successive years—*Kattubadi* not fixed in money or kind but on gross produce—Causes of action are different and suits are not barred under O. 2, r. 2. 147 I.C. 756=39 L.W. 65=

1934 M. 46. First suit for declaration of title dismissed—Second suit for refund of purchase money—Causes of action different. 1933 L. 1017=147 I.C. 651. Where a suit is brought either on a non-existent cause of action or upon a false cause of action it will not disable a plaintiff from filing a fresh suit on the true cause of action. 7 L.W. 557=45 I.C. 969.

WHERE TWO SUITS ARE FILED ON THE SAME DAY.—The presumption is that they were presented and admitted in the order in which their numbers appear in the suit register kept in Court. 1937 R.D. 86.

RELINQUISHMENT OF PORTION OF CLAIM.—There is no reference in this rule to the jurisdiction of the Court trying the claims. Where a person chooses a Court by relinquishing a part of his claim, a subsequent suit for the relinquished portion of the claim will be barred by this rule. The fact that the two suits are triable for two different Courts is immaterial. 14 Pat.L.T. 663=1933 P. 715. See also 1937 Rang. 324. A person must be taken to have relinquished or abandoned his claim on the real cause of action, when he files his suit on another known to him to be false. 6 M.L.J. 5. But see 26 M. 777. The relinquishment by a plaintiff of a portion of the claim under r. 2 applies primarily to relinquishment before institution of the suit. 54 I.C. 655. Amendment of plaint, on objection, omitting one relief—Effect of on subsequent suit for relief omitted. 104 I.C. 370=1927 R. 237. The possession of a right, without knowledge of it, cannot be said to be a portion of his claim, which can be intentionally relinquished. 37 I.C. 119=94 P.R. 1916. [15 C. 800 (P.C.), Ref.] A statement in the plaint that a portion of the claim which is not sued upon is not relinquished is of no effect. 2 N.W.P. 90. Relinquishment may be either accidental or involuntary, as well as deliberate. 11 M.I.A. 551.

"OMITS TO SUE."—See 1937 Rang. 324; 1938 Rang. 290. The words "to sue" mean to make a legal claim or to take legal proceedings. It does not necessarily mean to file a suit by means of a plaint. 7 Bom.L.R. 138; 38 A. 217. To constitute an *omission to sue* it is necessary that the claim must be known to the plaintiff. It is only a claim or remedy known at the time of the institution of the suit, which if omitted will be barred under O. 2, R. 2. Actual knowledge of the claim, and not constructive knowledge, is necessary in order that the relief may be barred in a subsequent suit. Where a plaintiff is unaware of a claim at the time of his suit, though he may, by proper inquiry make himself aware of its existence, the non-inclusion of that claim will not preclude him from subsequently suing in respect of that claim. 44 L.W. 379=1936 M. 699=71 M.L.J. 264. It is not necessary to determine whether the omission arose from a mistake or otherwise. 3 Beng. L.R. 265. See also 170 I.C. 946=1937



## NOTES.

Rang. 324. Casual omission to include some items of property from the schedule to the plaint does not mean abandonment of claim by plaintiff with respect to those items. 50 I.C. 331.

"PORTION OF CLAIM."—The right which a litigant possesses without knowing or ever having known that he possesses it can hardly be regarded as a "portion of his claim." 15 C. 808 (P.C.).

LEAVE OF THE COURT.—Where there has been an omission to sue for all reliefs in respect of the same cause of action, the remark of the Court in its judgment that a suit in respect of the omitted relief could be brought later on, does not amount to the leave of the Court in the sense in which it is used in O. 2, R. 2 (3). 1937 O. W. N. 1146. See also 48 L. W. 292=1938 Mad. 865=(1938) 2 M. L. J. 534; 1938 Rang. 290. Per *Baguley, J.*—There is no provision of law by which a plaintiff can reserve the right to split his claim arising out of the same cause of action. He may ask the Court to allow him to do so under O. 2, R. 2 (3), but the Code gives no unilateral right to reserve a claim of this sort. 1937 Rang. L.R. 447=174 I.C. 794=A.I.R. 1938 Rang. 76. Under O. 2, R. 2, the omission to ask for a particular relief is not a defect that goes to the maintainability of the very suit in which leave should have been asked; it only entails a disability as regards subsequent proceedings. There is no reason for insisting that the application for leave to omit must precede, or at least be contemporaneous with the plaint in the first suit. It cannot be said that the Court has no power to grant leave unless the application is made before the institution of the suit or along with the presentation of the plaint. The Court, when called upon to deal with such an application, has ordinarily to consider whether the grant of leave to reserve certain remedies would in the circumstances be appropriate in the sense that it will not give an unfair advantage to the plaintiff or impose an unfair burden on the defendant. A question of this kind can as well be dealt with by the Court during the pendency of the suit as before its institution. The legislature did not wish to insist upon leave being obtained before the first hearing. A.I.R. 1938 Mad. 979=(1938) 2 M.L.J. 642.

"SHALL NOT AFTERWARDS SUE."—It is only remedy of suing which is barred. The right subsists. 7 Bom.L.R. 138. This rule is laid down with reference to suits brought under this Code. 9 C. at 46. See also 21 M. 236. It has reference to the subject-matter of the claim, and not to the persons against whom it may be brought. 10 C. at 929. See also 19 A. at 384. A set-off is subject, as a claim in a cross-suit would be, to the provisions of this rule. 32 C. 654.

TEST.—Whether the causes of action in two suits are different or identical can be

ascertained by the test whether the same evidence will maintain both actions. 40 B. 351=33 I.C. 950=18 Bom.L.R. 45. If the cause of action in the subsequent suit is different from that in the first suit the subsequent suit is not barred by R. 2. 66 I.C. 923=34 C.L.J. 465; 114 I.C. 871; 1930 A. 116=121 I.C. 827. The mere fact that the title to the property in dispute in both suits is the same and that the property is the same does not necessarily show that the cause of action is the same. 59 I.C. 517. Where the plaintiff was unaware of her assets and liabilities in respect of 1339 and 1340 fasli at the time of the institution of the prior suit in respect of arrears of revenue for 1337 fasli, it was held that a second suit in respect of 1339 and 1340 was not barred by O. 2, R. 2. 1941 O.W.N. 681=1941 O.A. 465=1941 A.W.R. (Rev.) 411.

PLEADINGS, PROOF AND PRACTICE.—A plea of bar under R. 2 must be specifically pleaded and established to the Court's satisfaction. 46 I.C. 119. A statement made in a previous suit by a party that he reserved the right of bringing another suit for damages cannot avoid the operation of the rule of limitation or of R. 2. 34 I.C. 51. Two suits presented on the same day must be presumed to be presented and admitted in the order in which their numbers appear on the register. 1 R. 682=1924 R. 161; 1937 R.D. 86. But see 49 M. 869=51 M.L.J. 351. Where it has been held that the numbering is not *prima facie* evidence of respective dates of admission and it could not be said that the suit bearing the later number was afterwards presented within the meaning of R. 2. Held also, that the plaintiff may elect as to which of the two suits should be held to be barred. (*Ibid.*) A second suit will not be barred by the rule unless the same cause of action is to be found within the four corners of the plaint in the first suit. 28 I.C. 301=82 P.L.R. 1915. Subsequent suit on alternate cause of action. 103 I.C. 888=1927 N. 322.

SPECIAL CASES: ACCOUNTS, SUIT FOR.—Where in a former suit between the parties, for accounts of a dissolved partnership, the Court on the basis of a Commissioner's report found that there was a certain amount due to a defendant therein, who, however, remained *ex parte* and did not choose to ask for a decree in his favour for that amount, though he could have done so; and the judgment in the former suit is capable of being read as declaring the rights of all parties, it is not right to say that that party has no right to make a claim on the basis of the prior judgments or, to obtain a decree for the amount in a suit instituted for the purpose. 67 M.L.J. 413=40 L.W. 792=1934 M. 665. See 158 I.C. 378=1935 L. 321. In order to ascertain whether a suit is barred by the provisions of O. 2, R. 2, it is necessary to consider what facts had to be proved in the first suit and what facts have to be proved in the second suit. Where in the earlier



## NOTES.

suit what had to be proved was the fact that the defendants had received certain sums of money from the military department on behalf of the plaintiff in respect to bills which had been submitted by the latter and in the later suit what had to be proved was the terms of a sub-contract between the plaintiff and the defendant and the liability of the defendant to render account, it was held that the cause of action in the two suits was different and that hence the provisions of O. 2, R. 2 did not operate as a bar. 1941 A.L.J. 288=1941 O.W.N. 676=1941 A.W.R. (H.C.) 169. A suit for accounts brought subsequent to a suit for dissolution of partnership is not barred under R. 2 as the two suits are not based on the same cause of action. 39 P.L.R. 197. Suit to set aside purchase of mortgage-deed and for reconveyance of properties—Claim for accounts not pressed—Subsequent suit for accounts barred by O. 2, R. 2. 35 C.W.N. 977=1931 P.C. 229=61 M.L.J. 294 (P.C.). Where careful perusal of the plaint in the first case indicated that the plaintiff was confining his claim to certain specific items said to have been appropriated by the respondent quite apart from his liability to render accounts as an agent which was the subject-matter of the second suit. *Held*, that the second suit was not barred under R. 2. 145 I.C. 1010=34 P. L. R. 905=1933 L. 542. Accounts of a partnership can only be taken and must be taken once for all in a suit to which all partners or their representatives are parties, and the law does not contemplate successive suits for accounts taking at the instance of the various partners. 40 L.W. 792=1934 M. 665=67 M.L.J. 413.

**ALIENATION.**—A plaintiff may either file a single suit or separate suits to set aside alienations made by a widow. 12 M.L.J. 103. *See also* 16 A. 279; 7 M.H.C.R. 290; 1 Luck. 1; 1930 N. 3=26 N.L.R. 121.

**COMPROMISE.**—When a suit is compromised, and the compromise provides for possession being given, a suit for possession based on the compromise is not barred. 2 A. L. J. 680. The fact that the previous suit is compromised is no bar to the application of the rule. 22 W.R. 424. *See also* 7 B. 182.

**CONTRACT.**—Where there are two breaches of one term in one contract, and both occur before any suit is brought, the cause of action is non-performance of the promise, and only one suit will lie. 12 C. at 348. But *see also* 135 I.C. 801=33 Bom. L. R. 1563=1932 B. 86; 19 C. 372. It is only when the party complaining of the breach of contract suffers damage that a cause of action is said to arise and till then only a term of the contract is broken. 38 M.L.J. 470. A cause of action might include claims upon several contracts provided they form part of a continuous course of dealing. 26 I.C. 209=41 C. 825. Suit on account—Different members of a joint Hindu

family executing different khata—Suit on one specific khata—Running account produced referring to all khata—Subsequent suit on another khata—Bar. 54 B. 11=122 I.C. 417=1930 B. 60. When one instrument contains two separate contracts and performance of each is secured in a different manner each gives rise to a separate cause of action, although they may be joined in the same suit. 58 I.C. 18=16 N.L.R. 136. Second suit is not barred when the former suit was one for an injunction and value of fodder taken away and the second suit is one for a refund of money advanced and damages for breach. 2 L.L.J. 304. (25 M. 669, Foll.)

**CONTRIBUTION.**—Where one of several co-debtors satisfies the debt, his cause of action for contribution accrues against all at one and the same time. The contributories may all be included as defendants is one plaint. 3 M.H.C.R. 187. *See also* 12 A. 110. First suit as manager for rendition of accounts against heirs of brother—Second suit for contribution towards joint liability—Suit not barred. 152 I.C. 199.

**DAMAGES.**—Where A sued B on the 2nd June, 1879, for damages for not having made over possession of certain leasehold properties during 1875-1876, and got a decree, a subsequent suit on the 14th June, 1880, for damages for 1876-77 to 1878-79 is barred. 9 C. 143. *See also* 1937 O. W. N. 1146. Prior suit for possession does not bar subsequent suit for compensation. 11 L.L.J. 64=1928 L. 534 (1). The same set of facts cannot give ground for two actions, i.e., for a tort and a conspiracy to cause damage. The one excludes the other. 40 C. 898=23 I.C. 25=18 C.W.N. 185. First suit for damages for failure to repair a motor car—Subsequent suit for the price of the car refused to be returned—Maintainability. 122 I.C. 733=1930 L. 688. Transaction giving rise to two different claims based on different causes of action—Separate suits not barred—Illegal distress by mamlatdar—Suit for recovery of amount levied and interest—Subsequent suit for compensation and damages not barred. 41 Bom.L.R. 1223. *See also* I.L.R. (1939) Bom. 721=1940 Bom. 20.

**DIVORCE.**—A suit for divorce based on the wife's misconduct does not bar a subsequent suit for partition of the common properties of the husband and wife. 38 C. 629=15 C. W. N. 766 (P.C.). *See also* 187 I.C. 380=1940 Rang. 29.

**EJECTMENT.**—Suit for ejectment of tenant from one plot—Subsequent suit regarding other plots in the same holding barred. 14 R.D. 632. The fact that the plaintiffs brought a previous suit for ejecting defendants from some of the plots in the plaintiff's holding is no bar to a second suit for ejecting the defendants from the remaining plots omitted in the first suit. For this purpose it makes no difference if the previous suit was withdrawn or dismissed for default or



## NOTES.

the plaintiffs omitted a portion of their claim. 17 R.D. 114. Where one of the proprietors reclaims *shamilat* land and a suit for ejectment by the proprietary body is dismissed and the former reclaims a further piece of *shamilat* land, a subsequent suit to eject him from the land reclaimed subsequently is not barred under R. 2. 158 I.C. 112=1935 L. 156. Where two separate and unconnected buildings are erected on a land and the plaintiff's suit for demolition of one of the buildings and possession of land underneath is dismissed, a subsequent suit for demolition of the other construction and for possession of land lying underneath it is not barred either by R. 2 or by *res judicata*. Each construction gives rise to a separate cause of action. 158 I.C. 620=1935 A.L.J. 948=1935 A. 790. See also 14 L.R. 134 (Rev.)=17 R.D. 176.

EXECUTION APPLICATION.—R. 2 does not apply to applications for execution. Application for partial execution is no bar to a subsequent application for execution of the rest of the decree. 28 N.L.R. 77=130 I. C. 120=1932 N. 89.

INSTALMENT BOND.—An instalment bond containing a provision that on default of payment of any two instalments, the whole amount would become payable and the creditors would be at liberty to sue for the entire amount, gives an option to the creditor either to sue for the whole amount in case of two successive defaults or to sue for the instalments only. If the creditor exercises his option of suing for the instalments only and waives the right to sue for the whole amount there is no longer any cause of action left to him for suing for the whole amount. It follows that at the time when the suit is brought, he disentitles himself from suing for the whole amount, and therefore R. 2 would not be a bar to a future claim brought by him when further instalments fall due. As a matter of fact R. 2 does not deal with cases where there is an option to sue for the whole amount and the option is waived before the suit is brought. 158 I.C. 53=1935 A.L.J. 456=1935 A. 461. See also 183 I.C. 425=1939 Rang. 251; 157 I.C. 643=1929 M.W.N. 204. Omission to sue for instalments which had accrued due bars subsequent suit therefor. 44 A. 663. But see also 1931 M.W.N. 1246. Two or more causes of action to recover money may be joined, but only if they arose within the jurisdiction of the Court in which the suit is brought. 12 M. L.J. 11. As to money suits, see also 8 C. 483 (F.B.); 7 B. 134; 5 C. 597; 12 B.L.R. 37; 28 B. 447. "Claim for a portion does not bar another claim for balance." 29 M.L.J. 474. On this point, see also 1931 M.W.N. 1246=35 L.W. 424=138 I.C. 340; 1938 Rang. 364.

MAINTENANCE.—A subsequent suit for a declaration that the maintenance decreed in a former suit is a charge on certain pro-

perty, is barred. 12 M. 285. See also 11 M. 127. The mere ground that the wife entertains any apprehension as regards the husband's transferring his property would not afford her a new cause of action for the relief sought for by her in the second suit. 167 I.C. 123=1937 A. 56. A subsequent suit for maintenance at an increased rate is not barred. 22 M. 175. Where under the terms of a will an amount is payable from the income of a property by way of maintenance, a suit for recovery of arrears of such maintenance can be framed as such, without framing it on the charge of the property left by the will. See 132 I.C. 684=35 C.W.N. 307=1931 C. 670.

SUIT ON MORTGAGE.—21 B. 267; 18 M. 257; 20 A. 322; also 24 A. 429 (P.C.) and 24 M. at 109; 30 B. 156; 10 Bom.H.C. 369; 6 Bom.H.C. (A.C.) 97; 7 B. 377; 3 A. 857. Two mortgages—Each can be sued on separately. 33 C.L.J. 232. A person holding two mortgages on a property can sue for sale on the second mortgage reserving his rights under the first. Each mortgage is a separate cause of action and the mortgagee is not bound to sue on them all. 38 M. 927=29 M.L.J. 195 (F.B.). This was held by a Full Bench of the Madras High Court. It is not now good law since the enactment of S. 67-A of the Transfer of Property Act by the Amending Act of 1929. Option to sue—Mortgagee authorized to sue for interest or for possession in default by mortgagor—Suit for interest—Subsequent suit for possession not barred. 2 L. 13 (F.B.). See also 44 M.L.J. 123=38 C.L.J. 126=4 L. 32=50 I.A. 115 (P.C.); 44 A. 121=49 I.A. 9 (P.C.); 26 A. L.J. 57; 102 I.C. 187=1927 M. 580=52 M. L.J. 636. Where the deed of anomalous mortgage contained a covenant by which the mortgagor undertook to pay interest yearly, a suit by the mortgagee to recover the interest only due under the document is maintainable. (4 Luck. 32 and 64 I.C. 953, Rel. on.) 152 I.C. 494=1934 R. 159. Suit for sale on mortgage—Court gave a decree declaring plaintiff's mortgage right and giving him liberty to enforce his right in a separate suit—Second suit for enforcing the mortgage right not barred. 1931 M.W.N. 1008=1931 M. 830. First suit for sale of mortgaged property for interest only may bar a second suit for recovering principal and balance of interest. The question whether any default accelerates the claim on which the principal money can be called in would depend entirely on the wording of the mortgage. English cases are not proper guides for deciding Indian cases. 6 R. 771=115 I.C. 671=1929 R. 71. A mortgage deed provided that the principal money would be payable on the expiry of four years. Interest was payable at 9 per cent. monthly and if it remained unpaid for three months, the mortgagee was entitled to compound interest and also if he chose, to realise the whole amount of principal and interest.



## NOTES.

During the third year, interest fell in arrears and the mortgagee brought a suit for interest and realised it. After the expiry of four years, he brought the present suit for principal. *Held*, that the default clause was one for the benefit of the mortgagee, which he was entitled to waive and as in the previous suit instituted before the expiry of four years, the principal was not recoverable, the present suit was not barred under r. 2. (Case-law referred.) 141 I.C. 613=34 P.L.R. 520=1933 L. 463. *See also* 1940 Lah. 498. Mortgage-deed containing provision for recovering interest only—Suit for interest after mortgage amount became payable—Personal relief claimed—Subsequent suit to recover mortgage amount—Bar. 27 A.L.J. 1045=119 I.C. 90 (2). Mortgage-deed providing for instalment payment—Default clause for payment of enhanced interest and whole amount—Default of mortgagor—Suit to recover instalment and enhanced interest—Subsequent suit to recover entire mortgage amount—Bar. 1929 M. 371=56 M.L.J. 580. Covenant to pay interest unless distinct from and independent of claim for principal cannot be basis of suit. 117 I.C. 61=1929 R. 96 (2). *See* 39 A. 506; 97 I.C. 285=1926 L. 661; O.W.N. 960. Mortgage and lease—Suit for rent—Subsequent suit on mortgage is no bar. 3 L. 1=1922 L. 111. *See also* 69 I.C. 54=1924 L. 190. Mortgage by tenant with possession—*Malguzar* suing mortgagee for declaring mortgage as void—Subsequent suit for possession—If barred. 122 I.C. 697=1930 N. 119. Where a mortgage and lease form one transaction and the lease is only a mode for realizing the interest due on the mortgage, a suit on the mortgage cannot be brought subsequent to a suit for rent on the lease. 63 I.C. 928=3 Lah.L.J. 390. Where the mortgagee brought a suit for principal and interest a subsequent suit for possession is barred. 97 I.C. 396=1926 L. 559=8 L.L.J. 381. The right of the mortgagee to recover the money from the mortgagor personally arises out of the *covenant to repay the loan and his right to realise the security, viz.*, to have the mortgaged property sold to satisfy his claim, accrues from the hypothecation. Each of these two rights furnishes an independent and distinct cause of action to the mortgagees. R. 2 makes it obligatory on the plaintiff to include in the suit the whole of the claim and all the reliefs which he is entitled to make and pray for only in respect of the cause of action. It therefore follows that a mortgagee is not bound to sue for the realisation of his security in a suit to enforce the personal covenants of the mortgagor to pay the overdue interest as the two claims arise out of distinct causes of action. 16 L. 640=158 I.C. 228 (2)=1935 Lah. 672 (F.B.). *See also* 1938 Mad. 255=(1938) 1 M.L.J. 184. Where the original obligation is single and entire, but when one party has chosen to

execute separate documents for portions of the obligation and the other party has chosen to accept the said documents each document constitutes a distinct cause of action. Hence where in pursuance of a settlement of accounts promissory notes and mortgage are executed, and a suit is filed only on the promissory notes, a subsequent suit on the mortgage is not barred by R. 2 as the notes and mortgage constitute distinct causes of action, even though made in settlement of single debt. 159 I.C. 720=1935 R. 365. Suit for return of mortgage money on the ground of failure of security is barred under R. 2, if the mortgagee first sues for possession and having failed there, institutes the second suit for the money. (1924 O. 147; 1925 O. 524; 1932 L. 523; 1921 L. 309 and 1926 Pat. 87, Foll.) 161 I.C. 698=1936 Pesh. 86. Suit on mortgage impleading Hindu mortgagor, his sons and grandsons—Court passing money decree against mortgagor alone—Suit dismissed against the rest—Interest of sons and grandsons—Liability to attachment and sale in execution. 1935 O.W.N. 1113. As regards the application of the rule to mortgage suits, *see also* 140 I.C. 181; 57 B. 316=34 Bom.L.R. 1615; 138 I.C. 270=1932 L. 523; 1932 M. 466=63 M.L.J. 672; 40 C.W.N. 627; 163 I.C. 834=1936 M. 473=70 M.L.J. 506; 1935 Pesh. 84; 1937 N. 99; 166 I.C. 996=64 C.L.J. 62=1937 Cal. 57.

MORTGAGE, REDEMPTION OF.—A suit for redemption is barred when the plaintiff had first sued for recovery of excess balance realised by the mortgagee. 48 I.C. 799; 103 I.C. 290=1927 N. 302. In a redemption suit all claims between the mortgagor and the mortgagee should be settled. 24 I.C. 688; 1927 N. 302. *See also* 152 I.C. 921=1935 A.L.J. 115=1935 A. 96; 161 I.C. 820=1936 R. 167; 1937 Rang. 204=171 I.C. 913; 191 I.C. 398. The dismissal of a suit for redemption according to the terms of a mortgage is no bar to suit for redemption on a subsequent agreement. 27 I.C. 732. Suit by mortgagee for possession—Second suit for possession barred. 67 I.C. 281=2 L.L.J. 678. *See also* 103 I.C. 289. Causes of action for the redemption suit and the subsequent suit for contribution against the person who had the part of the equity of redemption are different. 27 A.L.J. 1162=1929 A. 696. *See also* I.L.R. (1940) 1 Cal. 544=1940 Cal. 550 (title suit for possession dismissed—No bar to subsequent suit for redemption of mortgage).

MESNE PROFITS, SUIT FOR.—19 C. 615; 17 A. 533; 11 M. 151; 11 M. 210; 11 M.L.J. 332. *See also* 3 A. at 663; 24 A. 501. R. 2 does not bar a suit for mesne profits brought subsequently to a suit for possession, as a claim for mesne profits is based on a cause of action distinct from a claim for possession. 60 I.C. 65. *See also* 1931 A.L.J. 606; 152 I.C. 921=1935 A.L.J. 115=1935 A. 96; 161 I.C. 820=1936 Rang. 167; 158 I.C. 1119=



## NOTES.

18 N.L.J. 76; 10 P. 329; 133 I.C. 766=1931 P. 233; 1931 O. 57; 54 A. 65=1932 A. 510; 133 I.C. 298=1931 A.L.J. 673=1931 A. 429 (S.B.) (Suit for mesne profits accruing after institution of previous suit, not barred). (Case-law discussed.) 1931 A. 429; 1937 Mad. 849; 1940 Mad. 934. If a person is wrongfully kept out of possession of immovable property he is entitled to sue for possession and for mesne profits and under the provisions of O. 2, R. 2 (3), he is bound to include both claims in one suit. If he sues only for mesne profits he cannot in a subsequent suit sue separately for possession. In other words he is no longer entitled to possession, and if he is not entitled to possession, he is not entitled to mesne profits. A subsequent suit for mesne profits is therefore barred. I.L.R. (1940) All. 781=1940 A.L.J. 727=1940 All. 524. A claim for mesne profits for the period covered by a prior partition suit is a claim based on a different cause of action and is not barred by the provisions of R. 2. [1931 A.L.J. 673 (F.B.), Foll.] 3 A.W.R. 735. See also I.L.R. (1940) Kar. 36=185 I.C. 702; 59 B. 454=157 I.C. 634=37 Bom.L.R. 336=1935 B. 306; 156 I.C. 672=31 N.L.R. 304=1935 N. 137. A previous application for restoration of possession does not bar a subsequent claim for mesne profits by way of restitution. 38 C.W.N. 1197. Suit for redemption followed by decree and deposit of decretal amount—Failure of defendant to deliver possession—Fresh suit for mesne profits from final decree to delivery of possession not barred. 152 I.C. 921=1935 A.L.J. 115=1935 A. 96. Decree by consent for mesne profits up to date of judgment—Defendant wrongfully continuing in possession—Suit for subsequent mesne profits not barred. 56 B. 292=34 Bom.L.R. 447=138 I.C. 578=1932 B. 222. But see 49 A. 597=25 A.L.J. 409. Where in a prior suit for possession and future mesne profits the Court did not purport to decide the question of future mesne profits a subsequent suit for mesne profits *pendente lite* is not barred. 40 A. 292. A prior suit for partition and possession does not bar a subsequent suit for mesne profits in respect of the same property. 4 R. 103=95 I.C. 380=1926 R. 137. See also I.L.R. (1940) Kar. 36=185 I.C. 702; 1940 Mad. 934=(1940) 2 M.L.J. 487 (Prior suit for cancellation of deed is no bar to subsequent suit for mesne profits). A prior suit for possession does not bar a suit for mesne profits due for a period subsequent to the institution of the prior suit. 71 I.C. 972=1923 C. 442; 12 L.L.J. 152. Claims for possession and claims for mesne profits are separate causes of action. 38 M. 828=28 M.L.J. 127 (F.B.). Suit for profits accrued between date of deposit of mortgage-money and delivery of possession is maintainable. 35 I.C. 799. A party is not bound to include mesne profits after the institution of suit though he is required to do so for profits before suit. 32 I.C. 696. See also 49 A. 597=25 A.L.J. 409. The institution of

a suit for mesne profits only consequent on dispossession is a bar to a subsequent suit for possession. 29 I.C. 939=9 S.L.R. 23; 1938 A.L.J. 997=1939 A. 52=180 I.C. 356. A suit for proprietary profits against a lambardar does not bar a subsequent suit for mesne profits against the same lambardar and other trespassers. 41 A. 286.

PROFITS.—Where a plaint in a suit for one year's profits was not re-presented after being returned, a subsequent suit for account is not barred under R. 2. 40 M. 291=30 M.L.J. 341. See also 1937 Sind 300.

PARTNERSHIP SUIT.—When a suit for accounts of a partnership has been instituted no second suit for accounts is maintainable in connection with the same partnership, when the claim involved in the second suit could have been included in the prior suit. 158 I.C. 378=1935 L. 321. See also 67 M. L.J. 413. Suit for accounts after previous suit for dissolution of partnership is not barred. 39 P.L.R. 197=1937 Lah. 633.

PARTITION SUIT.—See 20 C. 385; 23 B. 597; 8 M.L.J. 92; 7 B. 182; 23 A. 216; 28 A. 39; 28 A. 50. A subsequent suit for partition of property in one district is not barred merely because the plaintiff had sued for partition and possession of some property in another district. 16 I.C. 383. See also 134 I. C. 803=34 L.W. 277=1931 M. 705; 7 B. 182; 3 M.H.C. 376; 38 A. 217. A suit for partial partition though dismissed does not bar a suit for partition of all joint properties. 87 P.R. 1915=31 I.C. 463. Second suit for partition of lands not included in the first suit by mistake or fraud of the defendant is not barred either on the principle of *res judicata* or R. 2. 130 I.C. 552=1931 S. 27. See also 170 I.C. 946=1937 Rang. 324. But not so where there was intentional omission. 9 I.C. 424. Suit for partition—Subsequent suit for rent barred except as regards rent for the period subsequent to the prior partition suit. 137 I.C. 775=1932 L. 448. Where a property is inherited from the collaterals of the parties to a previous suit for partition, there is no bar to a fresh suit for partitioning the property held by them jointly with other collaterals. 15 I.C. 214. An omission in a suit by the next friend of a minor of a portion of the property to which the minor is entitled, will not bar a second suit by the minor for the partition of property omitted. 45 B. 805; 14 I.C. 95. Where the first suit to set aside order for re-delivery under O. 21, R. 101 is decided against plaintiff a subsequent suit for partition is not barred. 49 M. 596=50 M.L.J. 681=1926 M. 683. A fresh suit for mesne profits is not barred under R. 2, by reason of the plaintiff having already sued and got a decree for partition and separate possession, when in the prior suit the plaintiff did not pray for mesne profits, past or future, and the decree therein said nothing about the same. 59 B. 454=157 I.C. 634=37 Bom.L.R. 336=1935 B. 306. See also I.L.R. (1940) Kar. 36=185 I.C. 702; 156 I.C. 672=31 N.L.R. 304=1935 N. 137. Suit for partition of property obtained under a will—Subsequent



*Illustration.*

A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

## NOTES.

suit for partition of property inherited—Maintainability. 122 I.C. 403=1930 A. 371.

POSSESSION, SUIT FOR AND RENT SUIT.—See 21 C. 157 (P.C.); 4 A. 171; 27 B. at 389; 10 C.W.N. 8; 13 M.L.J. 475. The cause of action in a suit for a declaration and in a suit for possession are different. 38 M. 247=25 M.L.J. 125. See also 167 I.C. 414=1937 O. 263. A dismissal of a declaratory suit by reason of the plaintiff not being in possession at the time of suit does not bar his subsequent suit for recovery of possession. 9 L.B.R. 37=37 I.C. 15=10 Bur.L.T. 189. Suit for bare declaration—Subsequent suit for possession not barred. 95 I.C. 892=1926 R. 123; 120 I.C. 509. Suit for mere declaration that property unattachable—Subsequent suit to recover damages for wrongful attachment is not barred. 95 I.C. 219. A suit for possession of property will not be barred by reason of the dismissal of a previous suit for declaration and injunction. 52 I.C. 434; 34 A. 172=13 I.C. 154=9 A.L.J. 111. Suit by daughter to establish reversion to her father's estate—Subsequent suit for specific property, if barred. 50 I.A. 267=51 A. 439=1929 P.C. 166=57 M.L.J. 160 (P.C.). Property in the possession of second defendant—Suit claiming property from first defendant—Second suit claiming that property from the second defendant not maintainable. 129 I.C. 737=32 Bom.L.R. 1473=1931 B. 114. See also 1937 O.W.N. 1146; 21 Pat.L.T. 790. First suit for certain items bequeathed, plaintiff having no knowledge of the items bequeathed to him—Subsequent suit for further items bequeathed to him but left out in the prior suit is maintainable. 23 L.W. 415=93 I.C. 1 (2)=1926 M.W.N. 94. See also 21 Pat.L.T. 790. Where a suit is based on certain title to certain property the plaintiff is not debarred from recovering some other property on some other ground in a subsequent suit. 38 M. 1162=16 M.L.T. 310=26 I.C. 232=27 M.L.J. 520. (26 A. 238; 23 W.R. 314; 29 M. 48; 12 C.L.J. 336; 13 B. 34, Foll.) See also 39 C. 704; 28 M. 560; 12 M. 134; 17 C. 933; 1 A. 688 (P.C.); 19 W.R. 133 (P.C.). Where the plaintiff, in a suit for possession on the basis of a lease, omits to include a relief for demolition of the building standing on a portion of the property, and obtains a decree for possession, he cannot afterwards bring a separate suit for that purpose. 155 I.C. 268=1935 P. 222. Where the right to recover possession would arise only on the sale being set aside the plaintiff suing for cancellation of the sale need not pray for possession and a fresh suit for the latter relief will not be barred by section 11 or O. 2, R. 2. 57 B. 456=35 Bom. L.R. 630=1933 B. 398. Purchaser at a Court-sale can recover separate lots of property purchased from different sets of defendants in separate suit. 44 B. 352. A decree

in a suit for the specific performance of an agreement to lease does not bar a fresh suit for possession of the properties. 48 I.C. 188=14 N.L.R. 176. See also 38 M. 693. A claim for possession can be joined to a claim for specific performance of a contract for sale of immovable property against the vendor but not a claim for possession against the usufructuary mortgagee of the vendor. 32 I.C. 237=(1916) 1 M.W.N. 77. See also 98 I.C. 160=1927 R. 197. Claim to recover part of the property as owner and to preempt the rest, if maintainable. 49 A. 219=25 A.L.J. 48. Prior suit for possession dismissed for mistake in description of property is no bar to subsequent suit for rectification with proper description. 1937 A.W. R. 245=1937 All. 401; 1937 O.W.N. 252=1937 Oudh 263. Suit under O. 21, R. 63 by unsuccessful claimant is not a bar to a second suit by him for recovery of property from purchaser at Court-auction held subsequent to first suit. 110 I.C. 554=1928 M. 840=56 M.L.J. 52. Prior suit for declaration and possession of certain share—Partition by Collector before decree—Fresh suit for distribution of decreed share to newly formed estates. 15 P.L.T. 747=1934 P. 515. Applicability—Former suit to recover movables—Same occasioned by order of Magistrate—Later suit to recover possession of immovable property—Defendants the same in the suits—Causes of action different—Subsequent suit if barred. 31 Bom.L.R. 1123=1929 B. 460. See also 1938 Lah. 492. Applicability—Prior suit to recover one item of property in the adverse enjoyment of one member—Subsequent suit for remaining property on the basis of tenancy-in-common—Bar. 113 I.C. 785=1929 O. 1. Earlier suit based on a conveyance for difference of the area of the land mentioned in conveyance and actual area is no bar under O. 2, R. 2 to a second suit for a different land on an agreement to convey. 1929 R. 285.

RENT, SUIT FOR.—See 15 C. 145 (F.B.). See also 21 M. 236; 6 C. 791; 12 C. 50; 5 M. H.C.R. 419; 5 C. 24; 27 M. 116; 16 M.L.J. 24. A prior suit for account of rents bars a subsequent suit for rent due prior to the date of the first suit. 46 B. 229=23 B.L.R. 1086; 103 I.C. 74=1927 M. 791; 1937 A.W.R. 867=1937 R.D. 394; 189 I.C. 204. Where rent is in arrears for several months the landlord cannot maintain separate suits for the several instalments but should institute a single suit, the cause of action being the same. The fact that payment is pleaded in one of the suits does not render the separate suits maintainable. Where separate suits are erroneously instituted the effect is that the moment one of the two suits is decreed the other suit must fail. 146 I.C. 351=37 C. W.N. 730=1933 C. 821. The non-inclusion of a claim for rent in the previous suit for possession is not a bar to a subsequent suit for rent. 35 A. 512; 101 I.C. 816 (2); 25 L.



3. (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

#### NOTES.

W. 11=100 I.C. 40=1927 M. 273. *See also* 1937 Sind 300. A suit to recover arrears of rent is not barred by reason of an earlier suit for ejectment. 63 I.C. 978. The relationship of owner and trespasser and that of mortgagor and mortgagee are different and the dismissal of a suit for ejectment is no bar to a suit to enforce a right to redeem as mortgagor. 63 I.C. 684. Suit for rent—Second suit for possession and future mesne profits—Suit for mesne profits for the period between the two suits not barred. 97 I.C. 389=1926 M. 1015=51 M.L.J. 252. (38 M. 829, Foll.). *See also* (1939) 2 M.L.J. 329=1939 M. 724.

SET OFF PLEA OF, set up in previous suit and not pressed may be raised again in a subsequent suit. O. 2, R. 2 is no bar. 1937 O.W.N. 831=1937 Oudh 394.

SPECIFIC PERFORMANCE, SUIT FOR.—*See* 158 I.C. 1119=18 N.L.J. 76. Suit for specific performance of contract of sale does not bar subsequent suit for possession. 178 I.C. 157=1938 Rang. 290. *See also* 43 Bom.L.R. 293.

SUCCESSION CERTIFICATE.—The executors under a will declined to pay a legacy to the legal representatives of the legatee, except on production of a succession certificate, but agreed to pay interest thereon. Legal representatives, after first suing for interest alone, subsequently sued for the amount of the legacy after getting succession certificate. *Held*, R. 2 was no bar to the second suit. 132 I.C. 196=1931 M. 313. [51 A. 439 (P.C.), *Rel. on*; 8 C. 422; 21 B. 267; 48 M. 703; 18 M. 466; 1922 P.C. 23, *Ref.*]

RESTITUTION.—Previous application for restitution of a sum of money recovered in execution does not bar a subsequent application for interest due on the said sum. 40 M. 780. The bar which the Code provides in O. 2, R. 2 and section 11, Expl. 4 in regard to suits does not apply to the case of an application for restitution under section 144. Therefore an application by the judgment-debtor for restitution of the principal amount under section 144 does not bar a second application by him to recover interest for the period during which the decree-holder had the use of the money. 153 I.C. 572=1935 A. 195.

WAGES.—A suit for damages for wrongful dismissal bars a subsequent suit for wages. 6 C.L.R. 91.

WAY, RIGHT OF.—The fact that a right of way was not claimed in a previous title suit does not bar a subsequent suit for declaration of a right of way. 57 I.C. 852.

BURDEN OF PROOF.—Plaintiff sued on a running account for a particular period and obtained a decree. Subsequently he brought a suit on an account for a prior period alleging that the accounts in the two suits were separate. *Held*, that it was for the defendant to prove that the cause of action in both the suits was the same, in order that second suit may be barred under R. 2. 1933 A. 852.

COURT-FEE.—Dismissal of suit—Rejection of plaint after refusal of permission to withdraw—Failure to give proper valuation and to pay deficit Court-fee—Subsequent suit on the same cause of action—If barrad. 40 C.W.N. 1390. *See also* 1935 C. 764.

O. 2, R. 2, O. 9, R. 9 and O. 23, R. 1.—On an application by the plaintiff, an amendment of plaint by addition of a relief for possession of the suit property was allowed and he was directed to give the value of the property to put in the deficit Court-fee in view of the relief claimed. On his failure to comply with the order, the Court dismissed his suit in default, on refusing permission to withdraw under O. 23, R. 1, C. P. Code. *Held*, that the proper order in the circumstances would not be a dismissal of the suit, but the rejection of the plaint under O. 7, R. 11, C. P. Code. *Held also*, that the effect of the order of dismissal would be the same if the Court had passed the order in correct form, namely, an order rejecting a plaint. A fresh suit was therefore not barred either by O. 9, R. 9, O. 23 R. 1 or O. 2, R. 2, C. P. Code. 1935 C. 764. *See also* 40 C.W.N. 1380.

O. 2, R. 3: MEANING OF TERMS.—The expression "cause of action" means causes of action which are distinct upon the fact or facts as stated in the plaint itself, or as proved at the hearing. Facts alleged by defendant need not be considered. 7 Bom.L.R. 925; 6 A. 106. *See also* 5 A. 163 (F.B.). The policy of the rule is to avoid needless expense where it can be done without injustice to any one. 103 I.C. 811 [(1910) 2 K.B. 1021; 1921 K.B. 1, *Rel. on*]. The words "jointly interested" do not mean jointly interested as a matter of affection, but jointly interested as to the subject-matter of the suit which the causes of action have in contemplation. 6 M. 239 (242). *See also* 103 I.C. 811; 140 I.C. 317=1932 R. 132.

SCOPE OF RULE.—Rr. 3 to 6 allow a plaintiff to unite in the same suit several causes of action against the same defendant and to order separate trials if necessary. 75 I.C. 438=5 Pat.L.T. 49. Under R. 3 a plaintiff cannot join in the same suit several causes of



Only certain claims to be joined for recovery of immovable property.

4. No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except—

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;

(b) claims for damages for breach of any contract under which the property or any part thereof is held; and

(c) claims in which the relief sought is based on the same cause of action:

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

5. No claim by or against an executor, administrator or heir, as such, shall

#### NOTES.

action against several defendants unless they are all jointly interested in each separate cause of action. 52 I.C. 927=12 Bur.L.T. 106. See also 55 C. 164. A plaint presented by two or more plaintiffs claiming different reliefs against the defendant is not improperly framed nor is it bad for misjoinder of causes of action. 26 M.L.J. 343. See also 140 I.C. 317=1932 R. 132. O. 2, R. 3 is not controlled by Ss. 3 and 4, Limitation Act. (1941) 2 M.L.J. 244.

APPLICATION.—The rule does not apply to suits for rent under the N.W.P. Rent Act. 29 A. 18. A good test to see whether two suits filed separately ought to have been filed together is to see if they could have been filed as one without a misjoinder of defendants. 1 R. 682=1924 R. 161. The cause of action for a personal decree upon the promissory note is incompatible with, and could not be joined to, a cause of action upon the mortgage; for the relief sought in respect of the claim based on a promissory note is a personal decree against the promisors, whereas the decree in a mortgage suit does not impose any personal obligation upon the mortgagor to pay the mortgage debt. 158 I.C. 828=1935 R. 315.

REQUISITES.—Joint interest in the main question raised in the litigation is a condition precedent to the joinder of several causes of action against several defendants. 6 A. 106. Claims against different estates cannot be joined in one suit merely because all such estates are represented by the same person, unless they are based on the same instrument affecting plaintiff's rights against all the estates. 50 I.C. 528=11 Bur.L.T. 222. Though the plaintiffs satisfied two different claims against themselves and the defendant separately, on two different occasions, the causes of action, which were different could be joined in one suit for contribution. 51 I.C. 826. A single suit lies against several alienees to whom different portions of an estate are alienated, although defendants set up different titles to the various portions held by them. 29 A. 267. See also 1901 A.W.N. 115; 29 C. 871. But see 7 B. 290. Where a member of a joint Hindu family sues to set aside the alienations made by the karta of the family ranging over a number of years and

all the alienees are made defendants, the various sets of defendants have a community of interest in the sense that they all derive their title from one and the same person (i.e.) the karta, and the cause of action against them is the same as it would have been against the karta, if he were alive, and hence the suit is not bad for misjoinder of causes of action. 1941 A. 209=I.L.R. (1941) All. 370=1941 O.W.N. 457. In a suit for partition and for setting aside a number of alienations, the best course is to order separate trials in respect of each alienation. 8 M. 75. A suit for both enhancement and arrears of rent at an enhanced rate is maintainable. 5 C.W.N. 88. A suit against several persons to whom assets have been wrongfully distributed in execution is valid. 13 C. 159. A mortgagor suing for redemption of a mortgage with possession can join with that claim a claim for rent paid by him to the mortgagee's use. 189 I.C. 109=A.I.R. 1940 Pat. 579. Suit on mortgage by assignee of mortgage—Prayer for mortgage decree—Alternative prayer for decree against assignor—No misjoinder. See 22 Pat.L.T. 196. A suit on several mortgages executed in favour of plaintiff on various items of family properties of defendants is not bad. 17 M.L.J. 515. See also 1937 Nag. 99. For other illustrative cases, see 35 B. 297; 12 I.C. 684=15 C.L.J. 258.

O. 2. R. 4.—See 43 Bom. L. R. 293. The rule prohibits not the joinder of several causes of action entitling a plaintiff to recover immovable property, but a joinder with such causes of action, of causes of action of a different character, except as excepted in the rule. 5 M. 161. See also 10 C. 1061; 31 C. 262; 1925 P. 674; 17 M.L.J. 135; 51 B. 800=29 Bom.L.R. 937. A mortgagee who purchases part of the mortgaged property in execution of his decree is entitled in a suit for partition and separate possession of his share, to claim also rendition of accounts regarding that share from those in possession. 159 I.C. 463=1935 Pesh. 161. The new cl. (c) has been inserted in order to avoid the possibility of mistake and to make it clear that there is nothing irregular in seeking to recover in one suit immovable and movable property if the cause of action is the same in both. 19 I.C. 981=4 P.R. 1914.



Claims by or against executor, administrator or heir. be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues, or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

6. Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient.

Power of Court to order separate trials.

7. All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Objections as to misjoinder.

#### NOTES.

Where in a suit for possession of immovable property and for mesne profits different claims have been made in consequence of separate orders having been passed in respect of different parcels of the same property but all these claims are based on the same cause of action, namely, the assertion of the adverse title by the defendant all these claims fall within the purview of cl. (c), R. 4, and the suit is therefore clearly a suit which is permissible under R. 4 without leave of the Court. 156 I.C. 702=1935 S. 129.

APPEAL.—No appeal lies from an order rejecting an application for leave. 3 A. 191.

O. 2, R. 5: SCOPE OF.—The case contemplated by R. 5 is one where the causes of action joined in the same suit are essentially different. 36 I.C. 29. It is contrary to the principle of R. 5 to attach money in the hands of an executor, administrator or heir as such, in execution of a decree against him personally, though the executor is a legatee and the money in his hands is due to him personally as legatee. 38 I.C. 563=9 Bur.L. T. 226.

MEANING OF TERMS.—The word "estate" means not only the "estate" rightly and properly held by executors but also the "estate" in its physical sense. 41 I.C. 615=21 C.W. N. 939. The words "arises with reference to" are very general, and cover a case where the plaintiff's personal claim can only be determined after calculating the amount due to him as administrator. 43 M.L.J. 218=1922 M. 436. A suit by a Hindu widow against the surviving coparceners of her deceased husband to recover stridhanam illegally detained by them and to enforce her right to maintenance is not bad for misjoinder. 38 B. 120. Where promissory notes are passed in the name of a Hindu, his son cannot after his death institute a suit to recover the amounts due thereunder, basing his claim on being the sole surviving coparcener of an undivided family or in the alternative on his being the sole heir and legal representative of his deceased father. The two claims cannot be joined

together under the terms of R. 5, and it makes no difference that the second claim is in the alternative to the first. 59 B. 573=37 Bom.L.R. 405=1935 B. 343. A suit by the assignee of a Mahomedan widow, for the recovery of part of the assignor's dower and of part of the estate of the assignor's late husband, does not contravene the provisions of the rule. 18 A. 256. On this rule, see also 31 B. 105. A claim against an executor as such can be joined with a claim against him personally when both the claims arise in reference to the same estate. 41 I.C. 615=21 C.W.N. 939. In an administration suit there can be an enquiry as to accounts of a partnership in which the deceased was a partner and of question of misjoinder of causes of action under O. 2, Rr. 4, 5 and 7. 51 B. 800=29 Bom.L.R. 937=1927 B. 470.

O. 2, R. 6.—On this rule, see 8 M. 75; 1938 Rang.L.R. 397; 8 B. 616. As to the scope of the rule, see 27 M. 80. As to what course the Judge ought to pursue where there has been a misjoinder of causes of action, see 8 W.R. 15; 9 Bom.L.R. 241; 113 I.C. 865=1928 M. 764. An objection as to misjoinder cannot be taken for first time in second appeal. 5 Bom.L.R. 185. As to waiver of objection, see 49 C. 37. The joinder of causes of action and parties is not invariably fatal to the suit. No doubt the misjoinder of claims and parties is to be discouraged when it is calculated to defeat the ends of justice; but such joinder would be unexceptionable unless it is apparent that the defence will be embarrassed by confusing different issues and proofs in the same litigation. Where a mortgagee files a suit against the mortgagors and also against others who had damaged and thereby rendered the mortgage security insufficient, the suit cannot be said to be bad for multifariousness. 1939 N.L.J. 338=A.I.R. 1939 Nag. 256=I.L.R. (1939) Nag. 63. It is not the intention of the legislature, and where the Court proceeds under O. 2, R. 6, the plaintiff should be required to file separate plaints.



LOC. AM.—[LAHORE]. *Add*

"8. (1) Where an objection duly taken has been allowed by the Court, the plaintiff shall be permitted to select the cause of action with which he will proceed and shall, within a time to be fixed by the Court, amend the plaint by striking out the remaining causes of action.

(2) When the plaintiff has selected the cause of action with which he will proceed, the Court shall pass an order giving him time within which to submit amended plaints for the remaining causes of action and for making up the court-fees that may be necessary. Should the plaintiff not comply with the Court's order the Court shall proceed as provided in R. 18 of O. 6 and as required by the provisions of the Court-Fees Act."

### ORDER III.

#### *Recognized Agents and Pleadors.*

1. Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader <sup>1</sup>[appearing, applying, acting, as the case may be,] on his behalf:

LEG. REF.

<sup>1</sup> Substituted by Act XXII of 1926.

#### NOTES.

The proper order to pass in such a case is that the plaintiffs should be given an opportunity so to amend his plaint that the allegations against each set of defendants in respect of the various alienations shall be separately set out in order that separate issues may be framed in respect of each transaction, thus enabling the Court to try the suit in sections, each section forming part of the same proceeding and when this has been done, the Court will proceed with the trial of the suit. 1941 O.W.N. 457=I.L.R. (1941) All. 370=1941 A. 209. Court cannot select one claim on which to proceed when plaintiff insists on pressing all. 2 Beng.L.R. at 343. Suit in ejectment of two holdings of different classes—Discretion of Court to order separate trials. 7 L.R. 139 (Rev.). See also 1937 A.L.J. 1139.

TRUST.—Suit for removal of trustee and for possession of trust property wrongfully alienated—Alienees also made defendants—Separate suits if to be instituted. 112 I.C. 649=1928 C. 514.

O. 2, R. 7.—The principle of the exception to the rule against multifariousness recognised before 1908 and now embodied in the rule is that where a party has, without objection, gone to trial on issues on the merits, he will not be allowed to plead after failing on the merits that his was a paramount title and one that ought not to have been adjudicated in the mortgage suit. 10 P. 234=1931 P. 64. See also 33 Bom.L.R. 603; 13 Bom.L.R. 56 (P.C.); 18 Bom.L.R. 763. Issue unnecessary or inappropriate—Raising of, by consent of both parties—Striking of issue subsequently at instance of one party without consent of the other—Power of Court—Mortgage suit—Paramount title—Issue as to. 113 I.C. 865=1928 M. 764.

O. 3, R. 1.—This rule contemplates appearance not as a man but as a party with

the intention of acting as a party in the suit. 1926 M. 971=97 I.C. 517=51 M.L.J. 290. The language of this rule means no more than that a recognised agent can appear, make applications and take such steps as may be necessary in the course of the litigation for the purpose of the case of the principal being properly laid before the Court. It cannot justify his being allowed to argue and plead. 161 I.C. 538=1936 O.W.N. 351=1936 O. 261. The words "except where otherwise expressly provided by any law for the time being in force" in O. 3, R. 1 do not mean other parts of the Code but refer to laws other than the Code. 193 I.C. 707. It is intended primarily for the moffusil Court. It does not authorise an attorney of the High Court to file an appearance for a limited purpose only in an ordinary case under the civil jurisdiction of the High Court. 36 Bom.L.R. 987=1934 B. 450. An advocate can "act" on behalf of his client and perform all the duties of a pleader. 4 P. 766; 9 A. 617. One pleader can appoint another to hold his brief. 9 A. 613; but the legality of this practice was doubted in 20 B. 293. Pleadors can perform certain ministerial duties through their clerks. 15 C. 638. See also 101 I.C. 205=1927 L. 428 (accepting notice on behalf of client). Pleader appointed by recognized agent of party is duly appointed pleader. 44 M. 736=48 I.A. 584=41 M.L.J. 645=26 C.W.N. 376 (P.C.); 25 I.C. 136=7 Bur.L.T. 199.

O. 3, R. 1 and O. 41, R. 1.—O. 3, R. 1 contains a general provision relating to procedure in Courts and is as much applicable to the presentation of suits as to that of appeals and applications for execution. O. 41, R. 1 is in fact a combination of the provisions of S. 26 and O. 3, r. 1. The presentation of every document in Court must therefore be governed by O. 3, R. 1. The presentation of a plaint, memorandum of appeal, or an application to the munsarim of a Court is undoubtedly an 'act in any Court' so that it is imperative that presentation should be made by the party in



Provided that any such appearance shall, if the Court so directs, be made by the party in person.

Recognised agents.

2. The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties ;

#### NOTES.

person or by his recognized agent or by pleader. Though the presentation of a plaint by a person not duly authorized is an irregularity curable at the discretion of Court, when no attempt has been made to get it cured in the trial Court, it is too late to get it cured in appeal. A.I.R. 1941 O. 169=1940 O.W.N. 1253.

**PRESENTATION OF PLAINT.**—As there is no specific rule either requiring or expressly authorising the plaintiff to present the plaint in person, it is doubtful whether O. 3, R. 1 would apply to such a case. If it does not apply the presentation by a person orally authorized to do so would be valid. 134 I. C. 26=1931 A.L.J. 777=1931 A. 507 (S.B.).

**POWERS OF PLEADER.**—A pleader duly appointed to act for a party can make any application including an application for a reference to arbitration. 34 I.C. 845=9 S. L.R. 183 (14 B. 455, Dis.). A pleader who appears on behalf of a duly empowered pleader, has no power, in the absence of specific authorization, to join in a reference to arbitration. 136 I.C. 712=1932 L. 373. A recognised agent as such has no right of audience. 28 I.C. 838=19 C.W.N. 64. An agent with a power of attorney to appear and conduct judicial proceedings has no right of audience in Court. Nor is he entitled to notice if his principal wants to appear and conduct the proceedings himself in person or appoints an advocate to appear for him. Such a power of attorney agent cannot carry on business as a solicitor or attorney, drafting, engrossing and filing plaint, Judge's summons, affidavits and generally issuing legal process and charge fees to the principal. I.L.R. (1938) M. 12=A.I.R. 1937 Mad. 937=(1937) 2 M.L.J. 552 (F.B.). There is no law which requires the vakalat to be dated. 26 M. 197 (199). Power not signed by party or his agent—Subsequent signing cures defect. 55 I.C. 990. See also 22 A. 55; 40 A. 147; 36 A. 46. Where a vakalatnama bore the signature of the vakil presenting it, but his name did not appear in the body the power is not valid. 102 I.C. 255. See also 1937 R.D. 5. But a petition of appeal presented without a vakalatnama has not been legally presented at all. 55 I.C. 271; 28 Bom.L.R. 538=95 I.C. 266. See also 1937 A.M.L.J. 47; 40 P.L.R. 255=1938 Lah. 698. Objection as to the validity of power of attorney cannot be raised for the first time in appeal. 69 I.C. 365. Technical irregularities in vakalatnama, effect of. See

102 I.C. 476=1927 L. 552; 1937 R.D. 5. A person alleged to be a lunatic may appear either by vakil or in person. 7 C. 242. Where the power of attorney in favour of the director of a company authorised him "to appear for and on behalf of the company, to conduct and represent the company in the proceedings in the application in the High Court and for the proper prosecution of the proceedings to do all acts as he may deem necessary," held, that the director had no right of audience in Court. The power only authorised him to appear and not to plead. (19 C.W.N. 64, Foll.) 61 C. 324=151 I.C. 753 (1)=1934 C. 563. When an appeal is dismissed for default a fresh vakalat is not needed to enable the vakil to have the appeal re-heard. 15 A. 55. Omission or failure to obtain leave before hand for signing and verifying plaint as plaintiff's agent is only an irregularity. 1925 M. 660=48 M.L.J. 721. Pleader has no power to bind his client by the oath of the opposite party. 34 C.W.N. 310=1930 C. 463. On this section, see also 65 M.L.J. 734=1933 M. 821.

**O. 3, Rr. 1 and 4.**—The presentation of a plaint by a pleader who is not authorised in writing is not a valid presentation in law. A vakalatnama accepted by the pleader but not signed by the plaintiff is not a proper authority. The omission by the Amending Act of 1926 of the words "duly appointed to act" in R. 1 does not make oral authorisation sufficient. The effect of O. 3, R. 4 read with rule is to make a written authority filed in Court the one and only manner in which the authority of a pleader can be brought to the notice of the Court. 39 C. W.N. 534=62 C.L.J. 277.

**O. 3, R. 2: RECOGNIZED AGENTS.**—A political agent appointed as the agent of the estate of a minor chief is not a recognized agent. 11 B. 53. A *gumasta* of a firm ceases to be a recognized agent when the business ceases. 5 Beng.L.R. App. 11. But if engaged in collecting the assets of the firm, he is a recognised agent. 9 Bom.H.C.R. 427. Person looking after Zamindari property of a judgment-debtor is not his recognized agent. 132 I.C. 808=1931 A.L.J. 404=1931 A. 449. O. 3, R. 2 is applicable to proceedings under the Madras Estates Land Act. A person who is looking after a factory on behalf of his master and is doing general business for him in the off-season cannot be regarded as a recognised agent of his master for the purpose of presenting an application on behalf of that another under S. 131 of



(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorised to make and do such appearances, applications and acts.

LOC. AM.—[BOMBAY]. O. 3, R. 2 (a)

"Persons holding on behalf of such parties either (i) a general power of attorney, or (ii) in the case of proceedings in the High Court of Bombay an Attorney of such High Court or an Advocate, and in the case of proceedings in any district, any such Attorney or any Advocate, or a Pleader to whom a sanad for that district has been issued, holding the requisite special power-of-attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorizing them or him to make and do such appearances, applications and acts on behalf of such parties."

#### NOTES.

the Madras Estates Land Act to set aside a sale of a holding for arrears of rent. Such a person cannot be held to be a person "carrying on business" under R. 2, in respect of the management of the land of his master, so as to entitle him to apply on behalf of his master under S. 131 of the Estates Land Act. An application to set aside the sale presented by such a person is not validly presented. 1937 M. 293=44 L.W. 567=71 M.L.J. 607.

POWER OF ATTORNEY—CONSTRUCTION—AUTHORITY TO FILE APPEAL.—An appeal is a proceeding in a suit and the prosecution of a suit includes the prosecution of all the proceedings till a final decree is passed. Where a power of attorney authorises the agent to "prosecute the claim", it confers an authority on him to file an appeal. 36 P.L.R. 135=1934 L. 973 (1). See also 151 I.C. 753=61 C. 324=1934 C. 563; 145 I.C. 760; 146 I.C. 363. But where a *vakalatnama* contains a clause to the effect that fresh power would be necessary to enable the Counsel to act in an appellate Court, the pleader is appointed only for the purpose of performing acts, necessary for proceedings in the first Court and it does not authorize the pleader to file an appeal. 145 I.C. 760=29 N.L.R. 295=1933 N. 219. A *vakalat* filed by a pleader engaged by an applicant for leave to sue as a pauper under O. 33 is not a *vakalat* merely for the petition, but becomes a *vakalat* for the purposes of the suit also, when the petition becomes converted into a suit by operation of law. No fresh *vakalat* is necessary to conduct the suit, unless the original *vakalat* is distinctly confined to the pauper application alone. 152 I.C. 132=1934 M. 690=67 M.L.J. 594. Each of two *vakalatnamas* in the usual form were on two sheets of paper, attached together, the typewritten portion of the authorisation continuing from the first page on to the second. On the first page, appeared the signatures of three petitioners and the second page bore the signature of the fourth. It was beyond question that the first three who had signed on the first page had never seen the second page; the fourth petitioner who had signed the second page had never seen the first page, but in both cases it was equally clear that the device

was adopted to save time, that all of them knew what the other sheet was and the purport of what they were signing. Held, that the *vakalatnama* was the act of all the four of them and perfectly in order. 149 I.C. 596=15 Pat.L.T. 233=1934 P. 290.

O. 3, R. 2 (b).—The agent contemplated by cl. (b) is one who has an initiative and independent discretion. 4 B. 416. See also 16 A. 241 (F.B.); 28 A. 135; 14 M.L.J. 223. A power-of-attorney authorising an agent to do all acts relating to the execution of the decree in favour of the principal is a general power-of-attorney and the agent under the power can act. 38 M. 134=24 M.L.J. 180; 1929 L. 759. See also 33 I.C. 661=18 O.C. 372. Where the *vakalat* executed by the agent within the period of limitation without the knowledge or approval of the principal has, however, been subsequently ratified by the principal, it is in order even though the ratification was made beyond the period of limitation. 149 I.C. 596=15 Pat.L.T. 233=1934 P. 290 (2). Where a power-of-attorney does not confer the power to confess judgment, a pleader appointed by the power-of-attorney agent has no such power either. 102 I.C. 470=1927 O. 222. Under Bombay High Court rules a person holding general power of attorney can act. 72 I.C. 1003=1923 B. 41 (1). See also 41 B. 40=18 Bom.L.R. 821. A recognized agent cannot prosecute or defend a suit in his own name. 5 Beng.L.R. App. 11; 12 B. 68; 15 W.R. 245. As to filing suit and signing plaint by recognised agent, see 101 I.C. 698=1927 A. 514; 138 I.C. 797=34 Bom.L.R. 628=1932 B. 367.

"CARRYING ON BUSINESS"—MEANING OF.—The expression "carrying on business" in R. 2 (b) must be interpreted in a restricted sense, viz., as relating to commercial business as in section 20. The appearance, application or act made or done must relate to matters connected with the trade or business only. 44 L.W. 567=71 M.L.J. 607. The management of an estate is "business" and the service of summons on the *Karinda* who carries on the management of the estate under the instructions of the proprietor is sufficient. But he cannot be regarded as an agent authorised by himself to file objections to a Commissioner's report. 12 L.L.T. 13.

BOMBAY AMENDMENT.—The word "persons"



Service of process on recognized agent.

3. (1) Processes served on the recognized agent of a party shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs.

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognised agent.

<sup>1</sup>[4. (1) No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power-of-attorney to make such appointment.

(2) Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client.]

#### LEG. REF.

<sup>1</sup> This rule was substituted by S. 2 of Act XXII of 1926.

#### NOTES.

in the first part of O. 3, R. 2 (a) Bombay Amendment is comprehensive and does not exclude an attorney of the High Court. What is meant under the second part is that an attorney of the High Court can also appear under a special power of attorney. A person who is not an attorney can only act under general power of attorney. The words "requisite power of attorney" do not mean that only a special power of attorney is required, but they mean that special power of attorney must be a proper one. An attorney of the High Court can therefore act both under a general and a special power of attorney, but a person who is not an attorney can only act under a special power. I.L.R. (1939) Bom. 295=184 I.C. 673=1939 Bom. 347.

O. 3, R. 3 (1).—See R. 5.

O. 3, R. 4: SCOPE OF.—Rule only provides in what manner and till what time a pleader should be appointed. 48 M. 676=49 M.L.J. 366=1925 M. 1201. O. 3, R. 4 does not lay down an absolute rule, but is subject to the rules of the High Court regulating procedure. 59 C. 370=35 C.W.N. 1100=1932 C. 1. See also 1935 Pesh. 2. An advocate unlike a pleader can be verbally appointed to act on behalf of his client. 4 P. 766=1926 P. 73=92 I.C. 179; 94 I.C. 841=1926 P. 246=5 P. 255. See also 1935 Pesh. 2. To act for a client in Court is to take on his behalf in the Court, or in the offices of the Court, the necessary steps that must be taken in the course of the litigation in order that his case may be properly laid before the Court. But there is nothing in O. 3, R. 4, which prohibits a pleader from delegating some of his functions, and the Code plainly contemplates that certain functions of a ministerial nature may be delegated. 1939 Rang. L. R. 108=A.I.R. 1939 Rang. 1. See also 1941 Pesh. 1; 17 Lah. 610=1936 Lah. 500. An advocate acts when he files a memorandum of appeal or cross-

objections or any other document in a case other than a memorandum of appearance under O. 3, R. 4 (5). 4 R. 249=98 I.C. 15=1926 R. 215. An unqualified person cannot practice under cover of special powers of attorney from the parties. 25 I.C. 163=7 Bur.L.T. 206. Power of guardian *ad litem* to appoint for minor party. 6 L.W. 272. The next friend of an infant plaintiff can change his attorney so long as he continues to act in the capacity. 28 C. 264. The acceptance of a power of attorney must be in writing. 84 I.C. 518=1923 L. 402. Acceptance of *vakalatnama* need not be in writing. 43 C. 884=20 C.W.N. 287; 61 C.L.J. 193=62 C. 642. See also 91 I.C. 30=6 L. 461=1926 L. 32. But see contra 20 C.W.N. 283. A pleader did not accept the *vakalatnama* in writing, but his name appeared in it and was allowed to appear and conduct the case. Held, there was an acceptance of the *vakalatnama* by him, and that he had all the powers which are mentioned in the *vakalatnama*. 61 C.L.J. 193=39 C.W.N. 938=62 C. 642. See also 153 I.C. 937=1935 Pesh. 2; 1937 A.W.R. 80; 1937 R.D. 5. An application for execution of a decree duly signed and verified by the decree-holder was filed in Court and acted on by the Court. The pleader had not, however, filed a *vakalatnama* along with the petition and on the omission being noticed he filed a *vakalatnama* duly stamped, but without having been accepted by him. Later the omission was made good, the pleader signing his acceptance in the back of the *vakalatnama* with the permission of the Court. Held, that the application was in order and was duly filed on the date it was presented to the Court, and that there was nothing wrong about it. 63 C. 733=40 C.W.N. 730. The acceptance must be unconditional. 14 W.R. 7. The writing need not be dated. 26 M. 197 (199). Where a pleader's name appears in a *vakalat*, it can be accepted even after filing in Court. 3 Pat.L.T. 447=68 I.C. 659. Where in a *vakalatnama* the pleader's name has been omitted by oversight, there is no due appointment of the pleader. 37 I.C. 103=12 N.L.R. 189; 36 A. 46=23 I.C. 464. But see 41 I.C. 685; 1937 R.D. 5;



LOC. AM.—[MADRAS.] In sub-rules (1) and (2) to R. 4, substitute the words "a document subscribed with his signature in his own hand" for "in writing signed."

(3) For the purposes of sub-rule (2) an application for review of judgment, an application under S. 144 or S. 152 of this Code, any appeal from any decree or order in the suit and any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of monies paid into the Court in connection with the suit shall be deemed to be proceedings in the suit.

LOC. AM.—[BOMBAY.] In sub-rule (3) the words "or any application relating to such appeal" shall be inserted between the words "order in the suit" and "and any application or act."

(4) The High Court may, by general order, direct that, where the person by whom a pleader is appointed is unable to write his name, his mark upon the document appointing the pleader shall be attested by such person and in such manner as may be specified by the order.

LOC. AM.—[PATNA.] Substitute for O. 3, R. 4 (4):—

"Notwithstanding anything contained in O. 3, R. 4 (3) of the First Schedule of the Code of Civil Procedure, 1908, no advocate shall be entitled to make or do any appearance, application or act for any person unless he presents an appointment in writing, duly signed by such person or his recognised agent or by some other agent duly authorised by power of attorney to act in this behalf; or unless he is instructed by an attorney or pleader duly authorised to act on behalf of such person."

#### NOTES.

102 I.C. 255 (A mere error can be rectified by permitting the party to put the name) See also 133 I.C. 171=12 Pat.L.T. 558 (Omission of pleader's name in the *vakalat* is not a fatal error. It can be rectified by inserting the proper name). See also 1937 R.D. 5; 102 I.C. 255. *Signature on vakalat proved to be forgery*—Presentation of appeal by pleader not competent. 65 C.L.J. 418, But see contra 132 I.C. 566=1931 A.L.J. 983=1931 A. 767. See also 71 I.C. 436=1923 N. 182; 55 I.C. 415. Where a *vakalatnama* was signed by the party and also by the Vakil who was actually intended by him to act on his behalf and who did, in fact, so act, the fact that by an error the name of another vakil remained in the body of the document is a formal defect of no importance. 39 P.L.R. 639=1937 Lah. 719; 164 I.C. 725=1936 A.L.J. 586=1936 A. 636. See also 1937 R.D. 5. Appointment of pleader for "prosecution" of all proceedings empowers him to file an execution petition. 1936 A.M.L.J. 138; 1938 N.L.J. 122. Where a power of attorney in favour of a pleader is not in proper form the Court may extend the time for appeal in order to have the error rectified. 150 I.C. 731=1934 L. 444 (2). Where a power of attorney filed in Court did not contain the signature of the party due to an accidental omission, the Court can allow the party to sign it. 116 I.C. 184. Where a plaint is filed by a pleader, in whose favour a valid *vakalatnama* has not been executed, the proper course is to return the plaint to the pleader who presented it. 132 I.C. 566=1931 A.L.J. 983=1931 A. 767; see also 1937 A.M.L.J. 47. Where any one of the joint defendants against whom the decree is passed, can appeal from the decree, any one of them can sign the power of attorney in favour of the pleader. All that is necessary is that all the others should be made respondents and not appellants. 120 I.C. 318

C. C. M.—100

=1930 L. 101. A fresh *vakalat* is not necessary to enable a vakil to appear in an application for a new trial. 12 W.R. 465. Where a counsel is engaged for the conduct of a suit and the suit is dismissed for default, his duties do not come to an end. As such no fresh power of attorney is necessary to make an application for the restoration of the suit as he is authorized to do all acts necessary for its prosecution. 10 L. 570=114 I.C. 76=1929 L. 96. Also in an application for leave to appeal to the Privy Council. 8 W.R. 92. As to when the duties of a pleader terminate; see 49 C. 732=35 C.L.J. 356. See also 67 I.C. 554=1922 O. 75; 2 Pat.L.J. 259=41 I.C. 328. Power of attorney to counsel terminates with death of party. 133 I.C. 877=33 P.L.R. 389. Return of plaint does not terminate authority. 67 I.C. 296=1922 N. 125. On a *vakalat* given in a suit a vakil can act in a claim case. 5 Bom.H.C. (A.C.) 83. Vakil cannot say after accepting engagement that, unless a large sum is paid to him, he will not continue the conduct of the case. 29 C. 63. A *vakalat* remains in force until all proceedings in the suit are closed. Application for execution are proceedings in the suit. 20 B. 190. Withdrawal of pleader. 47 M. 819=47 M.L.J. 398 (F.B.); 1938 N.L.J. 122 (Execution proceedings before collector). So also pleader can present petition for restoration of suit dismissed for default without a fresh *vakalatnama*. 1938 N.L.J. 98=1938 Nag. 272. An application to set aside an *ex parte* decree or dismissal order is part of the proceedings in a suit and so in the same way to oppose or consent to such an application is also part of the proceedings in a suit. Hence ordinarily a pleader appointed for the purposes of suit has power to consent to the restoration of the suit dismissed for default. He does not require a fresh power or appointment for that purpose. 1941 Rang.L.R. 254. R. 4 takes no notice of the termination of an ap-



(5) No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, unless he has filed in Court a memorandum of appearance signed by himself and stating—

#### NOTES.

pointment of a pleader by mutual consent between him and his client unless and until the Court is apprised of the fact by writing in the manner stated in the rule and leave of the Court obtained. 1930 L. 134=31 P. L.R. 551. A pleader who appears on behalf of another pleader engaged by a party, can appear for the latter pleader only "to plead" on behalf of the party, but he has no power "to act" on his behalf without a document in writing being executed in his favour in the manner prescribed by R. 4. The presentation of an appeal amounts to "acting" and not "pleading". If the appellant engages a certain Advocate for filing the appeal and duly executes a power of attorney in his favour, he alone could present the appeal. Where the memorandum of appeal presented in Court is not signed by him but by another Advocate for him, there is no proper appeal before the Court. 17 L. 610=163 I.C. 141=1936 L. 500. The mechanical act of handing over an appeal to the clerk of Court or another officer appointed for receiving appeals does not amount to "acting" as contemplated by O. 3, R. 4. It is only a ministerial work and similar in nature to the payment of process-fee, etc., which the clerks of counsel usually do. Consequently another counsel can present an appeal on behalf of the counsel duly authorized under O. 3, R. 4 without a document in writing authorising him to do so. A.I.R. 1941 Pesh. 1. But see 17 Lah. 610=1936 Lah. 500. A party appointed a general agent to conduct litigation on his behalf and gave him all powers necessary for conduct of case. The agent appointed a pleader by a *vakalatnama* duly signed and filed and gave him power to appoint another pleader if necessary. The pleader in his turn appointed another pleader by a *vakalatnama* duly signed by himself and such pleader filed the appeal. Held, that the appeal was properly constituted as the agent was duly authorized under the power of attorney to give a pleader a power to appoint another pleader and the pleader who filed the appeal had been duly authorized by the pleader engaged by the agent. 19 N.L.J. 207=1937 N. 65. See also 1936 A.M.L.J. 138.

REFERENCE TO ARBITRATION.—As to power of pleader to join in reference to arbitration, see 136 I.C. 712=1932 L. 373; 34 I.C. 845, cited under O. 3, R. 1, *supra*.

LIMITATION.—The appellant's advocate filed the appeal on the last day of limitation with a telegram attached to it authorising him to file the appeal and stating that the power of attorney was being sent by post. Nine days later the power of attorney was filed. Held, that the appeal was not presented within time. 33 P.L.R. 517 (1). A pleader who has not been appointed by a document in writing as required by R. 4,

is wanting in capacity or competence to act. If a pleader purports to do something which he has no power or capacity to do, it can have no legal effect. The presentation of an execution petition by a pleader who holds no *vakalat* from the decree-holder is a nullity. An execution petition presented by such a pleader though in proper form and duly signed by the decree-holder is not an application "in accordance with law" within the meaning of Art. 182 (5) of the Limitation Act, and cannot therefore operate as a step-in-aid, especially when the application was ultimately withdrawn and dismissed without any execution really taking place. *Quære*: Whether if anything has really been done upon such an application, it can be treated as mere waste paper. 165 I.C. 659=44 L. W. 528=71 M.L.J. 604. See also 1937 R. D. 99. It is contrary to the spirit of justice that a litigant should fail simply because, through some perfectly *bona fide* and reasonable mistake, the Counsel appearing for a party is not duly authorized. Where it appears that he is not duly authorized, it will doubtless be the duty of the Court in question to treat the proceedings that he has set on foot as of no effect; still the Court should so far as is possible, safeguard the litigant from his litigation coming to so unsatisfactory a conclusion, by pointing out to him the desirability of making the necessary application to set the matter on foot again, and, if an application is made, be indulgent as regards time, and should give effect to the provisions, in a suitable case, of S. 5, Limitation Act. 1937 N. 65.

AUTHORITY OF PLEADER ENGAGED IN TRIAL COURT—AUTHORITY IN APPEAL.—R. 4 (2) provides that every appointment of a pleader shall be filed in Court and shall be deemed to be in force until all proceedings in the suit are ended so far as the client is concerned. So where a pleader validly represents a party in the trial Court, he can present a memorandum of appeal on behalf of his client and prosecute the appeal. 165 I.C. 274=1936 L. 583. If the appointment of a pleader is not specifically revoked and the engagement is not specifically limited to acting in the trial Court, the statutory provisions of R. 4 apply and the counsel must be held to have been duly authorised to appear in the appellate Court. 146 I.C. 363=1933 Pesh. 67. See also 36 P.L.R. 135=1934 L. 973; 151 I.C. 753=61 C. 324=1934 C. 563; 145 I.C. 760=29 N.L.R. 295=1933 N. 219.

BOM. H. C. RULES No.4.—Advocate of High Court—Appearance in mofussil Court to plead—Memorandum signed by himself—Sufficiency—*Vakalatnama*—Necessity for. 42 Bom.L.R. 515.

O. R. R. 4 (5).—See 5 Bur.L.J. 221. O. 3, R. 4 (5) is inconsistent with the rules of the Calcutta High Court framed under



- (a) the names of the parties to the suit ;
- (b) the name of the party for whom he appears ; and
- (c) the name of the person by whom he is authorized to appear :

Provided that nothing in this sub-rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party.]

LOC. AM.—[MADRAS.] Insert as Cl. (6) to O. 3, R. 4, C. P. Code :—

“(6) No Government or other pleader appearing on behalf of the Secretary of State for India in Council, or on behalf of any public servant sued in his official capacity, shall be required to present any document empowering him to act.”

5. Any process served on the pleader of any party or left at the office or Service of process on pleader ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person.

LOC. AMS.—[MADRAS.] At the end of rule add—

“Explanation.—Service on a pleader who does not act for his client shall not raise the presumption under this rule.”

[NAGPUR.] In R. 5, substitute the words “on a pleader who has been appointed to act for any party” for the words “on the pleader of any party.”

[ODDH.] For “on the pleader of any party” read “on a pleader who has been appointed to act for any party.”

[PATNA.] Add—

“(5-B) Notwithstanding anything contained in O. 3, sub-rules (2) and (3) of R. 4 of the First Schedule of the Code of Civil Procedure, 1908, no pleader shall act for any person in the High Court, unless he has been appointed for the purpose in the manner prescribed by sub-rule (1) and the appointment has been filed in the High Court.”

6. (1) Besides the recognized agents described in R. 2 any person residing Agent to accept service. within the jurisdiction of the Court may be appointed an agent to accept service of process.

(2) Such appointment may be special or general and shall be made by an Appointment to be in writing and to be filed in Court. instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in Court.

LOC. AM.—[SIND.] Add the following as sub-R. (3) to R. 6 of O. 3:—

“(3) The Court may at any stage of a suit and whether upon application made to it, or of its own motion, direct any party to the suit : not having a recognised agent residing within the jurisdiction of the Court, to appoint within a time to be specified, an agent within the jurisdiction of the Court to accept service of process on his behalf. To every appointment made under the sub-rule the provisions of sub-rule (2) shall be applicable.”

#### NOTES.

S. 37, Letters Patent, and O. 3, R. 4 (5) being contrary to rules, under S. 37 the latter must prevail. 1932 C. 1=59 C. 370 =35 C.W.N. 1100.

TERMINATION OF POWER OF ATTORNEY—TRANSFEREE COURT, IF EMPOWERED TO GRANT LEAVE.—The Court which is contemplated by O. 3, R. 4 (2) includes not only the Court where the original power of attorney is filed but also in view of the provisions of S. 150, the Court to which a case is subsequently transferred. A Court which has ceased to exercise jurisdiction in a case cannot grant

leave to determine a power of attorney. 158 I.C. 922=1935 Pesh. 145.

O. 3, R. 5: NOTICE SERVED TO PLEADER—PRESUMPTION OF COMMUNICATION OF CLIENT.—Under R. 5, there is a presumption that notice which was served on the pleader is communicated to the client. The only method by which a pleader can avoid his duty of communicating notices served upon him is to file a document in writing under R. 4, sub-Cl. (2) showing that his authority is determined. Else the irrebuttable presumption under R. 5 arises. 152 I.C. 589 (1)=1934 P. 592.



## ORDER IV.

*Institution of Suits.*

Suit to be commenced by a plaintiff. 1. (1) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.

LOC. AMS.—[ALLAHABAD.] O. 4, R. 1:—

“(1) Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf a plaint, together with a true copy for service with the summons upon each defendant unless the Court for good cause shown allows time for filing such copies.

(2) The Court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed and in the case of all other proceedings when the process is applied for.”

Sub-rule (2) will be sub-rule (3).

[OUDH.] 1. (1) Same as original sub-rule (1) of the Allahabad High Court.

(2) To the above sub-rule (2), add the following words:—

“and, except with the permission of the presiding officer, for reasons to be recorded, no plaint shall be admitted until the necessary process-fee has been paid into Court.”

[NAGPUR.] Substitute the following for R. 1 (1):—

“1. (1) Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf a plaint, together with as many true copies on plain paper of the plaint as there are defendants, for service with the summons upon each defendant; unless the Court, for good cause shown, allows time for filing such copies.”

Add the following as sub-rule (2) to R. 1 and re-number the present sub-rule (2) as sub-rule (3)—

## NOTES.

O. 4, R. 1.—The date on which the plaint is presented to the Court or to the officer appointed in that behalf is the date on which it is instituted, although it is not admitted until a subsequent date owing to insufficiency of Court-fee. In this respect the language of O. 4 is in conformity with S. 3 of the Limitation Act. The date of presentation of the plaint, and not the date of its admission, is the date of institution for purposes of S. 10. The entry in the Register of suits as to the date of presentation is only *prima facie* evidence of the date of presentation, but not conclusive. 62 C. 1115. The absence of signature or verification or for the matter of that the absence of presentation on the part of some of the plaintiffs out of several does not affect the jurisdiction of the Court and the suit must be deemed to have been duly instituted on their behalf if it was filed with their knowledge and authority. 134 I.C. 26=1931 A.L.J. 777=1931 A. 507 (S.B.). The omission to comply with the provisions regarding presentation of plaint is a mere irregularity and not an absence of jurisdiction, and if a person presenting it is not properly authorized the presentation would be irregular and the Court would have the discretion to allow the irregularity to be cured. If the plaintiff has acted in good faith and without gross negligence and it is fair and just to allow the defect to be cured, the Court would do so by directing an amendment of the plaint. (*Ibid.*) Presentation of plaint at residence of Judge after Court hours is valid. 65 I.C. 674=1922 N. 167; 20 L.W. 655=82 I.C. 928; 47 M. 312=46 M.L.J. 78. But see 7 N. W.P.H.C.R. 5 (*contra*). The placing a petition on the table when the officer is not

present, is not a presentation to him. 3 N. W.P. 341. Where the same Judge has to preside over two Courts in different places the presentation of a plaint to him when presiding at one place, with reference to property within the jurisdiction of the other Court, is a valid presentation. The Judge has jurisdiction to accept such a plaint. 1939 N.L.J. 503. The presentation of petition to clerk not valid. 14 I.C. 221. But presentation to the Head Ministerial Officer is legal and proper where authorised to receive plaints. 40 I.C. 587=6 L.W. 18. See also 40 M.L.J. 229=13 L.W. 321. Presentation out of office hours. See 23 I.C. 360; 82 I.C. 928=20 L.W. 655. The reception of a plaint on a Sunday or other holidays is not illegal. 11 W.R. 537; 16 W.R. 231. Presentation of plaint—Time and place—Presentation to clerk outside Court house and outside Court buildings is valid. I.L.R. (1937) Bom. 136=38 Bom.L.R. 1196=1937 B. 25. District Court is not competent to receive the plaint which is to be presented to Sub-Court. 10 B.H.C. 495. A Nazir of a Court of Small Causes is not authorised to receive plaints. 18 W.R. 172. Also a karkum left in charge of a Court during the vacation. 6 B.H.C. (A.C.) 254. Where according to the practice laid down in Vol. I, Ch. 1-B, R. 4 of the Rules and Orders of the High Court of Lahore, a plaintiff presents his plaint to the District Judge and the District Judge then sends it for disposal to a Subordinate Court, the real date of presentation of the plaint is the date on which it is presented to the District Judge and not the date on which it is sent to the Subordinate Court. 1935 S. 225.



“(2) The Court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed, and in the case of all other proceedings when the process is applied for.”

2. The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted.

LOC. AM.—[CALCUTTA.] In O. 4, R. 2, insert the following words after the words “particulars of every suit” :—

“except suits triable by a Court invested with the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887.”

## ORDER V.

### ISSUE AND SERVICE OF SUMMONS.

#### *Issue of Summons.*

1. (1) When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified :

Summons. Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim.

(2) A defendant to whom a summons has been issued under sub-rule (1) may appear—

(a) in person, or

(b) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(c) by a pleader accompanied by some person able to answer all such questions.

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court.

LOC. AM.—[OUDH.] O. 5, R. 1-A:—

“A party shall file with his application for the issue of a summons to the defendant or opposite party a printed summons form, in duplicate, one part being in the Urdu and the other in the Nagri character, duly filled up, except in respect of the date of appearance and of the summons, in a bold, clear and easily legible handwriting : provided that—

(a) if the party to be served is a European British subject, the party applying for the issue of the summons shall file a special form which shall be filled up in English, and

(b) the presiding officer may, in his discretion, direct that such forms in general or that any such particular form be filled up entirely in the office of the Court.”

Copy or statement annexed to summons.

2. Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement.

## NOTES.

O. 5, R. 1.—It is the duty of a Judge on receiving a plaint to issue a summons on a defendant even if he is a minor. 14 C. at 217. But see 26 C. 267. Appearance by pleader instructed only to apply for an adjournment is not appearance in person or by pleader. 24 M.L.J. 235=18 I.C. 360; 92 I.C. 517=1926 M. 971=51 M.L.J. 290; 99 I.C. 717=1927 R. 46; 4 R. 408. The *onus* of proof of service is on plaintiff. 52 C. 453. The report of a peon that a summons or notice was served on a person is not evidence as to service unless the person is examined and the report is proved. 91 I.C. 711=1926 C. 539.

‘APPEARANCE.’—All that appears to be necessary for a party to ‘appear’ is for the party to be present in Court. If the ap-

pearance is by a pleader, unless he is able to answer all material questions or is accompanied by some one who can, there is no appearance, and, for this reason, when the only representative of the party in Court is a pleader who is only instructed to ask for an adjournment, there is no appearance in the case itself, because directly the Court leaves the question of adjournment aside and goes on to deal with the main question there is no appearance by the party or by any properly instructed pleader. But where both the pleader and party appear and the pleader withdrew from the case on the refusal of the Court to grant adjournment, the party must be deemed to have appeared. The purpose for which he appears or the action which he takes on appearance is immaterial. 1935 R. 123.



LOC. AM.—[ALLAHABAD AND OUDH.] In O. 5, R. 2 *omit* the words “or, if so permitted, by a concise statement.”

3. (1) Where the Court sees reason to require the personal appearance of the Court may order defendant defendant, the summons shall order him to appear or plaintiff to appear in person. in person in Court on the day therein specified.

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

No party to be ordered to appear in person unless resident within certain limits.

4. No party shall be ordered to appear in person unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house.

LOC. AM.—[ALLAHABAD.] O. 5, R. 4-A:—

“Except otherwise provided, in every interlocutory proceeding and in every proceeding after decree in the trial Court, the Court may, either on the application of any party or of its own motion, dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement.”

Summons to be either to settle issues or for final disposal.

5. The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly:

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit.

LOC. AM.—[MADRAS.] *Delete* the first paragraph of R. 5 in O. 5 and *substitute* the following in lieu thereof:—

“5. The Court shall determine at the time of issuing the summons, whether it shall be—

(1) for the settlement of issues only; or (2) for the defendant to appear and state whether he contests or does not contest the claim and directing him if he contests to receive directions as to the date on which he has to file his written statement, the date of trial and other matters and if he does not contest for final disposal of the suit at once; or (3) for the original disposal of the suit; and the summons shall contain a direction accordingly.”

6. The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

Summons to order defendant to produce documents relied on by him.

7. The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case.

LOC. AM.—[LAHORE.] *Substitute* the following for R. 7, O. 5:—

“The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he bases his defence or any claim for set-off and shall further order that where he relies on any other documents (whether in his possession or power or not) as evidence in support of his defence or claim for set-off, he shall enter such documents in a list to be added or annexed to the written statement.”

#### NOTES.

O. 5, R. 3.—There are only two cases in which the personal appearance of the plaintiff can be required and these fall under O. 5, R. 3 and O. 10, R. 4. 140 I.C. 716=1932 N. 135. R. 3 is confined to those cases in which the Court before issues are framed desires the personal attendance of a party. Besides, a Court acting under R. 3 cannot

compel the attendance of a party who is pardanashin. Such an order would be against the provisions of S. 132. 55 A. 666=1933 A.L.J. 1384=1933 A. 551.

O. 5, R. 6.—Where the time allowed is manifestly insufficient, the appellate Court will interfere. 3 M.H.C. 167. See also 9 B.H.C. 138.



On issue of summons for final disposal, defendant to be directed to produce his witnesses.

8. Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case.

#### *Service of Summons.*

9. (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates.

Delivery or transmission of summons for service.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct.

10. Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

Mode of service.

LOC. AMS.—[LAHORE.]

"Provided that in any case if the plaintiff so wishes, the Court may serve the summons in the first instance by registered post (acknowledgment due) instead of in the mode of service laid down in this rule."

[N.-W.F.P.] Add the following proviso:—

"Provided that in any case the Court in its discretion may attempt to serve the summons in the first instance by registered post instead of in the mode of service laid down in this rule; and provided always that should the defendant not appear in answer to the summons so issued, the Court shall have service effected in accordance with the provisions of this Order."

[PATNA.] To rule 10 of O. 5, the following proviso shall be added:—

"Provided that in any case the Court may of its own motion, or on the application of the plaintiff, send the summons to the defendant by post in addition to the mode of service laid down in this rule. An acknowledgment purporting to be signed by the defendant or an endorsement by postal servant that the defendant refused to take delivery may be deemed by the Court issuing the summons to be *prima facie* proof of service."

Service on several defendants.

11. Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.

Service to be on defendant in person when practicable, or on his agent.

12. Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agents shall be sufficient.

#### NOTES.

O. 5, R. 9.—Residence is not synonymous with ownership for purposes of the service of summons. 38 C. 394. In mofussil Courts the "proper officer" is the Nazir. 13 B. 500. A special bailiff cannot be sent to serve a civil process in foreign territory. 2 B.L.R. (A.C.) 59. If a plaintiff in an action gives a wrong address of the defendant and takes no part in serving the summons on the defendant the giving of the wrong address by itself would not prevent the defendant from appearing before the Court to defend the suit. 60 C. 98=1933 C. 274=143 I.C. 710.

O. 5, R. 10.—Service is complete when it is tendered to the witness and his refusal to sign the original makes no difference. 39 M. 561=28 M.L.J. 505; 38 I.C. 545=13 N.L.R. 46. See also 46 I.C. 277. As to service on the sons of a deceased defendant

pending suit, see 135 I.C. 110=1932 P. 150. Order by Court to deposit process fees and postal charges—Dismissal of suit for failure to comply with—Order not legal. 99 I.C. 909=1927 L. 157. *Punj. proviso*:—Service of summons by registered post—Non-appearance—Procedure. 101 I.C. 615=1927 L. 376. Need for copy of plaint accompanying summons. (*Ibid.*) As to the mode of service of summons on a pardashin lady, see 1935 A.L.J. 632=1935 A. 660=155 I.C. 676.

O. 5, R. 11.—When one of the defendants is a minor, summons should be served on his guardian. 26 C. at 273. But see 14 C. at 217.

O. 5, R. 12.—Defendant at first residing in British India, residing outside British India at the time of suit—Service should be effected by affixing the summons to his last known place of residence in British India



13. (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service.

Service on agent by whom defendant carries on business.

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer.

14. Where in a suit to obtain relief respecting, or compensation for wrong to, immovable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

Service on agent in charge in suits for immovable property.

15. Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Where service may be on male member of defendant's family.

*Explanation.*—A servant is not a member of the family within the meaning of this rule.

#### NOTES.

and by registered post. 32 I.C. 820. Service of summons on the chela of a person is not valid. 57 I.C. 568=23 O.C. 104. Service on a pardanashin lady, affixing a copy of summons at her residence, if sufficient service. 57 I.C. 594. Pardanashin lady—Service of summons on husband is not proper service. 4 Pat.L.T. 89=72 I.C. 910. Summons addressed to B can be refused by A. But if A poses as B and knows that it is intended for him, then it is sufficient notice if the summons is served on A. 3 R. 515=93 I.C. 91=1926 R. 73.

O. 5, R. 13.—Sub-Rule (2) follows the ruling in 7 B.H.C. (O.C.) 97. This rule is controlled by R. 3 of O. 32. 26 C. 267. This rule and R. 2 of O. 3 are to be read together. 4 B. 416. Service on agent—When valid. 43 C.L.J. 576=97 I.C. 286=1926 C. 1030.

O. 5, R. 15: PARDANASHIN LADY—MODE OF SERVICE OF SUMMONS.—A pardanashin lady cannot be considered to be a person who cannot be "personally served," even though it may not be possible for the process-server to have access to her. It is the duty of the process-server to make an attempt to find ways and means of delivering or tendering the summons to the pardanashin lady for whom it is intended. He can very often find some one living with her on in the neighbourhood, male or female, who can take the summons to her. If the pardanashin lady accepts service, it is personal service as contemplated by Rr. 10 and 15 of O. 5. He should in ordinary cases obtain the attestation of the witness taking the summons to the pardanashin woman concerned which should also be done in case of refusal by her to accept the summons. If the process-server cannot find any one, male or female, who can take the summons to her, it may be a

case referred to in R. 15, namely, that the defendant cannot be personally served. 155 I.C. 676=1935 A.L.J. 632=1935 A. 660. Pardanashin lady may come under the expression "cannot be found" under O. 5, Rr. 15 and 17. 4 Pat.L.T. 89=72 I.C. 910. Service made on brother and no attempt made to effect personal service is not proper service. 9 I.C. 763=9 M.L.T. 358. See also I.L.R. (1939) 1 Cal. 530=1939 Cal. 369; 39 P.L.R. (J. and K.) 133. Service of summons on paternal uncle of defendant when proper. 35 A. 556. "Adult," meaning of, see 34 C. 787. Service on son when sufficient to bind father. 26 C.W.N. 359=35 C.L.J. 203=68 I.C. 991. Service by registered post called in question—Slight evidence will displace it. 113 I.C. 698.

IRREGULAR SERVICE OF NOTICE.—Where from evidence it did not appear that the service peon had used any diligence at all in serving a notice under O. 5, R. 17 and where also it appeared that the house on which the notice was stuck up was not within O. 5, R. 17. *Held*, the service was irregular. 13 P. 467=15 Pat.L.T. 273=1934 P. 274. Where in a suit for ejectment, there are several defendants living in different villages, service of process on one tenant in one village is insufficient to fix the others with notice. 14 L.R. 500 (Rev.)=17 R.D. 608. Where a service of summons to father was effected on his son in the father's absence but the son was not residing with the father. *Held*, that the summons was not duly served on the father. (1932 P. 150 and 43 C. 447, Ref.) 146 I.C. 474 (2)=34 P.L.R. 963=1933 L. 797. See also 35 C.L.J. 203=68 I.C. 991.

BENGAL AMENDMENT RULES 15 AND 17.—Where notices issued under O. 21, R. 22 on the heirs of a deceased judgment-debtor who were substituted in his place, were tendered



LOC. AMS.—[ALLAHABAD.] For the words "where in any suit the defendant cannot be found" read "when the defendant is absent or cannot be personally served."

[CALCUTTA.] O. 5, R. 15, substitute the following:—

"15. Where in any suit the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time, then unless he has an agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him:

Provided that where such adult male member has an interest in the suit and such interest is adverse to that of the defendant, a summons so served shall be deemed for the purposes of the third column of Art. 164 of Sch. I, of the Limitation Act, 1908, not to have been duly served.

Explanation.—A servant is not a member of the family within the meaning of this rule."

[LAHORE.] In R. 15 after the words "where in any suit, the defendant cannot be found" the following words were inserted:—

"or is absent from his residence."

[MADRAS.] In R. 15, of O. 5, delete the words "the defendant cannot be found" and in lieu thereof insert the words "the defendant is absent."

[NAGPUR.] In R. 15, substitute the words "When the defendant is absent or cannot be personally served" for the words "Where in any suit the defendant cannot be found."

[N.-W.F.P.] For the words "where in any suit the defendant cannot be found," substitute "where the defendant is absent from his usual place of residence."

[ODDH.] O. 5, r. 15, for the words "where in . . . found" substitute "where a summons has been issued to a defendant on the institution of a suit and he is absent from the address stated in the summons."

[RANGOON.] For the words "where in any suit the defendant cannot be found" in the first line of R. 15, substitute the words "where the defendant is absent."

Omit the word "male" between the word "adult" and the word "member" in the third line of R. 15.

16. Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.

17. Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving

#### NOTES.

to the eldest son who took the notice in his name and signed an acknowledgment but refused to take the notices in the names of his brothers, and those notices were then affixed on the main door of the house. *Held*, that there was good service on the other legal representatives of the judgment-debtor under O. 5, Rr. 15 and 17, as amended in Bengal in 1928. I.L.R. (1939) 1 Cal. 530 = 43 C.W.N. 539 = A.I.R. 1939 Cal. 369.

O. 5, R. 16.—Service is not proper when no signature or mark of the defendant is affixed on the original summons on the ground that he could not write. 8 Bom.L.R. 584.

O. 5, R. 17.—The provisions as to service of process in the Code must be strictly observed. 39 I.C. 544. See also 1937 M. 84; 13 P. 467 = 149 I.C. 828 = 1934 P. 274. The serving peon before he can take advantage of the provisions of O. 5, R. 17, must attend at the right place and he must attend at a time when he may reasonably expect that the defendant will be present, and if he fails to find the defendant, he must take

reasonable steps to discover where the defendant may happen to be. 1937 Rang. 475. The provisions of this rule are not strictly applicable to the first hearing in the case. 1939 A.W.R. (C.C.) 149 = 1939 O.W.N. 787; 1938 A.M.L.J. 43. The procedure of affixing a copy of the summons to the outer door of a defendant's house, can come into operation only when certain conditions have been fulfilled, one of them being the inability of the serving officer to find out the defendant after using all due and reasonable diligence. Where the process-server was told that the defendant had gone out on business and would be back in the evening and he thereupon affixed the summons to the door of the house, it cannot be said that the summons has been duly served, for it could not be said that reasonable diligence had been used to find out the defendant. 1939 A. 180 = 1938 A.L.J. 1166. A simple delivery of the copy of the summons personally to the defendant is not complete service. It is the duty of the process-server to take the signature of the defendant to its acknowledgment. If the defendant refuses to sign



officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

LOC. AMS.—[CALCUTTA]. O. 5, R. 17. *Substitute* the following :—

17. Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person upon whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

[NAGPUR.] In R. 17 of O. 5, the following proviso shall be *inserted* namely :—

“ Provided that where a special service has been issued and the defendant refuses to sign the acknowledgment it shall not be necessary to affix a copy as directed hereinbefore.”

#### NOTES.

the acknowledgment, it is incumbent to effect service under R. 17 and without that the service is not complete. (46 I.C. 277, Diss. from.) 144 I.C. 1019=1933 A.L.J. 165=1933 A. 165. *See also* 1939 R.D. 929=1939 A.W.R. 54. Where a person refuses to accept the summons when tendered by the process-server and the proceedings are taken *ex parte* against him, the fact that the summons has not been affixed on the outer-door of his house as required by this rule would be at the most an irregularity and would not affect the validity of the service. 1935 L. 171. For serving summons upon the defendant, proper enquiries and real and substantial effort should be made as to when and where the defendant is likely to be found. 23 C.L.J. 183=43 C. 447. *See also* 50 I.C. 566; (1939) 1 M.L.J. 618. Where the report of the peon entrusted with the service of summons on a defendant is to the effect that he sent the summons to the defendant through a maid servant, and the latter is not examined to prove that the defendant refused to accept the summons, there is no ground for holding that there has been a proper service under O. 5, R. 17, which can be accepted as a substitute for personal service. 21 Pat.L.T. 340=A. I. R. 1940 Pat. 563. Affixing a copy of summons on the outer-door is sufficient service, if the defendant is absent and it is not known when he would return. 21 M.L.J. 978=12 I.C. 420; 49 M.L.J. 445=1926 M. 31; 124 I.C. 673=1930 L. 192. Summons returned by the serving officer because the defendant was not in the village, cannot be said to have been duly served. 1914 M.W.N. 79=22 I.C. 498. Fixation of summons on door when a person is temporarily away and is traceable is no service on him. 32 I.C. 826 (24 A. 302). Leaving the summons on the teapoy in defendant's residence does not constitute “affixing” and is therefore no service of summons. 118 I.C. 792=31

Bom.L.R. 424=1929 B. 257. Where a process-server visits the village no fewer than five times to serve the summons on the defendant, it may reasonably be held that every effort was made to effect service upon the defendant and that he was evading service, and it should be held that the process-server used all due and reasonable diligence. When, then, the summons was affixed to his house, the service of the summons is good. 27 N.L.R. 50=134 I.C. 268=1931 N. 122 (2 N.L.R. 63; 24 A. 302, Dist.). As to how the Court is to act on a return under this rule, *see* R. 19. *See* 7 Bom.L.R. 159. *See also* 43 I.C. 632. As to modes of service of summons, *see* 99 P. R. 1918=48 I.C. 28.

CANNOT FIND.—The question whether serving officer “cannot find” the defendant must be determined by the Court (and not the process-server) with reference to the circumstances of each case. 21 M. 324; 1938 A.M.L.J. 43. *See also* 26 C. at 102. “Due and reasonable diligence”. *See* 91 I. C. 965=1926 C. 327.

ORDINARILY RESIDES.—It is necessary that the defendant should be residing in the house in such a manner as to make it probable that knowledge of the service of the summons will reach him. 5 M.H.C.R. 101; 21 W. R. 242. *See also* 41 I.C. 181.

AFFIDAVIT OF SERVICE.—An affidavit in support of service of a summons under this rule should show that proper efforts have been made to find out when and where the defendant is likely to be found. 19 C. 201. *See also* 20 I.C. 318=11 A.L.J. 540.

AFFIX A COPY.—Where there is no affixture, there is no proper service. 16 B. 117. For illustrative cases, *see* 21 M. at 421; 10 B. at 204; 21 B. 223. *See also* 24 A. 302 and 18 M.L.J. 14; 30 B. 623; 20 C. 358. All available steps to effect personal service should be taken before resort is had to the provisions of O. 5, R. 17. 52 C. 179=88 I.C. 508. Affixture on outer door of house



18. The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

LOC. AM.—[MADRAS]. Insert the following as R. 18-A :—

18-A. "A District Judge within the meaning of the Madras Civil Courts Act, 1873, may delegate to the Chief Ministerial Officer of the District Court the power to order the issue of fresh summons to a defendant when the return on the previous summons is to the effect that the defendant was not served and the plaintiff does not object to the issue of fresh summons within seven days after the return has been notified on the notice board." Vide P. Dis. No. 777 of 1929.

19. Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

LOC. AM.—[CALCUTTA]. O. 5, R. 19. Substitute the following :—

19. Where a summons is returned under R. 17, the Court shall, if the return under that rule has not been verified by the declaration of the serving officer, and may, if it has been so verified, examine the serving officer on oath or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

O. 5, R. 19-A.—Add after R. 19 :—

19-A. A declaration made, and subscribed by a serving officer shall be received as evidence of the facts as to the service or attempted service of the summons.

#### NOTES.

whether good service. 22 L.W. 423=49 M.L.J. 445=1926 M. 31.

AGENT is not invariably entitled to refuse summons. 23 N.L.R. 166.

O. 5, R. 18.—The report of the Nazir is not enough. 12 W.R. 365. The Court is not bound by the return. It is not evidence of the service. 7 C. 34; 10 W.R. 3.

O. 5, R. 19.—There must be strict compliance with the rule as to propriety of service in cases where the service is the basis of the plea of constructive *res judicata*. 103 I.C. 822=26 L.W. 481=1927 M. 813; 1940 M. 213=(1939) 2 M.L.J. 926. The declaration required by R. 19 of above service may in a proper case be implied or inferred. 9 O. W.N. 896=1932 O. 326; (1939) 2 M.L.J. 926; 1940 Mad. 213. The provision of R. 19 will apply to all cases in which return of summons is made under R. 17 whether due to absence or refusal of person to be served. Even in the case of a refusal, unless there is a declaration by the Court that the service under R. 17, is sufficient as required by the provisions of R. 19 any order passed by the Court in the absence of judgment-debtor will not constitute as *res judicata*. 1937 M. 84. Rule 19 of O. 5, C. P. Code, casts a duty on the Court, when a summons is returned under R. 17, to either declare that the summons has been duly served or to order such service as it thinks fit. It is

not enough for the Court to merely act mechanically on the affidavit of the serving officer. The rule requires that the Court ought to be satisfied on the affidavit of the serving officer and on the verification in the return that it can safely declare the summons properly served. When there is no such declaration, the mere fact that the Court declares the defendant *ex parte*, does not lead to the conclusion that the Court has impliedly made such a declaration of due service. There must be a strict compliance with R. 19. 1937 M.W.N. 184 (2). See also 71 M.L.J. 317=1936 M. 812. (Summons not personally served—Omission to declare service sufficient—Effect).

PRINCIPLE OF CONSTRUCTIVE *res judicata*—APPLICABILITY OF.—When a notice of an execution application is ordered by Court to be served on the defendant and the notice has to be affixed to the door of the dwelling-house owing to the reported absence of the defendant, the Court must either declare it sufficient or order such service as it thinks fit, as it is imperatively required to do so under R. 19 and in a case where it is sought to apply the constructive principle of *res judicata* against the defendant, the omission of the Court to make such a declaration as enjoined by the Code is fatal. 1933 M. 466=64 M.L.J. 329. Where the notice of the application for arrest was fixed on the outer-door of the defendant's residence when he was absent and there was no declaration by



20. (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

Substituted service. (2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

Effect of substituted service. (3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

#### NOTES.

the Court under R. 19, that the notice was duly served. *Held*, that it was not due service for the purpose of creating constructive *res judicata* and that the defendant was not precluded from showing that the application was out of time. (1927 M. 813; 55 M. 233 and 40 M. 1016, Foll.) 142 I.C. 765 = 1933 M. 406 = 64 M.L.J. 637.

O. 5, R. 20.—The advisability of effecting service by substituted service is a matter primarily for the trial Court and if it is satisfied on the matters set out in R. 20, it should order substituted service, which is as effectual as if service was made personally. An appellate Court has no power to go into the question whether the substituted service ought to have been ordered unless the trial Court has made some error of law. All that the appellate Court can see is whether the summons is issued according to law. 131 I.C. 344 = 1931 L. 118 (102 I.C. 243, Foll.) Substituted service when to be ordered. 69 I.C. 467; 48 I.C. 28 (30); 120 I.C. 594. *See also* 138 I.C. 146 = 1932 M. 472. Under O. 5, R. 20 (2), service substituted by the order of the Court is as effectual as if it had been made on the defendant personally, but, it does not follow that substituted service is necessarily due service, the adequacy of which can never be questioned by the party concerned. 171 I.C. 617 = 1937 O.W.N. 1141. Substituted service may or may not be sound service. It is not sound service if the person on whom the notice was sought to be served can prove that in actual fact he was not evading service and knew nothing whatever about the hearing in question. 1938 A.M.L.J. 124. *See also* 1937 O.W.N. 141. "Effectual", meaning of, *see* 1939 Rang.L.R. 606. From the mere fact that when the notice of execution was taken to the house of the judgment-debtor for the first time, the house was found to be locked, it is very unsafe to infer that he was avoiding service; and it is not proper to order substituted service in such case. 1940 O.A. 864 = 1940 A.W.R. (B.R.). 141. Where in an order for fresh summons a Court remarked that "if the defendant evaded service or could not

be found after due care and diligence substituted service would be effected', it was held that such a *conditional order* was illegal, as it was for the Court and not for the serving officer to determine whether there was evasion of service. O. 5, R. 20 allows substituted service only when the Court is satisfied that defendant is evading service. 1938 A.M.L.J. 43. If at the time substituted service is ordered the Court is satisfied as to the grounds for the order, it is doubtful, if it can be invalidated by showing that its belief was erroneous. 138 I.C. 146 = 1932 M. 472. Affixing of summons on outer-door is not sufficient service. 29 I.C. 26. Copy attached to tree near house if sufficient. 69 I.C. 549 = 1923 N. 13. Where the Court finds that the defendants evaded service and refused postal notices, a finding that there was no due service is inconsistent. 1930 M.W.N. 1227. When substituted service is ordered sufficient time ought to be given for notice of the fact to reach the defendant, wherever he may be. 2 B. 449. The publication of a notice in a newspaper in Lahore requiring a party at Hardoi to appear in Gurdaspur Court on the next day of issue of the paper is not valid substituted service. 116 I.C. 620 = 1929 L. 235. The mode of substituted service must be settled according to the circumstances of each case. 10 B. at 205. Notice affixed to the judgment-debtor's house occupied by other members of his family is good service. 130 I.C. 485 = 1931 A.L.J. 62 = 1931 A. 159. Substituted service—When personal service. 116 I.C. 363; *see* 1930 L. 397. *See also* 1v2 I.C. 778 = 1931 O. 369 (1). The rule that substituted service is to be taken as effectual as personal service only means that the Court hearing the case may proceed with the suit as if the summons had been personally served on the defendant. But if for no fault of the defendant a defendant was never put in a position to know that a suit had been instituted against him whatever steps might have been taken for serving the summons on him, these steps can never be taken as amounting to "due service". It is therefore open to the defendant, when he appears to show that the method employ-



LOC. AMS.—[OUDH]. *Add after R. 20, O. 5, R. 20-A :—*

20-A. (1) Where the defendant resides in British India outside the province of Oudh or within the limits of headquarters town of a district in that province, a summons may be served on him by registered post, and in this case, where an acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service has been received, the process, shall, unless the contrary is proved, be deemed to have been served.

(2) Where the registered address of the defendant or opposite party, as defined in O. 8, R. 11, is within the limits of a headquarters town or of a municipality of India (including Burma) or Ceylon, a notice, summons or other process may be served on him at that address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served.

[RANGOON.] After R. 20, the following shall be inserted as R. 20-A, namely :—

" 20-A. (1) Every plaintiff, appellant or applicant on presenting or on entering an appearance to prosecute a plaint, memorandum of appeal, or originating petition or application, shall at the same time file in Court a proceeding stating his address for service.

(2) Every defendant or respondent who intends to appear and defend any suit, appeal or originating petition or application shall on or before the date fixed for his appearance in the summons or notice served on him file in Court a proceeding stating his address for service.

(3)\* Such address for service shall be within the local limits of the jurisdiction of the Court in which the suit, appeal, or petition or application is filed or of the District Court within whose jurisdiction the party ordinarily resides.

(4) Where any party fails to file an address for service as required by sub-rule (1) or sub-rule (2), he shall, if a plaintiff, appellant or applicant, be liable to have his suit, appeal, petition or application, dismissed for want of prosecution, and if a defendant or respondent, be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. Any party may apply for such an order against an opposite party, and the Court may on such application make such order as it thinks just.

(5) Where a party is not found at the address given by him for service, and no agent or adult member of his family on whom a notice or process can be served is found at the address, a copy of the notice or process shall be affixed on the outer door or some other conspicuous part of the house or place which has been given as the address for service; and such service shall be deemed, to be as effectual as if the notice or process had been personally served on the party.

(6) Where a party is represented by an advocate or pleader notices or processes for service on him shall be served in the manner prescribed by O. 3, R. 5, unless the Court directs service at the address for service given by such party.

(7) A party who desires to change the address for service given by him under sub-rule (1) or sub-rule (2) shall present a verified petition to that effect, and the Court may direct the amendment of the record accordingly. Notice of every such petition shall be given to all other parties to the proceedings.

(8) Nothing in this rule shall prevent the Court from directing the service of a notice or process in any other manner if it thinks fit to do so.

#### NOTES.

ed was not calculated to effect the purpose of informing the defendant of the institution of the suit, and in order to see whether there was due service or not, the Court must consider all the circumstances of the case, for example, the place where the defendant was when the summons was issued to him and where and how the summons was served. 1931 A.L.J. 1049=1931 A. 727 (F.B.). Even if the defendant is served personally, it is open to him to come to the Court and show that that was not really due service because it did not really give him knowledge of a claim against him. *A fortiori* it is open to the defendant who is served only by the inference through substituted service to show that he was never properly served at all and that he had no knowledge of the claim. 134 I.C. 1202=1931 M. 813=61 M.L.J. 920. Nor is the defendant precluded from afterwards showing that in fact there had been no service on him at all and that the order for substituted service was procured on misrepresentation of facts. Nor will an order recorded by the Court to the effect that substituted service was effected on the defen-

dant preclude the Court from entering into the merits of the defendant's application in spite of such order. 152 I.C. 830=38 C. W.N. 1066=1934 C. 745. When the order for substituted service is procured and such service is effected on misrepresentation of fact, the service so effected is not due service. (*Ibid.*). Substituted service obtained by fraud is not due and proper service. 153 I.C. 80=1935 L. 129.

PROCEDURE.—Granting of order for substituted service is at the discretion of the trial Court. Appellate Court will not interfere with such discretion. 102 I.C. 243=1927 M. 507=52 M.L.J. 472. See also 1935 L. 169. Service of summons whenever it is practicable, must be in person and it is only when reasonable grounds exist for believing that the defendant is keeping out of the way to avoid service, or that for other reasons it cannot be served in the ordinary way that substituted service should be ordered. Mere affixing the summons to the defendant's house is not sufficient service. 134 I.C. 279=1931 N. 119 (29 M. 324; 21 M. 419; 2 N.L.R. 62, Foll.). Application to set aside *ex parte* decree rejected—Appeal—Court, if can



21. A summons may be sent by the Court by which it is issued, whether within or without the province, either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

Service of summons where defendant resides within jurisdiction of another Court.

LOC. AMS.—[BOMBAY.] <sup>1</sup>O. 5, r. 21.—The following shall be inserted as R. 21-A in O. 5 :—

"21-A. The Court may, notwithstanding anything in the foregoing rules and whether the defendant resides within the jurisdiction of the Court or not, cause the summons to be addressed to the defendant at the place where he is residing, and sent to him by registered post pre-paid for acknowledgment, provided that at such place there is a regular daily postal service. An acknowledgment purporting to be signed by the defendant shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and declare the summons to have been duly served or order such further service as may in its opinion be necessary."

21-A. [NAGPUR]. The Court may, notwithstanding anything in the foregoing rules, cause the summons of its own Court or of any other Court in British India to be addressed to the defendant at the place where he ordinarily resides or carries on business and sent to him by registered post pre-paid for acknowledgment provided that such place is a town or village in the Akola revenue taluq. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service."

[RANGOON.] In O. 5, the following shall be inserted as R. 21-A :—

"21-A. When any summons is sent for service by a Court to any Court situated beyond the limits of Burma, it shall, unless it is written in English, be accompanied by a translation in English or in the language of the locality in which it is to be served."

#### LEG. REF.

<sup>1</sup>Vide High Court Notification No. 2182, dated the 9th August 1940, published at page 1197 of the *Bombay Government Gazette* for 1940, Part IV-C.

Rule 21-A was originally inserted by High Court Notification No. 2502, dated the 15th October 1930, published at page 2621, of the *Bombay Government Gazette*, for 1930, Part I and it ran as follows :—

"21-A. *Service of Summons by prepaid post wherever the defendant may be residing if plaintiff so desires.*—Where the plaintiff so desires, the Court may, notwithstanding anything in the foregoing rules and whether the defendant resides within the jurisdiction of the Court or not, cause the summons to be addressed to the defendant at the place where he is residing and sent to him by registered post prepaid for acknowledgment provided that such place is at a town or village in British India which is the head-quarters of a district or recognised sub-division of a district, such as a taluka, tahsil or mahal, or in which a municipality has been established, or to which the provisions of this rule may from time to time be extended by a Notification by the High Court published in the *Bombay Government Gazette*. An acknowledgment purporting to be signed by the defendant shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary."

#### NOTES.

consider legality of order as to substituted service. 1935 L. 169. Substituted service obtained by fraud—If due service. 153 I.C. 80=1935 L. 129.

REFUSAL TO ACCEPT SERVICE—SUBSTITUTED SERVICE, IF NECESSARY.—It is obligatory on the Court to effect substituted service under

R. 20, only if the summons could not be served in the ordinary way. Where the process-server and the postal peon had reported that the appellant had refused to accept the service and the Court was satisfied about the correctness of their reports. *Held*, that the Court was entitled to hold that the appellant had been duly served and to proceed *ex parte* against him. 1935 L. 171.

SUBSTITUTED SERVICE—STATEMENT OF PROCESS-SERVER AS TO—PRESUMPTION FROM—IF REBUTTABLE.—Where the trial Court was careful to obtain the statement on oath of the process-server before passing the *ex parte* decree, and the trial Court was satisfied that substituted service had been duly effected. *Held*, that this did not raise any unrebuttable presumption and it was open to the appellant to prove, if he can, that in fact substituted service was not duly effected. However difficult that task may be and however strong the presumption that there was proper substituted service, he must be given an opportunity to rebut the presumption. 157 I. C. 878=1935 Pesh. 112.

TRANSFER OF CASE.—Where the first summons was duly served, and it appeared that he intentionally neglected to ascertain the dates of hearing after the suit was transferred, *held*, that the *ex parte* decree passed by the transferee Court could not be set aside for want of due service. 139 I.C. 354=1932 L. 539.

O. 5, R. 21.—Service outside jurisdiction can only be done by an officer of the Court, with an order from a Court having jurisdiction over the place where he resides. 3 R. 239=89 I.C. 870=1925 R. 325. There is no provision of law by which summons may be issued by post on a defendant residing within British India. 1937 A.M.L.J. 70.



22. Where a summons issued by any Court established beyond the limits of the towns of Calcutta, Madras <sup>1</sup>[and Bombay] is to be served within any such limits, it shall be sent to the Court of Small Causes within whose jurisdiction it is to be served.

Service, within Presidency-towns, of summons issued by Courts outside.

LOC. AM.—[BOMBAY.] The following proviso be added to O. 5, R. 22 :—

“ Provided that where any such summons is to be served within the limits of the town of Bombay, it may be addressed to the defendant at the place within such limits where he is residing and may be sent to him by the Court by post registered for acknowledgment. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary.”

[RANGOON.] The following proviso shall be added, namely :—

“ Provided that where such summons is to be served within limits of the Town of Rangoon, the Court may, in addition to or in substitution of any other mode of service, send the summons by registered post to the defendant at the place within such limits where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant, or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service thereof.”

23. The Court to which a summons is sent under rule 21 or rule 22 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue, together with the record (if any) of its proceedings with regard thereto.

Duty of Court to which summons is sent.

LOC. AM.—[RANGOON.] The following shall be added as O. 5, R. 23-A :—

“ 23-A. (1) Before re-transmitting a summons, received from another Court for service, the Court shall either take down the deposition of the peon serving the summons as to the time when and the manner in which the summons was served, or cause the peon to make an affidavit before the bailiff if the bailiff has been empowered to administer oaths and shall transmit the same, together with the summons, to the Court whence the summons originally issued. In the case of processes received from other provinces, the deposition or affidavit of the peon serving the summons, if not recorded in English, shall be translated into English, before the summons is returned to the issuing Court.

“ (2) In the case of process received from India if the person on whom the summons is to be served is not personally known to the process-server, an affidavit or deposition by the person who pointed out to the process-server the said person or his ordinary residence or place of business shall also be attached to the summons.

“ (3) When a process is forwarded for service by one Court in Burma to another Court in Burma and when the person on whom the process is to be served is not personally known to the process-server, the case in connection with which the process was issued shall not be heard *ex parte* without an affidavit or deposition of some person who pointed out to the process-server the person to be served or his ordinary residence. The onus shall be upon the person at whose instance the summons is issued, either himself or by an agent, to point out to the process-server the person on whom the process is to be served or his ordinary residence or place of business.

“ (4) When the summons has been returned by the process-server under R. 17, a declaration of due service or of failure to serve shall be recorded in Form (Civil) 47, and sent with the summons to the Court by which it was issued.”

24. Where the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant.

Service on defendant in prison.

25. Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate.

Service where defendant resides out of British India and has no agent.

#### LEG. REF.

<sup>1</sup> Substituted for “Bombay and Rangoon” by A.O. 1937.

#### NOTES.

O. 5, R. 24.—The Court shall take judi-

cial notice of the signature of the jailor on the return. 4 B.L.R. O.C. 51.

O. 5, R. 25.—A summons cannot be sent by post to any place to which letters are not registered by a post office. 2 B.L.R. (A. C.) 59. The summons should be sent by



LOC. AMS.—[ALLAHABAD, OUDH, NAGPUR AND RANGOON.] For the word "shall" in the third line read the word "may".

[MADRAS.] Substitute the following for R. 25 in O. 5 :—

"25. Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons may be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate.

"Provided that if by any arrangement between the Local Government of the province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides the summons can be served by an officer of the Government of such territory, the summons may be sent to such officer in such manner as by the said arrangement may have been agreed upon."

[ALLAHABAD.] Add after R. 25 :—

"25-A. Where the defendant resides in British India, but outside limits of the United Provinces of Agra and Oudh, the Court may, in addition to or in substitution for any other mode of service, send the summons by post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant, or an endorsement by a postal servant that the defendant refused service, may be deemed by the Court issuing the summons to be *prima facie* proof of service.

[NAGPUR.] Add the following as R. 25-A :—

"25-A. Where the defendant resides in British India but outside the limits of the Central Provinces, the Court may, in addition to any other mode of service, send the summons by registered post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by him, or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service."

[RANGOON.] Add the following as R. 25-A :—

"25-A. Where the defendant resides in British India, but outside the limits of the Province of Burma, the Court may in addition to or in substitution of any other mode of service, send the summons by registered post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service thereof."

Service in foreign territory  
through Political Agent or  
Court.

26. Where—

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in <sup>1</sup>[the Central Government or the Crown Representative], a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

<sup>2</sup>[(b) The Provincial Government has, by notification in the Official Gazette declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons <sup>3</sup>[issued under this Code by a Court of the Province] shall be deemed to be valid service,]

the summons may be sent to such Political Agent, or Court, by post or otherwise for the purpose of being served upon the defendant; and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other officer of the Court that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.

#### LEG. REG.

<sup>1</sup> Substituted for "the Governor-General in Council" by A.O., 1937.

<sup>2</sup> Sub-rule was substituted by S. 2 and Sch. I, Act XVII of 1914.

<sup>3</sup> Substituted for the words "issued by a Court under this Code" by A.O., 1937.

#### NOTES.

post under a registered cover. 15 W.R. 31; 1930 L. 439=121 I.C. 382. A person refusing a registered letter cannot afterwards plead ignorance of its contents, 16

W.R. 223. But see 18 B. 606. See also 23 A. 99; 35 B. 213=13 Bom.L.R. 323=11 I.C. 351. There is no law by which witnesses in Native States which have made arrangements for mutual service of processes with British India can be compelled to obey the processes, i.e., punished if they fail to do so. If the witnesses so summoned fail to appear, the only way to take their evidence is by commission. The rule as to 200 miles is not applicable in such a case. 142 I.C. 201=61 M.L.J. 334.



LOC. AMS.—[ALLAHABAD, NAGPUR AND OUDH.] After the words "the summons may" insert the words "in addition to, or in substitution for the method permitted by R. 25."

[MADRAS.] Substitute the following for R. 26, O. 5 :—

"26. Where—

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

(b) the Governor-General in Council has, by notification in the *Gazette of India* declared in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be valid service, or

(c) by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides, the summons can be served by an officer of the Government of such territory,

the summons may be sent to such Political Agent or Court, or in such manner as may have been agreed upon to the proper officer of the Government of the foreign territory by post or otherwise, for the purpose of being served upon the defendant; and, if the summons is returned with an endorsement signed by such Political Agent or by the Judge or other officer of the Court or by the officer of the Government of the foreign territory that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service."

[NAGPUR.] In R. 26 (b) insert the words "in addition to or in substitution for the method permitted by R. 25" between the words "may" and "be sent."

[OUDH.] In R. 26 (b) after the words "the summons may" insert the words "in addition to or in substitution for, the method permitted by R. 25."

27. Where the defendant is a public officer (not belonging to His Majesty's military <sup>1</sup>[naval or air] forces <sup>2</sup>[\* \* \* \* \*]), or is the servant of a railway company or local authority, the Court may, if it appears to it that the summons may be most conveniently so served, send it for service on the defendant to the head of the office in which he is employed, together with a copy to be retained by the defendant.

LOC. AMS.—[ALLAHABAD.] To O. 5, C. 27, add the following as note 1 and note 2 :—

"NOTE 1.—A list of heads of offices to whom summonses shall be sent for service on the servants of Railway Companies working in whole or in part in these provinces is given in Appendix II of the General Rules (Civil) of 1911.

NOTE 2.—In every case where a Court sees fit to issue a summons direct to any public servant other than a soldier under O. 16 simultaneously with the issue of the summons, notice shall be sent to the head of the office in which the person concerned is employed, in order that arrangements may be made for the performance of the duties of such persons."

#### Illustration.

"If the Court sees fit to issue a summons to a *kanungo* or *patwari* it shall inform the Collector of the district, and if to a Sub-Registrar it shall inform the District Registrar to whom the Sub-Registrar is subordinate."

[MADRAS.] In O. 5, R. 27 after the words "send it" insert the words "by registered post pre-paid for acknowledgment."

[OUDH.] Insert the word "air" between the words "Military" and "or".

[RANGOON.] Delete the words "Or His Majesty's Indian Marine Service."

28. Where the defendant is a soldier, <sup>3</sup>[sailor] <sup>4</sup>[or airman], the Court shall send the summons for service to his commanding officer together with a copy to be retained by the defendant.

LOC. AMS.—[ALLAHABAD.] The present R. 28 shall be numbered 28 (1), and add the following as :—

"(2) Where the address of such Commanding Officer is not known, the Court may apply to the officer commanding the station in which the defendant was serving when the cause of action arose to supply the address, in the manner prescribed in sub-rule (4) of this rule.

#### LEG. REF.

<sup>1</sup> Substituted for the word "or naval" by Act X of 1927.

<sup>2</sup> The words "or His Majesty's Indian Marine Service" omitted by Act XXXV of 1934.

<sup>3</sup> Inserted by Act XXXV of 1934.

<sup>4</sup> Inserted by Act X of 1927.

#### NOTES.

O. 5, R. 27.—Mode of service of summons on a public servant. See 9 O.W.N. 896=1932 O. 326.



(3) Where the defendant is an officer of His Majesty's military forces, wherever it is practicable, service shall be made on the defendant in person.

(4) Where such defendant resides outside the jurisdiction of the Court in which the suit is instituted, or outside British India, the Court may apply over the seal and signature of the Court to the officer commanding the station in which the defendant was residing when the cause of action arose, for the address of such defendant, and the officer commanding to whom such application is made shall supply the address of the defendant or all such information that it is in his power to give, as may lead to the discovery of his address.

(5) Where personal service is not practicable, the Court shall issue the summons to the defendant at the address so supplied by registered post."

[MADRAS.] In O. 5, R. 28 *after* the words "shall send" *insert* the words "by registered post pre-paid for acknowledgment."

[OUDH.] *Add* the following as R. 28 (a) and re-number the present rule as (b) :—

"28. (a) Where the defendant is an officer in His Majesty's military, naval or air forces, the Court shall send the summons direct to him for service together with a copy to be retained by him."

[RANGOON.] In R. 28 as amended (by a prior amendment the word 'sailor' was inserted after the word 'soldier'). for the words "soldier, sailor or airman," *substitute* the words "Member of His Majesty's military, naval or air forces."

\* 29. (1) Where a summons is delivered or sent to any person for service under rule 24, rule 27 or rule 28, such person shall be bound to serve it, if possible, and to return it under his signature, with the written acknowledgment of the defendant, and such signature shall be deemed to be evidence of service.

(2) Where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.

LOC. AMS.—[ALLAHABAD.] In R. 29, sub-rule (1) for the words "R. 28" *read* "R. 28 (1)."

[MADRAS.] *Insert* as R. 29-A:—

"29-A. Notwithstanding anything contained in the foregoing rules, where the defendant is a public officer (not belonging to His Majesty's military or naval forces or His Majesty's Indian marine service) sued in his official capacity, service of summons shall be made by sending a copy of the summons to the defendant by registered post pre-paid for acknowledgment together with the original summons, which the defendant shall sign and return to the Court which issued the summons."

30. (1) The Court may, notwithstanding anything hereinbefore contained, substitute for a summons a letter signed by the Judge or such officer as he may appoint in this behalf, where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration.

(2) A letter substituted under sub-rule (1) shall contain all the particulars required to be stated in a summons, and, subject to the provisions of sub-rule (3), shall be treated in all respects as a summons.

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court or, in any other manner which the Court thinks fit; and, where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent.

LOC. AMS.—[ALLAHABAD.] To O. 5, *add* the following as Rr. 31 and 32 :—

"31. An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose. No other forms shall be received by the Court.

"32. Ordinarily every process, except those that are to be served on Europeans, shall be written in the Court vernacular. But where a process is sent for execution to the Court of a district where a different language is in ordinary use, it shall be written in English and shall be accompanied by a letter in English requesting its execution.

#### NOTES.

O. 5, R. 29.—The Commanding Officer must serve the summons. 10 M. 319, although the defendant is entitled to the privilege given by section 144 of the Army Act,

1882. 11 M. 475. The words "such signature shall be deemed to be evidence of service" give effect to the ruling in 11 B. L.R. App. 43.



In cases where the return of service is in a language different from that of the district from which it is issued, it shall be accompanied by an English translation."

[SIND.] Add the following as R. 31 in O. 5 :—

"31. If a summons issued to a defendant residing in British India is returned unserved, the Court may, while issuing a fresh summons for personal service or ordering substituted service of summons, also order that a copy of the summons addressed to the defendant at the place where he is residing be sent to him by registered post, if there is postal communication between such place and the place where the Court is situate."

## ORDER VI.

### *Pleadings generally.*

Pleading.

1. "Pleading" shall mean plaint or written statement.

2. Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures.

### NOTES.

O. 6.—The provisions of O. 6 apply to petitions under O. 33. 138 I.C. 652=1932 L. 548. Where a portion of the written statement is too vague and too general to indicate what is meant by the defendant and though no attempt is made on behalf of the plaintiff to seek a clarification of the plea contained therein, it is the duty of the Court to call upon the defendant to furnish definite particulars of the plea. The practice of introducing obscure pleadings with a view to taking the adversary by surprise is open to grave objection and is not unoften likely to lead to grave miscarriage of justice. The law imposes a duty on the Judge to clarify the pleadings. 194 I.C. 588=1941 O.W.N. 801=1941 Oudh 457.

O. 6, R. 1.—Pleadings in Indian Courts must not be construed with the same strictness as in English Courts. 6 A. 406. They must be very liberally construed. 5 C.L.J. 25. An amendment of the pleadings can be allowed at any stage of the proceedings where the sole result of the refusal would be to drive the plaintiff to a separate suit, to avoid which is one of the principal objects of the much wider rule as to amendment which has been introduced into the present Code. A plaint in a suit for rent and possession may be allowed to be amended by the addition of a prayer for declaration of title. 113 I.C. 296=1929 M. 273. A statement by a pleader is not a pleading under O. 6, R. 1. 114 I.C. 113=1929 O. 204.

O. 6, Rr. 1 and 4: SCOPE.—The Court under its inherent jurisdiction, is entitled to interfere and direct particulars if it considers that a litigant is substantially embarrassed owing to lack of precision in a petition or affidavit; and a party disregarding this opponent's request for particulars will be doing so at his own risk. Any relevant statement which could have been incorporated in the petition or furnished by way of particulars will not, on failure to

furnish particulars, be allowed to be imported in an affidavit in reply at the hearing of the petition. 165 I.C. 24=40 C.W.N. 913.

O. 6, R. 2.—As to frame of plaint in collision cases, see 25 C.W.N., 519=34 C.L.J. 178. In election enquiry under Municipal Act, in which allegation of corrupt practice is made. See 39 C. W. N. 910. The law of pleadings may be tersely summarised in four words "Plead facts not law". It is the duty of the parties to state only the facts on which they rely for their claim. It is for the Court to declare the law arising out of those facts. 1933 S. 103=143 I.C. 713; 1926 N. 265. Every practitioner when pleading should have particular regard to R. 2. Nearly all pleadings in this country offend against this rule in one way or another. Either they lack conciseness or they state immaterial facts and a mistake, which is frequently made, is to include in the pleading either directly or indirectly by reference to some document annexed, the evidence by which material facts are to be proved. 58 C. 418=134 I.C. 538=1931 C. 458.

ESSENTIALS OF PLAINT.—What it should contain. 22 C.L.J. 254=20 C.W.N. 310. The object of pleadings is to bring the parties to an issue. 25 M.L.J. 329. Inconsistent pleas are not prohibited. 1925 O. 120=27 O.C. 175. Pleas and facts constituting them should be clearly expressed. 6 Pat.L.T. 465=1925 P. 168. Pleadings are confined to facts and a point of law need not be raised in the pleadings. 92 I.C. 926=1926 N. 265. See also 1933 S. 103. In a suit for damages for breach of contract, the defendant may be allowed to give evidence of a previous contract between the parties, although it is not pleaded. The fact can be proved as part of the circumstances, and when the defendant does not rely on it except as evidence, it is not necessary to plead it. 152 I.C. 117=38 C.W.N. 908.



3. The forms in Appendix A when applicable, and where they are not applicable forms of the like character, as nearly as may be, shall be used for all pleadings.
- Forms of pleading.
4. In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.
- Particulars to be given where necessary.
5. A further and better statement of the nature of the claim or defence, or

## NOTES.

O. 6, R. 3.—Evidence has no place in pleading. 1925 P. 410.

O. 6, R. 4.—In an action for damages for injury done, the nature of the injury ought to be set out. 13 W.R. 246; 10 Bom. H.C. 182. In a suit for money advanced, defendant pleading illegality of contract must clearly plead and prove illegality. 3 R. 275=1925 R. 275. [23 M. 227 (P.C.), Foll.] A custom should be specifically pleaded and all the essential requisites to its validity and binding effect should be proved. 66 I.C. 640=34 C.L.J. 319. Ordinarily a party should not be allowed to prove a custom different from that set up by him. Where plaintiffs set up a particular custom and the defendants in terms deny the custom set up by the plaintiffs and go on to plead different custom it is not permissible in such a case to split up the custom but the case as regards the custom set up either by the plaintiffs or by the defendants must be taken as a whole and not piecemeal. 114 I.C. 113=1929 O. 204. A plea of a special nature must be distinctly pleaded and made the subject of a distinct issue. 25 I.C. 729=18 C.W.N. 622. *See also* 60 C. 733=37 C.W.N. 504=1933 C. 632. A pleading charging fraud must set forth particulars and general allegations, however strong the words may be, cannot be noticed. 15 C. 533 (P.C.); 23 C.W.N. 1045=31 C.L.J. 3; 35 I.C. 339=20 C.W.N. 819; 35 I.C. 284=20 C.W.N. 638; 20 I.C. 753; 92 I.C. 322=1926 L. 96; 40 C. 898; 2 Pat.L.T. 528=6 P.L.J. 373 (F.B.); 58 I.C. 317; 46 I.C. 342; 30 I.C. 20=8 L.B.R. 185; 144 I.C. 1013=1933 R. 123; 146 I.C. 954=1933 R. 169; 1935 R. 73 (2)=13 R. 175=155 I.C. 890; 1935 L. 222. But the omission to set forth particulars and details of the conspiracy, by which the plaintiff has been fraudulently deprived of his property, does not contravene the provisions of R. 4, when the transactions alleged by the plaintiff speak for themselves and furnish internal proof of a well-thought-out design on the part of the defendants to deprive the plaintiff of his property. 152 I.C. 468=11 O.W.N. 1323. Points as to fraud or forgery shall be specifically pleaded. 31 C.W.N. 538=97 I.C. 543=1926 P.C. 109 (P.C.). Fraud of one kind alleged—Relief of another ground cannot be given. 34 C.L.J. 529=26 C.W.N. 177.

*See also* 24 C.W.N. 662=30 C.L.J. 475. To call a deed both 'fraudulent' and 'bogus' is not a clear piece of pleading. Though fraud may be present in both cases, a deed may be fraudulent without being bogus and hence it is better to keep the two distinct. 1938 N.L.J. 279=A.I.R. 1938 Nag. 546. Where a person relies on the fraud of another, it is his duty to say so in his pleadings. In the absence of any pleading, even if there is evidence of fraud, the Court would not be able to consider it. 1941 N.L.J. 230. Charges of fraud and collusion must be proved by those who make them by established facts or inferences legitimately drawn from those facts taken together as a whole. 29 I.C. 482; 45 M.L.J. 363=39 C.L.J. 165=1923 P.C. 73 (P.C.). Suit for money advanced—Defendant pleading illegality of contract—Defendant must clearly plead and prove illegality. 92 I.C. 270=1925 R. 275. Coercion, undue influence, fraud and misrepresentation are all separate categories in law. 39 B. 441=42 I.A. 135 (P.C.). (15 I.A. 119, Ref.) If there are facts on the record to justify the inference of undue influence, the omission to make an allegation of undue influence specifically is not fatal to the plaintiff's case. All that the Court has to see is that there is no surprise to the defendant. 132 I.C. 452=1931 N. 63. Where fraud or coercion or misrepresentation is alleged, it must be supported by particulars. 39 B. 149; and also strictly proved. 13 R. 175=155 I.C. 890=1935 R. 73; 1935 L. 222. New case of fraud must not be allowed to be set up on appeal. 26 Bom.L.R. 622. Plea of estoppel should preferably be raised and issue framed. 1926 M. 1052=96 I.C. 915 (2). Special damage—Particulars to be given. 91 I.C. 728=1926 C. 549. Suit on *settled accounts*—Order for inspection to be allowed—Lateness of application may be dealt with by an order as to costs. 137 I.C. 636=1932 M. 284=62 M.L.J. 226. Suit relating to easements—Plea of lost grant or immemorial user not specifically stated—Inference of lost grant may be made—Plaint allegations to be liberally construed. 1933 C. 215=142 I.C. 458=56 C.L.J. 274.

O. 6, R. 5.—If averments in a plaint are not precise, the defendant can apply for particulars. Failure to do so operates as estoppel in second appeal. 1 Pat.L.T. 34=52 I.C. 964. On this rule, *see also* 137



Further and better statement,  
or particulars.

further and better particulars of any matter stated in any pleading, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.

6. Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified

Condition precedent.

in his pleading by the plaintiff or defendant, as the case may be ; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

7. No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the

Departure.

same.

8. Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a

Denial of contract.

denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

#### NOTES.

I.C. 842. O. 6, R. 5 permits merely a further and better statement of the nature of the claim or further and better particulars of any matter stated in any pleading, and not the submission of new material altogether based on an entirely different cause of action. This would be really repugnant to R. 7 of the same Order which unequivocally prohibits the raising of any new ground of claim or the alleging of any fact inconsistent with previous pleadings. 1937 Lah. 795. It is not open to a defendant to make a grievance of any vagueness in the plaintiff's pleadings at an appellate stage because if they so desired, it would be open to them to apply for further and better particulars under R. 5. I. L. R. (1937) 1 C. 491=41 C.W.N. 88=1937 C. 51.

O. 6, R. 5 only permits a better statement of the claim being put in when it is ordered by the Court. If the Court considers that no replication is called for, it has the discretion to reject it. 41 P.L.R. 650=A.I. R. 1939 Lah. 386. Court will not allow a party to take advantage purely on technical grounds which are devoid of any merit. I.L.R. (1937) Nag. 498=1937 Nag. 376. Where a plaintiff is ordered to give particulars one of the terms of the order may be that the action shall be dismissed unless the particulars are delivered within a certain time. Where a trial Judge makes an order of dismissal and makes it fairly giving every kind of chance, an appellate Court, if indeed it has any power at all to interfere with such a discretion so judicially exercised, should be exceedingly slow to do so. Broadly speaking, it is not desirable that cases should be lost in this way. It is not desirable that Judges should be stringent where it comes to dealing with litigants who may have gone wrong because of ignorance or wrong advice. It is not advisable on the other hand to allow litigants to take up a contumacious attitude, holding their facts

back until they have an opportunity of fishing about in their opponent's evidence. 190 I.C. 719=1940 N.L.J. 307=1940 Nag. 261.

O. 6, R. 6.—Scope of contract—Condition precedent—Specific plea necessary. 94 I.C. 304=1926 L. 318. A claim cannot fail for mere failure to comply with mere technical rules of pleading—especially in the mofussil. 1937 Nag. 345. Where a suit is instituted after the expiration of limitation, the plaintiff should no doubt state the ground of exemption, but where he has stated a particular ground, he is not precluded thereby from relying on any other ground, and particularly when such ground is a ground furnished by an act of the legislature. Where in the plaint, the plaintiff relied only upon an acknowledgment to save limitation, it was held that it was open to him to rely upon S. 5 of the U.P. Temporary Postponement of Execution of Decrees Act, 1937, as saving his suit from the bar of limitation. 1940 O.W.N. 988=1941 Oudh 111. See also 1941 Rang. 37.

O. 6, R. 7.—A plaintiff must be limited to the case which he puts forward in his plaint. 54 I.C. 43. Statement made by a party on being questioned by Court before framing issues is in the nature of a supplementary pleading and no plea inconsistent with it can be raised at a later stage except by way of amendment of pleading. 117 I. C. 813=1929 L. 165. Court can ignore subsequent pleadings. 57 I.C. 684. Amendment of plaint should not be allowed where the object is to get round the effect of some admissions made by the plaintiff himself. 80 I.C. 355 (2). Alternative plea not raised in trial Court cannot be allowed to be set up on appeal. 8 L.R. 156 (Rev.). Section applies even to minors. 1937 P.W.N. 720=1937 Pat. 625.

O. 6, R. 8.—Plea of want of consideration can be raised even when execution of the document is denied. 4 Bur.L.T. 24=9 I.C. 469; 5 C. 684; 13 M. 549; 18 A. 125.



9. Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

Effect of document to be stated.

10. Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

Malice, knowledge, etc.

11. Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.

Notice.

12. Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon mere contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

Implied contract or relation.

13. Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied (*e.g.*, consideration for a bill of exchange where the plaintiff sues only on the bill and not for the consideration as a substantive ground of claim).

Presumptions of law.

14. Every pleading shall be signed by the party and his pleader (if any):

#### NOTES.

O. 6, R. 10.—Allegations of fraud must be taken in the pleadings and must not be allowed to be made at a later stage of the suit. (1916) 1 M.W.N. 180; 15 C. 533 (P.C.). Mere want of diligence is not fraud. 61 I.C. 823=2 Pat.L.T. 401.

PLEA OF INSANITY—PLEADINGS.—Though it may be that a party seeking to avoid the effect of a deed by pleading insanity at the time of execution of the deed is not bound to plead circumstances from which he was bound to establish insanity and though it is permissible for him to lead evidence in proof of general insanity from which an inference of unfit mental condition at the time of the deed could be drawn and the burden lay on the opposite party to prove the contrary, that does not absolve the Court from the liability to scrutinise the pleadings of the parties when pleas have been made and if these pleas appear to be destructive of the case of usual insanity it will not be proper for the final appellate Court of fact to infer usual insanity from the statement of some witnesses ignoring the pleading. 177 I.C. 80=A.I.R. 1938 Nag. 204.

O. 6, R. 13.—See 99 I.C. 538=1927 L. 83. Flaw in title appearing from pleadings of person bound to prove it—Objection can be raised on such disclosure—Pleadings. 1929 P.C. 303=124 I.C. 575.

O. 6, R. 14)—Strict proof of pleadings having been read out and explained to

Purdanashin ladies should be had, before they are accepted as satisfactory proof of the contents. 38 A. 627=31 M.L.J. 607=43 I.A. 215 (P.C.), reversing 13 I.C. 882. This rule has no application to cases falling under O. 29, R. 1. 21 C. 60 (P.C.). What is required by this rule is that the plaint must be in existence before the signature is put in. 15 A. at 60. See also 22 A. 55; 6 M.L.J. 213; 17 C. at 582 (P.C.). There is no rule providing that a person named as co-plaintiff is not to be treated as a plaintiff unless he signs the plaint. 17 C. at 582 (P.C.); 80 I.C. 141=1925 S. 159.

SIGNATURE, OBJECT OF.—The object of the signature to a plaint is to prevent as far as possible disputes as to whether a suit was instituted with the plaintiff's knowledge and authority or not. 87 I.C. 1002=1925 S. 275; 139 I.C. 114=1932 S. 9. Such authority may be established by other means than the signature. 139 I.C. 114=1932 S. 9. The provisions of R. 14 relate to a mere matter of procedure and any mistake or omission therein may be amended at any time subsequent to the institution of the suit. 1932 S. 9. See also 80 I.C. 141; 104 I.C. 747; 167 I.C. 158=1937 Pesh. 17. R. 14 of O. 6 which requires a pleading to be signed by the parties is merely a matter of procedure. So, where it is found that a suit was duly authorized by a person the question whether his signature was made by him or by somebody else on his behalf be-



Pleading to be signed. Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

LOC. AM.—[CALCUTTA.] O. 6, R. 14-A. *Add after R. 14 :—*

"14-A. Every pleading when filed shall be accompanied by a statement in a prescribed form, signed as provided in R. 14 of this Order, of the party's address for service. Such address may from time to time be changed by lodging in Court a form duly filled up and stating the new address of the party and accompanied by verified petition. The address so given shall be called the registered address of the party and shall, until duly changed as aforesaid, be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purposes of execution and shall hold good subject as aforesaid for a period of two years, after the final determination of the cause or matter. Service of any process may be effected upon a party at his registered address in all respects as though such party resided thereat."

15. (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

#### NOTES.

comes immaterial. I.L.R. (1939) Nag. 515=1939 Nag. 242. There is no rule that a person named as a co-plaintiff is not to be treated as plaintiff unless he signs and verifies the plaint. 139 I.C. 114=1932 S. 9; 167 I.C. 158=1937 Pesh. 17. *See also* 17 Cal. 580 (P.C.). The plain terms of O. 6, R. 14 apply to a company and are not excluded by reason of the provision of O. 29, R. 1 in case of corporations. 32 Bom.L.R. 1305. *See also* 32 P.L.R. 655; 134 I.C. 1170=1931 S. 178 [following 21 C. 60 (P.C.) and 55 B. 151]. The use of a stamp bearing the name of the party is sufficient for the purpose of signing even in cases where he is able to sign. 54 M. L.J. 65. Plaint valid if signed by person instructed by plaintiff to sign. 1925 L. 144 (1); 4 B. 468; 75 I.C. 880. Plaint filed on behalf of person exempted from personal appearance in Court—Plaint signed by his servant—Subsequent power of attorney to servant by plaintiff ratifies prior acts of servant. 104 I.C. 747. A plaint is properly signed when it is signed by a person specially authorized to do so by a company, which is incorporated in a foreign country. 8 P.R. 1912=10 I.C. 141. As to filing pleading on behalf of corporation, *see* 31 C.W.N. 1030=105 I.C. 568=1927 C. 780. A prisoner in jail, who is unable to sign a plaint, may authorize some other person under R. 14 to sign it for him, and the plaint so signed will be a valid plaint. 40 A. 147=16 A.L.J. 64. An omission by the plaintiff to sign the plaint is no ground for rejecting it; the plaint ought to be returned for amendment. 80 I.C. 141; 11 I.C. 842=254 P.L.R. 1911. A defect in the signature of a plaint or even the absence of any signature, it being found that the suit was filed with the knowledge and consent of the plaintiff, is not ordinarily a ground for interference in appeal. Much less is it a ground

for interference by a District Munsif under S. 73 of the Village Courts Act or by the High Court in exercise of its powers of revision, if petitioner cannot assert any specific prejudice to himself arising out of the irregularity. 30 L.W. 499=1929 M. 790. *See also* 134 I.C. 26=1931 A.L.J. 777=1931 A. 507 (S.B.); 139 I.C. 114=1932 S. 9.

O. 6, Rr. 14 and 15.—*See* 41 Bom.L.R. 530. Suit by limited company—Plaint signed and verified by Secretary—Sufficiency—Affidavit testifying to Secretary's fitness to verify—Necessity. 40 C.W.N. 930.

O. 6, R. 15.—As to importance of verification, *see* 19 I.C. 993=41 C. 113. As to applicability of the rule to petitions to High Court in criminal revision, *see* 19 Pat. 263. A verification to the effect that the statements made in the plaint were true to the information and belief of the plaintiff is in accordance with R. 15 though it does not disclose the sources of his information. 59 C.L.J. 391=38 C.W.N. 551=1934 C. 632. When a pleading does not conform to this rule, the defect is a mere irregularity that can be cured by amendment. 31 C.W.N. 397=54 C. 480=1927 C. 376. Plaint when amended takes effect from the date of original institution. (*Ibid.*) The absence of verification by some of the plaintiffs does not affect the jurisdiction of the Court. 134 I.C. 26=1931 A.L.J. 777=1931 A. 507 (S.B.). *See also* 133 I.C. 626. The verification should be made by some person acquainted with the facts of the case. 9 A. 188. *See also* 4 B. 468. Paragraphs raising legal points need not be verified. 138 I.C. 335=1932 L. 328. A petition by the Administrator-General for Letters of Administration is sufficiently verified by his signature. 20 C. 879. When a plaint contains numerous allegations of fraud, the defendant might require the plaintiff to verify the plaint himself. 9 A. 505. *See also* 8



(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

16. The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit.

17. The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

#### NOTES.

C. 855. In case the verification is defective, it can be amended. 20 A. 442. *See also* 18 A. 396 (F.B.). A plaint which is not verified cannot be treated as waste paper. 22 A. 55. Also a written statement. 11 C. W.N. 871. But *see* 46 A. 637=22 A.L.J. 690. If the verification is found to be false the suit cannot be dismissed. 24 W.R. 71. Sub-R. (2) follows the ruling in 15 A. 59.

O. 6, R. 16: SCOPE OF THE RULE.—92 I.C. 926=1926 N. 265. O. 6, R. 17 and O. 7, R. 11 should be read together. 41 Bom.L.R. 787=1939 Bom. 354. The jurisdiction given to the Court under R. 16 is one which ought to be exercised with great care and caution. 29 C.W.N. 670=88 I.C. 435. Inconsistent rights claimed alternatively may be permitted except when they are destructive of each other. 22 C.L.J. 254=20 C. W.N. 310. *See also* 17 C.W.N. 565=16 C.L.J. 404. Pleadings disrespectful to the Court may be struck out. 22 M. 155; 42 I.C. 620. A Court can at any stage of the proceedings direct that any matter in any pleading which may tend to prejudice, embarrass or delay the fair trial of a suit be amended or struck out. 20 O.C. 192=41 I.C. 903; 75 I.C. 433=1923 P. 357; 1924 P. 280. In a suit by son disputing alienation by a Hindu father, general allegation as to immorality without particulars must be struck out. 140 I.C. 535=1932 A.L.J. 309=1932 A. 467. When the trial Court is not moved to strike out inconsistent defences which are embarrassing, re-trial cannot be claimed on the ground of embarrassment in second appeal. 32 L.W. 61=1930 M. 814. When an order is made under R. 5 of O. 6, for delivery of particulars and the defendant makes default, it is open to the Court to direct that the defence should be struck out even though it was not a term of the original order that the defence should be struck out. In such a case the defaulting party comes within the reach of this rule. 53 M. 645=59 M.L.J. 22=1930 M. 473.

O. 6, R. 17: SCOPE OF THE RULE.—Under this rule the powers of amendment vested in the Court are very wide. 10 M. L.T. 116=12 I.C. 119; 3 L. 382; 96 I.C.

79; 1925 M. 585 (2)=48 M.L.J. 349; 49 I.C. 441; 87 I.C. 950=1925 O. 692; 29 I.C. 132; 84 P.R. 1919=52 I.C. 464; 58 I.C. 665=24 C.W.N. 749; 100 I.C. 469=1927 C. C. 477; 1931 L. 595. *See also* 36 P.L.R. 253=1934 L. 1009; 155 I.C. 1016=41 L.W. 429=1935 M. 286. O. 6, R. 17 is not exhaustive of the powers of Court in matters of amendment of pleadings. 19 Pat.L.T. 101=1938 Pat. 209. *See also* 1938 Lah. 270. The provisions of the Civil Procedure Code allow a wide discretion to the Courts in the matter of amendment of pleadings. The main considerations to be borne in mind while allowing amendment of pleadings are the advancement of the interest of substantial justice and the avoidance of the multiplicity of litigation. 1937 O.W.N. 1131=A.I.R. 1937 Oudh 484. *See also* 1937 Rang. 413; 1941 O.W.N. 704. It is not by a mere change in the wording of the plaint or the introduction of fresh details that the nature of a suit is altered. The alteration which affects the case is one where the original suit is wholly displaced by the proposed amendment or where a totally different or inconsistent case is introduced. But where this is not the case, leave to amend cannot be refused merely on the ground that the words which did not find place in the original plaint had been introduced in the subsequent plaint, even though the effect of those words is not to introduce a new or an inconsistent case. A.I.R. 1938 Lah. 712. Though O. 6, R. 17 begins with the words 'the Court may', the latter portion indicates that if the amendment is permissible under the law otherwise the Judge has no discretion but to allow it, if it is necessary for determining the real question in controversy between the parties. Where a suit was for monies due on a mortgage as evidenced by a pronote and a deposit of title-deeds, but the pronote was found to be inadmissible in evidence, the plaintiff could be permitted to amend his plaint, so as to base his cause of action on the original debt for which the defective pronote was given. There could be no prejudice to the other party such as could not be compensated by costs, and the suit, would still remain after the amendment, a



## NOTES.

suit to recover money on a mortgage created by deposit of title-deeds. 1938 Rang.L.R. 521=1938 Rang. 461. A Court has no right to direct the amendment of a plaint when it has no jurisdiction over the subject-matter of the plaint. Hence where a suit is filed in a Court for a sum beyond the jurisdiction of the Court, the Court has no right to allow amendment of the plaint reducing the amount claimed so as to bring it within the pecuniary jurisdiction of the Court. (33 M. 262, Rel. on.) 158 I. C. 516=1935 A.L.J. 981=1935 A. 842. To allow or not to allow an amendment is in the Court's discretion which must be liberally exercised. 1925 M. 794=48 M.L.J. 489; 1925 N. 9; 25 I.C. 567=19 C.L.J. 518; 13 I.C. 128=15 C.L.J. 439; 41 C.W. N. 1084=1937 Cal. 485; 1941 O.W.N. 704=1941 A.W.R. (H.C.) 188; 11 I.C. 481=14 C.L.J. 188; 9 I.C. 267; 45 I.C. 649; 37 I.C. 914; 34 C.L.J. 529=26 C.W.N. 77; 27 M. 80. It must be exercised in a judicial manner and according to well-settled principles. It is within the power of the Court to allow parties to add to their pleadings and where this is done without any objection by the parties, it is too late in the day for one of the parties to raise objections to it in appeal for the first time. 1941 O. 498=1941 O.W.N. 768. In many cases where the plaint is allowed to be amended the subject-matter of the claim is necessarily enlarged and the defendant can hardly be heard to say that it is unjust that the plaint should be allowed to be amended simply because it will result in his having to pay the just dues of the plaintiff. Hence an amendment of plaint by which the subject-matter of the claim is enlarged by including the right to enforce the mortgage bond against the properties which the plaintiffs were entitled in law to enforce by the right of subrogation which they possessed and to which they had expressly referred in their written statement in an earlier suit is justified. 195 I.C. 428=A.I.R. 1941 Pat. 276. 1931 L. 595=133 I.C. 646. An amendment of the plaint should not be allowed when plaintiff seeks to amend in order to sue on an entirely different legal relationship between himself and the defendant from that relied upon in the original plaint, and when the entire nature of the suit is sought to be changed. 1937 A.M.L.J. 104. See also 1939 Sind 173; 1941 Rang. 37. It is generally most desirable that a party desiring to amend his pleadings should submit his proposed amendments in explicit form before leave sought is granted. 1940 Rang.L.R. 603. An amendment which only seeks to develop the original cause of action without varying it can well be allowed. 41 L. W. 37=1935 M. 137. As to conditions which should be satisfied before granting amendment, see 103 I.C. 455=23 N.L.R. 81=1927 N. 310; 103 I.C. 670=1927 M. 859; 92 I.C. 926; 55 I.A. 360

C. C. M.—103

=55 M.L.J. 523=52 B. 597 (P.C.); 1930 N. 295. A written application is not necessary to move the Court for an order allowing an amendment. An oral application is sufficient. 52 I. C. 758. Discretion in allowing amendment should be freely exercised but not where the suit by amendment would relate to a different subject-matter. 32 I.C. 624= (1916) 1 M.W.N. 171.

NOTICE.—Where a plaint was returned for amendment and was amended without notice to the other side, and the amendments were all important, the order was set aside and case remanded for trial on the original plaint. 1939 A.M.L.J. 112 (1).

LEAVE TO AMEND WHEN GIVEN.—Principles as to allowing amendment. See 132 I. C. 311=1931 M. 1=60 M.L.J. 713. See also (1938) 2 M.L.J. 846. The nature of the defence can be looked into for the purpose of seeing whether an amendment of the plaint should be allowed. 154 I.C. 720=41 L.W. 37=1935 M. 137. The only thing which must not be altered by an amendment is the fundamental character of the suit which expression refers to the foundation on which the suit is based and not the prayer in the plaint. Hence when a plaintiff leaves the foundation of the case entirely unchanged but seeks to amend the plaint by asking for a different relief, the amendment may be allowed. 1933 R. 247. O. 6, R. 17, restricts amendments to matters necessary for determining the real question in controversy between the parties. Where the amendment sought would introduce a new and inconsistent case involving fresh trial with fresh pleadings and fresh evidence, it ought not to be allowed. 1940 N. 8=1939 N.L.J. 525. See also 1941 Rang. 37. If the plaintiff had put forward one ground of exemption from limitation, he is not precluded from applying at the hearing of the suit to amend the plaint claiming exemption on another and not inconsistent ground of exemption. 156 I.C. 531=37 Bom.L.R. 165=1935 B. 213; 41 C.W.N. 1084=1937 Cal. 485. In a case where it appeared that the appeal was authorised by the Government the Court allowed the amendment of cause title by substituting the words "The Secretary of State for India in Council" for "Karachi Municipality (The Special Land Acquisition Officer, Karachi)". 131 I.C. 118=1931 S. 63. Amendment to change the date when cause of action arose and not to change the cause of action itself should be allowed. 1925 M. W.N. 781; 30 I.C. 391. See also 48 C. 932 (P.C.); 15 R.D. 293. One distinct cause of action cannot be substituted for another. 133 I.C. 646=1931 L. 595. Where a person, an heir of M, claims that the mortgages in question were assigned to him by way of a family partition as his share of inheritance but being unable to rely on that deed, as it was not registered, he subsequently desires to bring the suit as heir to M since deceased, and he has joined the other heirs



## NOTES.

as defendants as they did not wish to be plaintiffs, it cannot be said that one distinct cause of action has been substituted for another nor that the subject-matter of the suit has been changed. The proposed amendment is purely an amendment and not a transformation and the amendment should be allowed. 1934 R. 234. Plaintiff sued her deceased husband's brother and his sons for an injunction to restrain them from trespassing on her land, claiming title to the land as heir to her husband who got the same on a partition between him and the defendants. The defendants admitted the partition but denied that the land was family property at any time. Before trial, plaintiff applied for an amendment of the plaint by further basing her title on adverse possession against the defendants and asking for a declaration that the land belonged to her and was in her possession and enjoyment. It was *held*, the amendment ought to be allowed. There is no objection to amendments which just develop the original cause of action so long as they do not vary it. 154 I.C. 720=41 L.W. 37=1935 M. 137. Where a suit was based on an acknowledgment and on the defendant's plea for re-opening the earlier transactions, an application to amend the plaint by basing the suit on the original transaction was made, it was *held* that the amendment though it sought to introduce a new case, did not seek to introduce an inconsistent case and that as the amendment was in pursuance of a request of the defendants for re-opening earlier transaction it should be allowed. 196 I.C. 190=1941 N.L.J. 340. Cause of action can be amended if the frame of the suit is thereby not altered. 14 L.R. 60 (Rev.). All amendments necessary for deciding points in dispute should be allowed—Revision lies against improper refusal. 21 L.W. 639=87 I.C. 90=48 M.L.J. 349; 85 I.C. 344; 22 L.W. 26=1925 M. 950; 1930 L. 278 (2). The Court ought to give all reasonable indulgence with regard to amending. 32 C. 582 (600). Amendments of plaint should be allowed to avoid multiplicity of suits. 86 I.C. 615=1925 C. 944; 45 A. 220; 19 I.C. 250=11 A.L.J. 423; 56 I.C. 115; 64 I.C. 99; 28 P.L.R. 15=1927 L. 103; 155 I.C. 1016=41 L.W. 429=1935 M. 286, or to rectify mere technical defects. 42 P.L.R. 139=1940 Lah. 201. Suit in firm name by sole proprietor may be allowed to be amended on terms by inserting the words "(plaintiff) carrying on business under the name and style of (firm)". 35 C.W.N. 432=134 I.C. 1200=1931 C. 770. See also 1935 A.M. L.J. 11 (Amendment to insert statement that the suit is on behalf of the family). When the amendment is only asked for out of abundant caution because of a conflict of decisions on the point it should be allowed as it does not injure the defendant and prevents plaintiff being formally driven to a fresh suit on the same matter. Where a

minor files a suit for accounts of the partnership alleging that the release deed by his mother was not binding on him as his mother was neither *de jure* nor *de facto* his guardian in executing it, an amendment of adding a specific prayer for a declaration that the release deed executed by his mother as his guardian is not valid or binding against plaintiff should be allowed. (1925 M. 188, Foll.; 1930 M. 322; 1927 M. 973 and 1927 M. 182, Dist.) 148 I.C. 869=39 L.W. 476=1934 M. 267. A prayer for confirmation of possession can be changed into one for recovery of possession on the same facts. 35 C.W.N. 620. See also 1940 P. W.N. 986. So also a prayer for declaration of plaintiff's right to an office in a temple by terms and for possession of the same for a particular year, can after the lapse of the year, without the suit being taken up for hearing be changed into a prayer for possession during alternative years. 155 I.C. 1016=41 L.W. 429=1935 M. 286. Where a suit is wrongly instituted in the name of the deity when the property is bequeathed to the temple, but the irregularity had neither occasioned any injustice nor misled any of the parties to the suit and had not resulted in any of the questions at issue being improperly tried, it would not be right to dismiss the suit altogether and amendment would meet the ends of justice. 1941 N.L.J. 184. No power has been given to Courts to enable one distinct cause of action to be substituted for another nor can the subject-matter of a suit be changed by an amendment. 42 P.L.R. 194=1940 Lah. 225. Amendment should not be refused on the ground that a fresh party shall have to be joined. 10 I.C. 737=7 N.L.R. 43.

LEAVE TO AMEND WHEN REFUSED.—Mere delay is not an adequate ground for refusing amendment. 157 I.C. 64=1935 P. 463; 79 I.C. 1033=1925 O. 291; 26 N.L.R. 359. But amendment sought for at a very late stage would be disallowed. 51 B. 749=29 Bom.L.R. 1071=1927 B. 521; 1930 C. 721 (1); 1940 Nag. 8. Amendment of plaint is not allowed if it alters the nature of the suit. 35 C.L.J. 25=26 C.W.N. 73; 51 I.C. 435; 35 I.C. 91; 10 I.C. 250; 54 I.A. 55=6 P. 323=1927 P.C. 18=52 M.L.J. 402 (P.C.); 10 I.C. 218; 1931 L. 595; 154 I.C. 103=1935 P. 86. Especially when the new claim is barred by limitation. 133 I.C. 497=1931 M. 542=61 M.L.J. 316. See also 17 Pat. 168=1938 Pat. 44. Substitution of one plaint for another cannot be allowed by amendment. 27 Bom.L.R. 277. It is not enough for a plaintiff to show that the amendment does not alter the character of the suit. 21 B. 571. The test is whether the evidence to be offered after the amendment will be substantially the same as that offered if the plaint stood as originally framed. 3 C.654 at 661. See also 1940 Lah. 63. Amendment of plaint so as to make out an inconsistent case is not allowed. 101 I.C. 280. See also 33 Bom.L.R. 1385



## NOTES.

=1931 B. 590. It is not an inflexible rule to disallow an amendment which modifies to some extent the original cause of action or adds another. 122 I.C. 174; 30 L.W. 557. *See also* 1937 A.M.L.J. 16. The main point in considering whether leave should be granted to any party to amend his pleading is whether the amendment is necessary for the determination of the real questions in controversy. But the Court will not allow an amendment that would involve a complete change of front in the defence. 157 I.C. 764=1935 P. 463. *See also* 48 L.W. 498=(1938) 2 M.L.J. 846. Improbability of defence is no ground for refusing permission to raise it by amendment of pleadings. 157 I.C. 764=1935 P. 463. An application for amendment of plaint was dismissed on merits; subsequently plaintiff put in another application similarly worded and no further fact was mentioned on the merits. *Held*, that no reasonable ground was made out for granting the application. 1934 S. 193. Amendment seeking \*to introduce a new claim would not be allowed where no cause is shown for introducing new matter which was not included in the original plaint. *See* 4 O.W.N. 1219=1928 O. 135. The fact that an issue would have to be tried again is no ground for refusing an amendment. 1906 A.W.N. 220. In the absence of special circumstances leave to amend a plaint ought not to be given where the effect of the amendment is to deprive the opposing party of an acquired right. 145 I.C. 630=35 Bom.L.R. 929=1933 B. 450; 154 I.C. 103=1935 P. 86. *See also* 40 C.W.N. 1233 (Suit for declaration that a patni sale is collusive and fraudulent—Objection that suit is not maintainable as contravening the procedure prescribed in S. 14 of the Bengal Patni Regulation—Amendment at late stage not allowed. 40 C.W.N. 1233). Amendment changing plaintiff's name from temple to idol not applied for in trial Court—Amendment cannot be allowed. *See also* 1930 O. 43; 30 P.L.R. 41=9 L. 588. A party deliberately omitting to join a necessary party and actually concealing his existence is not to be allowed to amend the plaint at a late stage by adding such party. The benefit of O. 6, R. 17, is not to be given to such party, 1938 R.D. 137=1937 A.W.R. (B.R.) 44. Declaratory suit—Consequential relief not asked though objected—Subsequent amendment to ask the relief should not be allowed. 115 I.C. 911. A suit based on adoption cannot be treated as a suit for partition of undivided family property. 21 I.C. 737=1913 M.W.N. 828. An alteration in the relief claimed does not alter the character of the suit. 20 C. 805 at 808. The addition of a prayer ancillary to the principal one does not alter the character of the suit. 5 C.W.N. 273. *See also* 1902 A.W.N. 114. Amendment applied for an appeal—Suit for declaration as to invalidity of adoption—Trial Court dismissing suit on ground of limitation—Appeal—Death of

widow pending—Application for amendments so as to convert suit into one for possession—Permissibility. 30 L.W. 507. Different causes of action—Mortgage suit—Dismissal for want of proof of mortgage—Mortgage deed not executed—Application in second appeal to convert suit into one for possession—Maintainability. 7 R. 140=117 I.C. 577=1929 R. 179. Plaint verbose and unintelligible—Suit for breach of contract—Details of contract and special damage not alleged—Striking off of plaint and ordering amendment of the same. 114 I.C. 906=27 A.L.J. 496. A suit by plaintiff as reversioner to the estate of the last male holder cannot be converted into a suit by him as heir to the widow of the last male holder on the basis that the properties were her stridhanam properties when the new claim set up is time-barred. 132 I.C. 311=1931 M. 1=60 M.L.J. 713. In this case the defendants had no merits at all. They had taken the money of an old pardanashin lady; they had refused to pay it on demand; and the only ground upon which they resisted payment was purely a technical one under the Limitation Act. *Held*, that an application by defendant for permission to amend pleadings to include the plea ought to be dismissed. 1934 A. 11=154 I.C. 415.

SUIT ON PRO-NOTE.—Suit on promissory note, insufficiently stamped—Amendment can be allowed to sue on original consideration. 1922 L. 394 (1); 52 I.C. 758; 99 I.C. 625=1927 M. 378. Such amendment can be allowed even after limitation. 14 R. 383=165 I.C. 810=1936 R. 508. *See also* 44 L.W. 267=1936 M. 632=71 M.L.J. 166; 1937 Rang. 413; 1938 Rang.L.R. 521=1938 Rang. 461; 1940 Rang.L.R. 603. (Suit pro-note contravening the provisions of Paper Currency Act. 1936 Mad. 632. But *see contra* 138 I.C. 783=34 Bom.L.R. 643=1932 B. 394. Where the facts are fully stated in the plaint on an insufficiently stamped promissory note the suit cannot fail on the original consideration merely because the plaint is formally amended. 1933 N. 57. *See also* 61 C. 433=150 I.C. 982=1934 C. 554; 158 I.C. 533=1935 R. 282; 1940 Rang.L.R. 603. Where all the facts of the original loan and all its terms are set out in the plaint, but the plaint is based on a promissory note which is either insufficiently stamped or barred by limitation, the plaintiff is entitled to succeed alternatively on the original loan, although there is no such prayer in the plaint. Such an amendment ought to be allowed and the plaintiff given a decree on that basis. 44 L.W. 258=1936 M. 785=71 M.L.J. 250 (F.B.). Where liability of the members of a joint Hindu family is disputed in a suit on a promissory note because of sections 26 and 27 of the Negotiable Instruments Act, it is permissible to amend the plaint so as to base the suit on the original consideration. 32 Bom.L.R. 1035=1930 B. 424. *See also* 130 I.



## NOTES.

C. 347=1931 O. 54; 131 I.C. 1=1931 M. 533 (Plaintiff ordered to pay court-fee afresh). Suit on pro-note signed by one partner in his name only—Creditor contending to hold all partners liable—No clear indication in plaint whether creditor based his suit on independent liability—Amendment of plaint. 1930 M. 168=123 I.C. 358. An amendment of plaint in a suit on a promissory note with a view to base the cause of action on the loan itself, cannot be allowed, when the application is made for such amendment not only after the claim had become barred by limitation, but after the trial and before delivery of judgment—Anticipating an adverse finding on the genuineness of the pro-note on the ground that the defendant had deceived the plaintiff, a suit on a pro-note cannot be converted into one based on fraud or deceit and that at a late stage. 153 I.C. 266=1935 M. 50=67 M.L.J. 918. Where at the time of a loan two documents are executed, a promissory note and a voucher containing all the terms of the loan, and intended to be the record of the transaction, and the promissory note is given only as a collateral security, if the promissory note is under-stamped and inadmissible in evidence, the creditor can fall back on his cause of action based on the voucher independently of the promissory note; and he can prove it and obtain a decree on the same. In such a case, the plaint in a suit based on the promissory note alone ought to be allowed to be amended and the claim decreed on the basis of the voucher, notwithstanding that on the date of such amendment the claim is barred by limitation, especially when the defendant is not in any way prejudiced, when his defence is a total denial of the whole transaction. Such an amendment when refused in the trial Court was allowed by the High Court on appeal. 39 C.W.N. 1235. In a suit to recover money lent under a promissory note executed by the karta of a joint Hindu family, the plaintiff's case substantially being that the loan was taken by the joint family through the manager for purposes of the joint family and the joint family business, the suit cannot be regarded as one simply for recovery of the amount on the note only; and when the other members of the family are also impleaded as defendants to the suit, the suit must be taken as one on the promissory note as well as on the original consideration, namely, the debt incurred by the manager for the purpose of the family and the family business. In such a case if the plaintiff applies for an amendment of the plaint so as to avoid any future dispute as regards the real nature of the claim, the plaintiff ought to be allowed leave to amend the plaint and should also be allowed to adduce evidence relevant to the alternative claim. Even if the plaint con-

tains only a claim on the note only, leave to amend ought to be given, especially when the defendant has raised no objection to the issues about the purpose of the loan and has not been taken by surprise. The question of limitation does not arise and will not be bar to the amendment, when the original consideration is already included in the plaint. 1935 C. 102=38 C.W.N. 1146. The cause of action based on dealings between the parties is distinct from that based on a promissory note for the amount due in respect of such dealings. It cannot be laid down as a proposition of law that in a suit on a promissory note an amendment claiming in the alternative on the consideration for the note should never be allowed at the trial; whether such an amendment should be allowed or not depends on the circumstances of the case and various other considerations. 35 Bom.L.R. 965=1933 B. 476. Suit on contract of sale of land—Contract found to be void—Refund of purchase money—Amendment of plaint—Permissible. 1938 Lah. 244.

AMENDMENT WHEN MAY BE ALLOWED IN APPEAL.—An amendment which is not of such a character as to be objectionable either as changing the subject-matter of the suit or as being otherwise unfair is within the competence of the Court under O. 6, R. 17 and can be made even in appeal. 16 P. 149=41 C.W.N. 418=1937 P.C. 42 (P. C.); 144 I.C. 168=1933 L. 395; 1938 P. W.N. 398=1938 Pat. 400. Amendments involving an entire change in the form and character of a suit cannot be allowed in second appeal. 9 I.C. 774=4 Bur.L.T. 47; 12 I.C. 200=4 Bur.L.T. 244; 19 Pat. 507=1940 Pat. 494=21 Pat.L.T. 219; 42 P.L.R. 479; 186 I.C. 852=1940 Pat. 88. 20 I.C. 501=292 P.L.R. 1913; 14 C.W.N. 128; 93 I.C. 871=1926 L. 453; 42 I.C. 455; 1935 R. 88; 1937 O.W.N. 1121; 1937 A.M.L.J. 516. A Court of second appeal if and when can order amendment of a plaint. 59 P.L.R. 1916=30 I.C. 387; 20 I.C. 501=292 P.L.R. 1913; 50 I.C. 180; 98 I.C. 39=51 M.L.J. 418; 52 M.L.J. 253; 1935 R. 88. Amendment can be allowed in second appeal if the error is *bona fide*. 21 M.L.J. 475=10 I.C. 218; 33 B. 644; 3 L. 382; 2 P. 919=5 Pat.L.T. 315; 1940 Lah. 201=42 P.L.R. 139; 1938 M.W.N. 274=1938 Mad. 331. But *see also* 16 Pat. 527=18 Pat.L.T. 640 (a party coming to Court on the basis of a forged document cannot be allowed to amend his plaint in second appeal). Omission to state in plaint—Ground of exemption from limitation—Subsequent amendment in second appeal—Permissibility. *See* 20 N.L.J. 42. The discretion exercised by the lower Courts in rejecting an application for amendment will not be interfered with in second appeal. 40 C.W.N. 1233. Where the plaintiff-appellant prays in appeal for



## NOTES.

amendment of the plaint on the ground of mistake having been made in the typing of the draft plaint, but no sufficient explanation is offered why the alleged mistake was not discovered by the plaintiff till after the disposal of the case by the lower Court, it is not a case in which the High Court would in appeal exercise its discretion in allowing the amendment. 161 I.C. 862=1936 P. 191. Where a District Judge exercises his discretion and refuses to allow an amendment of pleading, the High Court will not interfere with his order unless a strong case is made out for such interference. 1933 L. 867. New cause of action—Suit on Hundi—Application in appeal to amend plaint so as to introduce claim for moneys lent—Permissibility. 115 I.C. 400. It is open to the appellate Court to allow an amendment of the plaint so as to convert a suit for a declaration into one for possession. 157 I.C. 1024=1935 L. 91. The plaintiff sued for a mere declaration though on the facts it appeared that consequential relief was necessary. The plaintiff persisted in the above course in the appeal. *Held*, that the Court need not allow an amendment of the plaint so as to include consequential relief. 35 P.L.R. 136=1934 L. 235. Where a suit for injunction is found to be not maintainable for want of a prayer for a declaration, it is not proper that the suit should be dismissed. The plaintiff who desires an amendment of the plaint in the appellate Court and is willing to pay the costs to the other side, must be allowed to amend his plaint by inserting the prayer for declaration on payment of costs. 152 I.C. 340=1934 M. 600=67 M.L.J. 245. Per *Aston and Rupchand, A.J.Cs.*—A suit for possession of land was dismissed with costs on the ground that the defendants were not licensees as alleged and that the defendants had been in adverse possession for more than the statutory period. It was not made a ground of appeal that plaintiff had not understood the defence, but the appellate Court granted the plaintiff's application for an amendment of the plaint and directed a re-trial of the suit on the basis of the defendants being trespassers. *Held*, that the Court of first appeal was in error in allowing the applications for amendment of the pleadings and in permitting the plaintiffs to re-agitate the same questions and lead further evidence by resorting to the device of asking for amendment of the pleadings; it was a gross abuse of the process of the Court to permit the plaintiff to do so. 146 I.C. 777=1933 S. 279 (F.B.). See also 1939 Lah. 172=41 P.L.R. 715. Where in a suit by a sub-mortgagee for foreclosure of the original mortgage the suit was dismissed by the first Court on the ground that the proceedings were defective under Regulation XVII of 1806 and therefore the

plaintiffs had not acquired the rights of the original mortgagees, the plaintiffs cannot be allowed in appeal to amend the plaint so as to enable them to sue on the sub-mortgage, because, apart from delay, that would be to introduce an entirely different cause of action. 14 L. 640=1933 L. 676. Principles governing amendment of plaint in appeal. See 54 I.A. 55=1927 P.C. 18=52 M.L.J. 402 (P.C.); 165 I.C. 737=1936 M.W.N. 411=1936 M. 545. See also 1927 L. 770=102 I.C. 194; 1927 M.W.N. 175=1927 M. 504; 1 Luck. 33=91 I.C. 927.

SUIT AGAINST DEAD PERSON.—A suit filed against a dead person is no suit at all and no question of amendment of the plaint arises. Such a suit cannot be maintained by substituting the representatives of the deceased. 31 M. 86; 42 I.C. 539; 30 I.C. 679=2 L.W. 828. But see 105 I.C. 284. See also 1937 S. 92. Where a suit is filed against several defendants, one of whom was dead at the time, the suit cannot be considered to have been instituted against the dead person, but it cannot be said that there is no validly instituted suit against any one. In such a case the Court can exercise all the powers which the C.P. Code confers on it as regards addition of parties and amendment of the plaint. 147 I.C. 782=1934 A.L.J. 126=1934 A. 25.

PAUPER SUITS.—An order directing a plaintiff to pay in cash the costs of an amendment of the plaint, after he has been found to be a pauper, is improper. 24 Bom.L.R. 924=47 B. 104. See also 19 Pat.L.T. 101=1938 Pat. 209 (Amendment of application to sue *in forma pauperis* by adding an item of property originally omitted is within this rule).

PARTITION SUITS.—Failure to include certain items in partition suit—Amendment—Permissibility. 6 O.W.N. 142=117 I.C. 412=1929 O. 162.

PRE-EMPTION SUIT.—A pre-emption suit should state the ground on which right is claimed; and though the Court has discretion to allow amendment in all cases where it may be just and proper to do so, where the effect of the amendment of the plaint by which plaintiff seeks to change the ground on which his right is claimed is to take away from the defendant a legal right which has accrued to him by lapse of time, such amendment should not be allowed. (83 P.R. 1917, Rel. on.) 144 I.C. 822=1933 L. 774 (1).

REDEMPTION SUIT.—A suit for redemption can be converted into one in ejectment. 28 B. at 161; 24 A. 456; 5 B. 496; 7 B. 146; 9 B. 355; 3 B. 222. A suit for redemption cannot be amended when the action is instituted for purposes absolutely inconsistent with redemption. 5 C.L.J. 653. See also 5 C. 269. Suit for redemption—Alleged mortgage not proved—Another and different



## NOTES.

mortgage cannot be substituted. 96 I.C. 304. *See also* 53 M.L.J. 647; 42 P.L.R. 139=1940 Lab. 201.

**RENT SUITS.**—A suit for rent may be amended into one for damages for use and occupation. 30 I.C. 753=8 Bur.L.T. 234. But *see contra* 1927 M. 182=99 I.C. 977=52 M.L.J. 399. *See also* 1927 O. 505; 11 I.C. 863=4 Bur.L.T. 197.

**EJECTMENT SUIT.**—A suit in ejectment cannot be converted into one for partition 37 M. 529=23 M.L.J. 189. Where in a suit in ejectment, the landlord based his cause of action on illegal sub-letting by the tenant and by a subsequent amendment he was allowed to plead illegal transfer by way of mortgage in the place of sub-letting as his cause of action, the frame of the suit is not thereby altered and for the purposes of limitation, the suit must be deemed to have been filed on the original date and not on the date of amendment. 14 L.R. 60 (Rev.)=17 R.D. 71. Suit for ejectment and for damages for use and occupation—Death of original defendant and his legal representative setting up possession in his own right—Amendment to include prayer in the alternative for possession on title. 1935 A.M.L.J. 100.

**SUIT FOR ACCOUNTS.**—A suit for dissolution of an alleged partnership and rendition of accounts cannot be converted into a suit for remuneration as an agent or servant of defendant as it would necessitate the altering of the whole nature and frame of the suit. 148 I.C. 253=1934 L. 38 (2). *See also* 161 C. 505=1936 Sind 9, where such amendment was refused in the circumstances of the case. The plaint as originally presented was one for a specific sum ascertained on the striking of a balance of the accounts of a dissolved partnership. The plaintiff subsequently amended his plaint to the effect that the accounts were settled between the parties, and the defendant agreed to pay his share. *Held*, that the amendment that the balance had been struck was not one altering the nature of the suit as the suit was one for a balance of the partnership account whether the balance was struck or no. 29 N. L.R. 115=1933 N. 82. *A* and *B* were partners in cloth business. *A* brought a suit against *B* wherein he averred that the partnership was started in April, 1921, and prayed for an order directing that partnership accounts be taken. But later on it was found that the partnership was started in December, 1919. *A* accordingly applied for an amendment which was opposed and disallowed. *Held*, that the suit being essentially one for accounts, there was no splitting of the causes of action; and under such circumstances even if *A* had not sought the amendment it was open for him whilst in the witness-box or even earlier to intimate to the Court that there had been a mistake in the

plaint with regard to the date. 144 I.C. 250=1933 S. 131.

**ADMINISTRATION SUIT AND PARTITION SUIT.**—A suit for administration of an estate is a different kind of suit from a suit for partition of a piece of land. Different considerations arise in the two cases. It is not possible that a suit for partition should be tried as a suit for administration by amending the plaint. A.I.R. 1937 Rang. 525.

**SUIT FOR SPECIFIC PERFORMANCE.**—A Court cannot at a late stage convert a suit for specific performance into a suit for compensation or damages, and a Court should not in Letters Patent appeal grant an amendment by adding a prayer for compensation or damages in a suit for specific performance unless such relief is asked for at an early stage. 19 Pat. 90=1939 P.W.N. 880=A.I.R. 1940 Pat. 92.

**INSOLVENCY PROCEEDINGS.**—Section 5 of the Provincial Insolvency Act makes the provisions of O. 6, R. 17, C.P. Code, applicable to proceedings in insolvency. An insolvency petition by a creditor, which sets out clearly the acts of insolvency but is formally defective owing to the omission of the words "with intent to defeat and delay his creditors", may be amended so as to add the said words. And it makes no difference, because the amendment is made more than three months after the alleged acts of insolvency, whether the said period of three months be regarded as a condition precedent or as a period of limitation. 67 M.L.J. 924=1935 M. 202. Ordinarily an application for amendment should not be granted where it deprives the opposite party opportunity of raising the plea of limitation but under special circumstances it can be allowed. The petitioning creditor was not aware of the several acts alleged to have been committed by the debtor with the object of defeating his creditors. Immediately on his becoming aware of the acts relied upon by him in the insolvency application, he came to the Court. He was subsequently apprised of the fact that another transfer was also made with the like intent and he came to Court within three months of the date of the transfer and applied for amendment of application. If instead of applying for amendment, he had presented a fresh petition on that day incorporating this act as an additional act of insolvency and had craved leave to withdraw the original petition he would have been justified in doing so. *Held*, that the amendment should be allowed. 148 I.C. 974=1934 S. 33.

**SUIT AGAINST SECRETARY OF STATE.**—Where the notice under S. 80 of the C.P. Code was not given, permission to amend the pleadings by discharging the Secretary of State from the record and allow the suit to proceed against the orders could not be given in a case where it would not be possible to proceed without a material change in the nature of the suit, the cause of action and



## NOTES.

the relief sought. 1938 P. 127=1937 P.W. N. 694=18 Pat.L.T. 921.

**DECLARATORY SUITS.**—A suit for declaration of title cannot be changed into one for specific performance. 133 I.C. 646=1931 L. 595. Plaint in a suit for declaration can be allowed to be amended by including a prayer for setting aside the decree. See 33 Bom. L.R. 141=131 I.C. 886=1931 B. 218. Declaratory suit, if can be permitted to be changed into one for recovery of possession. 24 M. L.J. 455=19 I.C. 672; 1935 L. 91. See also 8 L. 531=1927 L. 499; 2 Pat.L.J. 379=40 I. C. 174; 93 I.C. 871=1926 L. 453; 139 I. C. 678=34 Bom.L.R. 125=1932 B. 175; I.L.R. 1937 N. 151=168 I.C. 351=1937 N. 84; 1939 Sind 107; 1939 P. 219.

**OTHER ILLUSTRATIVE CASES.**—In a suit for injunction, an addition of subsequent prayer for possession can be allowed by way of amendment. 105 I.C. 784=1927 O. 513. See also 1937 Nag. 84. Where plaintiff prays for exclusive possession amendment claiming joint possession may be allowed. 104 I.C. 325. Claim for possession as reversioner—Amendment into a claim in plaintiff's own right. 52 M.L.J. 253. Different cause of action not to be introduced by amendment. 52 I.C. 961. Suit for possession by person admittedly a sharer—Amendment of suit into one for partition to be allowed. 23 L. W. 468=92 I.C. 396=1926 M. 909. Suit to recover purchase-money on the basis of vendor's lien—Amendment into a suit for damages for breach of contract may be allowed. 8 L. 257=1927 L. 103. But see 134 I.C. 1110=1931 L. 260, where such an amendment was not allowed on the ground that it was applied for at a late stage and that, if allowed, it would make a fresh trial necessary. 1938 N.L.J. 198=1938 Nag. 388; see also 1940 Pat. 92. Application for probate can be converted into one for letters of administration. 9 L.L.J. 152=102 I.C. 194. As to amendment of written statement in an action for libel, see 54 C. 73. Where the basis of plaintiff's right to sue has been jeopardised by a decision in another suit after the plaint in the suit was filed, an application for the amendment of the plaint put in promptly ought to be allowed. 23 L.W. 618=1926 M. 754. Suit by a person who had no right to sue—Amendment of plaint to enable proper party to sue should not be allowed. 93 I. C. 305=1926 M. 577. On this rule, see also the following cases:—26 A. 215; 2 M. 295; 5 Bom.L.R. 329; 13 B. 548; 14 B. 395; 15 M. 15; 15 M. 255; 5 Bom.L.R. 643; 5 B. 181; 7 M.H.C.R. 364; 6 B. 495; 12 C. 414.

**LATE STAGE.**—Under the Rule, the Court can allow amendment at any stage. 156 I.C. 531=37 Bom.L.R. 165=1935 B. 213. Delay by itself is not an adequate reason of refusing permission to amend a pleading. The significance of delay lies not in the quantity of time that has elapsed but in what

has transpired during that time. 157 I.C. 764=1935 P. 463. An amendment at a very late stage should not be allowed. 45 C. 305; 46 C. 168; 48 C. 110 (P.C.); 48 C. 832 (P.C.); 3 L.L.J. 437; 47 I.C. 906; 3 L. L.J. 184; 67 I.C. 132; 51 B. 749=29 Bom. L.R. 1071=1927 B. 521; 99 I.C. 979; 101 I.C. 390=1927 M. 650; 46 I.C. 929=5 Pat. L.J. 164; 134 I.C. 1110=1931 L. 260. See also 1939 N.L.J. 525; 1938 O.W.N. 1138=1938 O.A. 917; 1940 Pat. 92; 1938 Nag. 388; 60 C. 801=1933 C. 668; 40 C.W.N. 1233. But it can be allowed provided that no injustice is caused to the other side. 61 I.C. 328; 1938 Mad. 388=(1938) 1 M.L. J. 106. See also 36 C.W.N. 112. Where amendment was allowed at a late stage and further trial directed. A belated amendment can be allowed only on condition of payment of costs by the petitioner to the opposite party and the latter being given an opportunity to adduce evidence on the new case adopted for the petitioner. 56 A. 428=1934 A.L.J. 1129. Where in a suit for money due on account of business transactions, after the *ex parte* decree was set aside, the defendant pleaded in his written statements that certain items were barred by limitation and in answer thereto, the plaintiff applied to amend his plaint by inserting therein an acknowledgment made by the defendant to save limitation and the lower Court refused the application on the ground that it was "unduly delayed," held, that the delay may influence the Court in deciding whether the acknowledgment was genuine but as the amendment did not in any way alter the nature of the suit, the application should not have been dismissed. 55 A. 256=1933 A.L.J. 268=1933 A. 374. A contract between the parties was that commission was to be paid on "steam coal, rubble coal, hard coke and soft coke" that was manufactured out of a mine. The contract also provided that "no commission or royalty shall be paid on dust coal". In a suit brought by the plaintiff to recover the commission, 13 months after the filing of the plaint, the plaintiff applied for amendment of the plaint to admit of his claiming commission on the coke manufactured from all coal whether rubble, slack or dust. Held, that the amendment could not be allowed, as it was made at so late a stage and as it substantially changed the character of the suit. 145 I.C. 428=1933 P. 443.

**SUIT PREMATURE.**—When suit is premature amendment cannot cure the defect. 49 A. 599=25 A.L.J. 385=1927 A. 451.

**NEW CASE.**—Courts must be careful not to allow a *volte de face* which would completely change the complexion of the pleadings and confront the defendant with a surprise attack, for which he cannot be expected to be prepared. 1939 A.W.R. 78=1939 A.L.J. (Supp.) 66. The plaintiff brought a suit on the basis of a *bahi* entry against the defendant alleging that money had been advanced by him. On the date fixed for evidence the scribe of the entry was examined



## NOTES.

on behalf of the plaintiff. He stated that the loan was advanced by the father of the plaintiff. The plaintiff closed his evidence on that date and the counsel for the defendant stated that he had no evidence to produce. On the same date the plaintiff made an application asking the Court to grant him permission to amend the plaint by adding that the loan was advanced by the father of the plaintiff and the father having died, the plaintiff succeeded him as his son and heir and was, therefore, entitled to sue on the basis of the *bahi* entry in favour of his father. *Held*, that an order allowing the amendment was fully justified and that there was no new case set up in the amended plaint and all that was done was a change in the history of the transaction. 36 P.L.R. 264=1934 L. 974. *See also* 171 I.C. 437=1937 O.W.N. 1121.

ALTERNATIVE CLAIMS.—Suit against members of a joint family can be amended by including an alternative claim against them as members of a partnership. 33 Bom.L.R. 1385=1931 B. 590. But *see* 34 Bom.L.R. 35=1932 B. 117, holding that such an amendment should not be allowed if the suit on that basis is barred on the date of the application.

AMENDMENT OF PRAYER FOR RELIEF.—“Amendment” is a very wide term and includes addition of claims; and claims which are not time barred can always be added if otherwise permissible. In a suit on a first mortgage executed by a Hindu father, if the plaintiff applies for an amendment of the plaint for addition of a claim under a second mortgage executed to him by the father and his son, on the allegation that the mortgagor in both cases is the joint Hindu family of the father and son, the amendment is one which ought to be allowed. 156 I.C. 479=1935 P. 365. A prayer for plaintiff's share of an amount due on a bond may be altered into a prayer for the whole amount due on the bond including the share of his co-obligee added as defendant. 166 I.C. 992=1937 O. 290. A suit was brought for recovery of a sum being the amount of unpaid purchase-money still due by the vendee on account of a certain piece of land purchased by him. In his written statement the vendee pointed out that the suit was barred by limitation under Art. 111. The plaintiff then filed an amended plaint setting forth the same facts but asking for a different relief, thus bringing her claim within Art. 132. This application was still within time under that Art. 132. *Held*, that it is permissible to allow a plaintiff without amending his cause of action to amend his prayer for relief when it is a relief which he is entitled to claim and that, as the vendee would not be deprived of any defence which he might have put forward before, the amendment should be allowed. 152 I.C. 125=1934 R. 266; 98 I.C. 458=1927 M. 212. *See also* 54 I.A. 55 (P.C.). An amendment for an additional relief on the facts alleged in the plaint ought to be allowed. 28 I.C. 828=29

M.L.J. 464. *See also* 10 I.C. 260=9 M.L.T. 429; 155 I.C. 1016=41 L.W. 429=1935 M. W.N. 56=1935 M. 286. But *see* 11 L.L.T. 306=1929 L. 449. Suit under O. 21, R. 103, for declaration and possession—Amendment of plaint by deleting claim for possession to avoid payment of additional Court-fee—Application for leave to re-amend plaint in second appeal by including claim for possession cannot be allowed. 1938 P.W.N. 455=1938 Pat. 558.

INCONSISTENT PLEA.—An amendment inconsistent with the plaint should not be allowed. 34 I.C. 541; 101 I.C. 280; 188 I. C. 23=1940 Nag. 8; I.L.R. (1940) Lah. 593=(1940) Lah. 63. *See also* 148 I.C. 1044=11 O.W.N. 453=1934 O. 118. By means of an amendment, the subject-matter of the suit cannot be changed, or one distinct and inconsistent cause of action cannot be substituted for another. 42 M.L.J. 43=68 I. C. 703=1922 M. 49. If an amendment changes the cause of action, and the suit if brought on that date would be barred, the amendment should be refused. 28 I.C. 828=29 M.L.J. 464; 183 I.C. 436=1939 Oudh 245=1939 O.W.N. 755; 14 Luck. 701; 31 M. L.J. 688=38 I.C. 720; 46 I.C. 29=13 Bur. L.T. 201; 4 Bur.L.J. 110=90 I.C. 639=1925 R. 264; 87 I.C. 218; 13 I.C. 370=38 C. 797; 26 I.C. 42=12 A.L.J. 833; 41 M.L.J. 525. Amendment of plaint must be allowed when it merely amplifies and does not vary the original cause of action. 1925 M. 188; 41 L.W. 37; 23 L.W. 771=1926 M. 827. *See also* 1939 Nag. 23. Where a person brings a suit for recovery of possession of land but it is found that in fact his claim is for redemption of an unprovable usufructuary mortgage, such person cannot be allowed an amendment of the pleadings by basing his suit on his title, the causes of action for the two suits being different. 176 I.C. 631=A. I.R. 1938 Rang. 125. When a claim is made on a document the fact that at one stage when a plaint was presented it was read in a particular way and at another time, when it is sought to be amended, it is sought to be read in another way, will certainly not justify the view that a new and inconsistent claim is sought to be introduced. These are really alternative ways of reading the document and it will be for the Court ultimately to decide what its correct construction is and in such a case amendment of the plaint should be allowed. 160 I. C. 989=1936 Mad. 151. It is indisputable that leave to amend a pleading is more or less a discretionary matter and the power to grant leave ought to be liberally exercised. Although mere delay would not be a ground for refusing leave to amend, where the amendment is being proposed with the object of introducing an entirely new and inconsistent case, it cannot be allowed. It might be possible for a defendant to raise an inconsistent or an alternative case when he files his written statement, in the beginning, but he cannot be permitted to advance new positions at the time of arguments before the trial Court or ask for the written



## NOTES.

statement to be amended before the appellate Court. Leave to amend a written statement so as to set up a plea of *jus tertii*, in answer to the plaintiff's claim for recovery of possession of property, ought not therefore to be granted on an application preferred to the appellate Court. (1941) 2 M.L.J. 442.

**LIMITATION.**—Amendment should not be allowed so as to defeat plea of limitation. 39 M.L.J. 195=47 I.A. 255=48 C. 110 (P.C.); 10 R. 74=1932 R. 26; 132 I.C. 311=1931 M. 1=60 M.L.J. 713; 36 A. 370; 37 B. 340; 50 C. 878; 34 Bom.L.R. 35=1932 B. 117; 30 I. C. 379; 21 I.C. 306; 22 C.W.N. 104; 11 M. I.A. 468; 28 C.W.N. 1009=1925 C. 67. See also 46 C.L.J. 51=104 I.C. 151=1927 C. 733; 25 L.W. 506=101 I.C. 390=1927 M. 650; 23 L.W. 771=1926 M. 827=51 M.L.J. 414=96 I.C. 700; 131 I.C. 417=1931 N. 74; 154 I. C. 103=1935 P. 86; 44 C.W.N. 806; 1938 Pat. 44=17 Pat. 168; 1937 Rang. 413; I.L. R. (1939) Kar. 275=1939 Sind 172. Where an amended plaintiff did nothing more than furnish particulars and did not introduce any new cause of action, no question of limitation could arise in such a case. 181 I.C. 106=1939 N.L.J. 21=A.I.R. 1939 Nag. 23. See also 1938 Mad. 265. Where on the date of the application for leave to amend the plaintiff, the claim in the suit was barred by limitation, the Court has power to make amendments in the plaintiff if there are special circumstances. 44 L.W. 267=1936 M. 632=71 M.L.J. 166; 1937 O.W.N. 163=1937 Oudh 290. In a suit on a promissory note, claiming exemption from limitation on the ground of a part-payment, the Court has power under O. 6, R. 17, C. P. Code, to allow an amendment of the plaintiff, which seeks to add an acknowledgment of liability as a further ground of exemption. Under the rule, the Court is not only given the power, but is under a duty, to allow all such amendments as will enable the real questions in issue to be raised, provided such amendment does not take away an existing right of the defendant. 67 M.L.J. 921. See also 1938 Mad. 265; 156 I.C. 531=37 Bom.L.R. 165=1935 B. 213; 20 N.L.J. 42. Leave to amend the plaintiff should be refused when a person who was a necessary party to a suit was not impleaded and a step is taken to implead him after the suit is barred against him. 1935 P. 86=154 I.C. 103. See also 104 I.C. 700 (where it is laid down that there may be special considerations that may necessitate an amendment even in such cases). An agreement to appropriate a part of claim was not proved and the plaintiff amended the suit, so as to cover the full claim after the period of limitation. *Held*, that the suit was not barred by limitation, as no new claim was made. 150 I.C. 739=1934 L. 412. See also 1938 Mad. 265.

**RECTIFICATION OF MISTAKES.**—Inclusion of wrong property owing to mistaken identity—Amendment can be allowed. 51 I.C. 757=56 P.W.R. 1919. See also 1938 Lah. 718 (misdescription of defendant firm can be rectified by amendment). Amendment may be

allowed when a claim has been left out by mistake or inadvertence and not deliberately. 17 I.C. 646=17 C.W.N. 311; 97 I.C. 896 (2)=1926 L. 460. See also 63 M.L.J. 725=140 I.C. 500. Where it is proved that notice required under S. 80 has been served on the Secretary of State, the omission of amendment in the plaintiff of service of such notice as required by that section can be allowed to be rectified by amendment. 154 I.C. 103=1935 P. 86. A plaintiff cannot be amended when it would expose the defendant to an injury which could not be compensated in costs. 40 B. 158. See also 139 I.C. 441=33 P.L.R. 694. Amendments should be allowed to rectify technical defects. 34 A. 348; 47 B. 785=25 Bom.L.R. 513; 40 C. 541; 30 I.C. 323; 82 I.C. 177; 1926 A. 672. Want of verification of pleadings can be set right by amendment. 133 I.C. 626 (L.). The proper signing of a plaintiff is a matter of practice only and, if defective, it may be amended at any time. 138 I.C. 797=34 Bom.L.R. 628=1932 B. 367. The amendment of the plaintiff will relate back to the date of the institution of the suit for purposes of limitation. 1932 B. 367. See also 143 I. C. 504=1933 M. 153; 14 L.R. 60 (Rev.). Major suing as minor—Plaintiff can be amended if the party was under a *bona fide* mistake. 136 I.C. 710=1932 L. 322. Events that happen even after the filing of the suit may be taken notice of and an amendment of the plaintiff for including a prayer for relief on the foot of such events ought to be allowed to avoid multiplicity of proceedings. 90 I.C. 881=49 M.L.J. 479; 22 L.W. 120=1925 M. 1021=91 I.C. 503; 155 I.C. 1016=41 L.W. 429=1935 M. 286.

**COSTS.**—Where an amendment of the plaintiff is ordered on condition of payment of costs to the opposite side and the opposite side has accepted such costs without demur, it is not thereafter open to that party to challenge the order. 1941 N.L.J. 371. If under the terms of an order a party receives the costs subject to which the other party has been allowed a relief the former will not be permitted to challenge the order, unless he accepts the costs expressly reserving his right to challenge the order. 30 N.L.R. 347=150 I.C. 845=1934 N. 163. But where before the date fixed for payment of costs, the other party appeals, the appeal is valid though he accepts costs when tendered on the due date. 1936 N. 20.

**COURT-FEES.**—Where an appeal by one defendant only from a decree against two is objected to on the ground that the valuation of the appeal is restricted to that part only which relates to the appellant, if the appellant offers to amend the valuation and pay the difference of Court-fee, the same must be accepted by the Court especially when the appeal in form is against the whole decree. 1938 P.W.N. 523=1939 P. 162. No party has an absolute right to abandon any portion of his claim at any stage. It is always in the discretion of the Court whether to allow an amendment of the plaintiff or memorandum of appeal or refuse it. Where a



18. If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then Failure to amend after orders. within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.

## ORDER VII.

### Plaint.

Particulars to be contained in plaintiff. 1. The plaintiff shall contain the following particulars :—  
 (a) the name of the Court in which the suit is brought ;  
 (b) the name, description and place of residence of the plaintiff ;

### NOTES.

party has obtained an adjudication of his claim from the trial Court or has argued his case in respect of it in the Court of appeal, he cannot thereafter be permitted to amend his plaint or memorandum of appeal by abandoning a part of his claim with a view to save himself from the payment of Court-fee. 1938 O.W.N. 1138=1938 A.W.R. (C.C.) 131. See also 1938 Pat. 558.

REVISION.—An order refusing leave to amend the plaint can be set aside in revision. 40 I.C. 65=26 P.R. 1917; 78 I.C. 510; 1937 A.M.L.J. 104; 1940 O.A. 1126; 1941 Pat. 44=1941 A.W.R. (Supp.) 3; 1941 N.L.J. 340; 1925 N. 195; 21 L.W. 639=87 I.C. 90=48 M.L.J. 349; 85 I.C. 344; 22 L.W. 26=1925 M. 950; 1930 M. 278. See also 1927 M.W. N. 175=1927 M. 504; 41 M.L.J. 525; 4 L. W. 654; 60 C.L.J. 91=38 C.W.N. 1146. Unless the discretion is exercised injudiciously and arbitrarily by the lower Court High Court will not interfere in revision. 1938 Lah. 270=178 I.C. 176. The power to allow an amendment of pleadings has been conferred on Courts in the interests of justice, with a view to correcting mistakes and bringing out the real matters in issue between the parties. But this power should not be exercised in favour of one party so as to cause prejudice to the other party—where an amendment is very drastic and changes the nature of the suit itself, a Court, if it allows such an amendment, exercises its jurisdiction with material irregularity, if not illegality and its order is liable to be set aside in revision. 16 Luck. 65=A.I.R. 1940 Oudh 367. A Court has no jurisdiction to direct a party to amend his plaint. If it thinks that there are grounds for rejecting the plaint, it may do so, but it cannot insist on a party amending his plaint. If it passes an order calling on the party to amend the plaint, the High Court will interfere and set aside the order as it is without jurisdiction. 190 I.C. 754=21 P.L.T. 946=1940 P.W.N. 797. Amendment ordered on payment of costs—Costs drawn out under protest—Such order cannot be impeached in revision. 105 I.C. 620=1927 M. 1009. The plaintiff sued for recovery of a certain sum on the basis of a note of hand, the consideration for which being the balance which was found to be due from the defendant upon an accounting between the parties. Execution

of the note of hand was apparently denied and the plaintiff applied for amendment of his plaint in such a manner as to base his claim alternatively on the *bahi khata* account. The application was rejected by the Court below on the ground that the amendment sought for would change the basis of the suit. Held, in revision, that the object of O. 6, R. 17, C. P. Code, is to prevent multiplicity of proceedings and that a Court is bound therefore to allow such amendment to be made as may be necessary for the purposes of determining the real question in controversy between the parties, that the real question in controversy in the case was whether the balance of account as shown in the promissory note was or was not due from the defendant and the foundation of the claim was the account-books and that the lower Court ought to have allowed the desired amendment and by refusing to do so it disregarded an express provision of law and failed to exercise a jurisdiction which was vested in it. 1934 A.L.J. 989=153 I.C. 65=1935 A. 353.

EFFECT OF AMENDMENT.—Amendment takes effect from date of presentation of plaint or application. 98 I.C. 658=1927 N. 95; 93 I. C. 625=50 M.L.J. 442. See also 143 I.C. 504=1933 M. 153.

COURT COMPELLING PLAINTIFF TO AMEND PLAINT—WHO CAN COMPLAIN.—Where the Court compels the plaintiff to amend the plaint, only the plaintiff can complain; and it is not open to the defendant to complain that the Court has no jurisdiction to compel the plaintiff to do so. 1934 M. 220=66 M.L.J. 315.

O. 6, R. 18.—Under O. 6 failure to amend merely involves loss of right to amend and therefore not the determination of the suit as expressed in the original plaint. 164 I.C. 181=1936 Pesh. 155. The Court cannot reject a plaint or dismiss the suit under O. 6, R. 18 but must proceed to try the suit on the original plaint. 169 P.L.R. 1913=19 I.C. 472. Where a plaint was rejected on the ground that it was not amended within the time fixed by the Court a fresh suit on the same cause of action is maintainable. 99 I.C. 538=1927 L. 83.

O. 7.—See 35 O.W.N. 930=59 C. 150.

O. 7, R. 1: SCOPE OF.—See 1925 N. 113. Provisions of O. 7 by reason of section 141



(c) the name, description and place of residence of the defendant, so far as they can be ascertained ;

(d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect ;

(e) the facts constituting the cause of action and when it arose ;

(f) the facts showing that the Court has jurisdiction ;

#### NOTES.

of the Code, apply *mutatis mutandis* to memoranda of appeals as well as to plaints. I. L.R. (1939) Kar. 527=1939 Sind 221. See also 1939 Pat. 137. The plaint should contain the facts constituting the cause of action and the time when it arose. 42 C. 85; 39 I.C. 21=13 N.L.R. 16. Pleadings in the mofussil Courts are drawn up by lawyers who are not generally familiar with the precision of English pleadings and in such cases the Courts should look to the substance of the plaint rather than to the wording. 131 I.C. 529=1931 P. 179. One plaint is only one suit. Jurisdiction depends on amount or value of the aggregate subject-matters at the date of institution. 40 M. 1=32 M.L.J. 221. Description of suit in heading does not determine nature of suit. See 1927 S. 78. Defect in signature is not fatal to a suit and the merits are not affected. 1927 A. 514. Adverse possession should be expressly pleaded at least as alternative ground. 88 I.C. 249=1925 M. 1005. Plaintiff cannot be tied down to the date of the accrual of the cause of action. The Court is entitled to determine the date from the facts alleged and proved. 9 L. 428=1928 L. 516. In a redemption suit pleadings and proof must relate to the mortgage and plaintiff's right to redeem. 132 I.C. 793=1931 O. 378. Specific date of the cause of action should be given in the plaint. 131 I.C. 529=1931 P. 179; 58 C. 418=1931 C. 458, as also the place where it arose. 58 C. 418. In a suit for breach of conditions of a contract the conditions and the exact manner in which they have been violated should be stated. 1938 N.L.J. 392=1938 Nag. 530.

NAME.—A suit cannot be instituted against a dead man. 17 M.L.J. 551. If so instituted and a decree is obtained it is invalid. 9 Bom. L.R. 274. See 16 M. 319.

DESCRIPTION.—This term includes age, father's name, caste, etc. 7 M.L.J. 81. Where the Government has recognized a person as having a right to bear particular titles, a plaint in a suit against such person may contain them. 12 Beng.L.R. 443 (P.C.). A plaintiff cannot be compelled to insert every name and title to which the defendant may conceive himself entitled. 3 M.H.C.R. 31.

PLACE OF RESIDENCE.—To describe the plaintiff as residing in Chitpore Road in Calcutta is not a sufficient description of his residence. 4 C.L.R. 366; 14 W.R. 474. See also 58 C. 418=1931 C. 458. Facts constituting cause of action must be stated. See 58 C. 418=1931 C. 458; 18 A. 403; 15 M.L.J. 122; 13 W.R. 248; 10 Bom.H.C.R. 182; 11 A. 438; 15 C. 533 (P.C.); 10 Bom.H.C.R. 414; 7 M.H.C.R. 364; 7 C. 169; 9 A. 486; 13 W.R. 48; 13 C. 9.

SUIT BY CORPORATION.—O. 29, R. 1 only requires a pleading filed by a corporation to be verified by a principal officer of the company. But there is nothing to suggest that the heading of the plaint should contain any further particulars showing the name and description or place of residence of the person who represents such corporation. 26 S.L.R. 431.

INCONSISTENT CLAIMS.—A claim to set aside a deed as a forgery cannot be combined with a claim to set it aside on the ground of absence of consideration, fraud, misrepresentation, etc. 15 I.A. 86. A claim to set aside an adoption on the ground that it never took place cannot be joined with a claim that even if it took place it was conditional one. 14 M. 172. A stranger to a deed can aver that it is a forgery, and that if not a forgery, it is not supported by consideration. 16 M.L.J. 13 (Recent Cases).

RELIEF CLAIMED.—The Court should not give the plaintiff more relief than he prays for. 6 Bom.H.C.R. 9. An injunction could be granted on a general prayer. 6 C. 485. In a suit for partition no decree for redemption can be given. 10 M.L.J. 242; 5 A. 345; 27 B. at 603; 28 B. at 160. Plaint defective—Relief not claimed in proper form—Duty of Court. 93 I.C. 928=1926 L. 417.

VERIFICATION OF PLAINT.—Practice criticised. See 58 C. 418=1931 C. 458. O. 29, R. 1 only requires a pleading filed by a corporation to be verified by a principal officer of the company. But there is nothing to suggest that the heading of the plaint should contain any further particulars showing the name and description or place of residence of the person who represents such corporation. 26 S.L.R. 431=142 I.C. 361=1933 S. 102.

CLAUSE (e).—In a suit on a promissory note payable at a specified place, the plaint ought to contain a statement that the note had been presented for payment as that forms part of the cause of action. If there is no allegation of presentment in the plaint, the plaintiff cannot be given an opportunity of proving presentment. 158 I.C. 89=1935 Pesh. 132.

CLAUSE (f).—The value of a suit for purposes of Court-fees is not applicable for determining jurisdiction. Acts of a fiscal nature are not to be resorted to for determining questions of jurisdiction. 6 M.H.C.R. 151. Plaintiff in certain cases is free to fix his own valuation for purposes of jurisdiction. 18 C. 378. The general rule is that in all suits for account the valuation for purposes of Court-fees determines the question of jurisdiction. 22 C. 690; 92 I.C. 730=1926 M. 591. If in the course of preliminary enquiry in a suit for the value of the relief



- (g) the relief which the plaintiff claims ;  
 (h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished ; and  
 (i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.

In money suits.

2. Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed :

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for.

LOC. AM.—[LAHORE.] In the second paragraph of r. 2 of O. 7, after the word "defendant" insert "or for movables in the possession of the defendant, or for debts the value of which he cannot, after the exercise of reasonable diligence, estimate" ; and after the word "amount" where it last occurs insert "or value."

3. Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement of survey, the plaint shall specify such boundaries or numbers.

LOC. AM.—[CALCUTTA.] After r. 3, O. 7, add the words :—

"and where the area is mentioned, such description shall further state 'the area according to the notation used in the record of settlement or survey, with or without, at the option of the party the same area in terms of the local measures.'"

4. Where the plaintiff sues in a representative character the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

5. The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

6. Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed.

#### NOTES.

claimed by the plaintiff whether that enquiry be instituted at the request of the defendant or of the plaintiff whatever be the reason assigned for the overvaluation of the reliefs it becomes clear to the Court that there has been gross under-valuation, it is the duty of the Court on the motion of either party or *ex proprio motu* to order that the plaint be returned for presentation in the proper Court if the value be held to be not higher than the figure up to which that Court has jurisdiction. 3 A.W.R. 405=1935 A. 157.

PROCEDURE.—See 35 C.W.N. 267.

O. 7, R. 2.—A claim for contribution should distinctly set forth the amounts due by each part. 14 W.R. 374. Plaintiff is only entitled to the sum specified in the plaint, even though on the evidence he is found to be entitled to more. 2 M.I.A. 113. See also 30 C. 406. Rr. 1 and 4 of O. 7 are mandatory. 82 I.C. 201. None of the rules under O. 7 require or allow documents which are part of the evidence in the suit to be annexed to the plaint. On the other hand, such a course is forbidden by O. 9, R. 2. Particulars which are too voluminous to be included in

the plaint may be annexed thereto and may be delivered separately, and these facts should be stated in the plaint. 58 C. 418=1931 C. 458.

O. 7, R. 4.—Plaint is to state the representative nature of the suit. 1925 N. 183=82 I.C. 201. A plaintiff suing in a representative character must set it forth, and show that he is qualified to fill it. 7 B. at 470. In Bombay Presidency Mahomedan executors can sue without first taking out probate. 8 B. 241. In the case of Hindus, see 14 C. 37. When the original plaintiff dies, the suit may be continued by his legal representative, although the latter has not taken out letters of administration. 16 B. 519. Production of a succession certificate is not a condition precedent to institution of the suit. 16 M. 454=19 C. 482. See also 17 M. 14.

O. 7, R. 5.—Plaint must show how the various defendants are interested in the subject-matter of the suit and the cause of action against each. 1924 N. 191=79 I.C. 614.

O. 7, R. 6.—R. 6 should be construed liberally and reasonably. 60 I.C. 772=3 L. L.J. 22=2 L. 13; 46 I.C. 495=102 P.R. 1918.



7. Every plaintiff shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

## NOTES.

As a general principle, a plaintiff must show in his plaint how his suit is in time; for, the question whether the suit is in time must, if denied, be one of the issues in the case, and if the plaintiff does not explain how his suit is in time, it is impossible to the defendant to meet his case. 1937 Mad. 826. Where a plaint is presented on the re-opening date after Court holidays and the period of limitation has expired during the holidays, the fact that the ground of exemption under S. 4, Limitation Act, was not specifically mentioned in the plaint will not entail the dismissal of the suit inasmuch as the Court is bound to take judicial notice of the holidays. 168 I.C. 383=1937 Pesh. 41. R. 6 has no application when the plaint is not on its face time barred. 70 P.R. 1914=25 I.C. 463; but is applicable to cases in which the suit as laid in the plaint is *prima facie* barred by limitation. 51 I.C. 956=1 L. 21. R. 6 is a rule of pleading. It makes no exception to the general rule that a plaintiff must plead the facts on which he relies for his case. If a party is advised that his pleadings are defective, the remedy is amendment by leave of the Court. There is no reason why a different consideration should apply to a plaintiff who wishes to throw over the ground of exemption from limitation pleaded and to put forward some other ground of exemption which he has not pleaded. If there is no application to amend the plaint, the suit ought to be dismissed as barred by limitation. 37 L.W. 370=1933 M. 395=64 M.L.J. 317. See also 20 N.L.J. 42. Where a suit is *prima facie* time barred the grounds on which exemption is claimed must be alleged in the plaint. 145 I.C. 343=1933 L. 491. Ground of exemption from limitation not set up in plaint cannot afterwards be set up and proved. 75 I.C. 1048=1924 L. 702. A ground to save limitation which has not been taken in the plaint cannot be taken unless the plaint is amended. 1933 M.W.N. 931=1933 M. 874. Failure to set up acknowledgment as saving limitation is a bar. 3 L. 233=1922 L. 39; 52 I.C. 243=9 L.W. 82. Grounds on which plaintiff relies for extending the period of limitation must be specifically alleged in the plaint. 27 I.C. 344=8 S.L.R. 69. It is obligatory as a matter of pleading to show the grounds upon which exemption from limitation is claimed. Consequently unless the plaint is amended, it will not be open to a party to rely on an exemption not pleaded in the plaint. 165 I.C. 737=1936 M.W.N. 411=1936 M. 545. When a plaintiff deliberately takes up a definite position as to when the cause of action arose, he cannot be allowed to shift his

ground later on, when he finds that position untenable. Thus the plaintiff cannot be allowed to take up a new plea of limitation resting on certain acknowledgments at the stage of arguments, when he finds his original position untenable. To adopt such a course is unfair, as the defendant has no notice either of the plea or of the statements in certain documents on which reliance is sought to be placed and he cannot therefore be reasonably expected to meet the plea. 1934 L. 753. Plea of exemption for limitation—Inconsistent averments when may be allowed. 65 I.C. 279=17 N.L.R. 209. Where in the plaint returned for presentation to proper Court the ground of exemption is not stated the endorsement of the Court as to the date of receipt and return is substantial compliance with the provisions of R. 6. 9 I.C. 157=9 M.L.T. 374; 1923 L. 591. The plaintiff ought not to be allowed to put forward a new case inconsistent with the plaint to enable him to avoid limitation. 30 C. at 709.

O. 7, R. 7.—The intent and purpose of R. 7, is to take the place of the practice previously followed by Courts. A Court should not refuse to grant a relief not specifically claimed in the plaint, if such relief is obviously required by the nature of the case and is not inconsistent with the relief specifically claimed and raised by the pleadings, although the plaintiff does not ask for any general or other relief. Thus in a suit for rent under a lease, the Court may, even if the lease is not properly proved, pass a decree for use and occupation. The minor relief being inherent in the claim for the greater, it is incumbent on the Court to grant it when the facts require it. 13 L.L.T. 34. In a suit on a negotiable instrument, relief on the strength of the original consideration could be granted if prayed for in the alternative. 46 C. 663=29 C.L.J. 340=36 M.L.J. 429 (P.C.); 14 I.C. 399=8 N.L.R. 7. See also 27 N.L.R. 327. [17 N.L.R. 22, Ref.; 27 A. 325 (P.C.); 2 M.I.A. 353; 24 A. 456; 43 C. 743; 29 M. 491; 30 M.L.J. 302; 2 L. 256; 3 C. 314; 18 C.W.N. 617 (P.C.); 7 P. 845; 24 B. 360, Rel. on.] Where specific allegation is not proved, it is not open to the Court to arrive at a finding in his favour contrary to the allegation set up. 54 I.C. 797. A plaintiff is entitled to put his case in the alternative and his suit should not be dismissed as being for inconsistent relief. 36 A. 476; 7 A. 184; 12 A.L.J. 798. Where a suit for divorce or dissolution of marriage on the ground of the other party's unsoundness of mind or in the alternative for a declaration of nullity of the marriage is found to be not maintainable it is not open to the plaintiff



8. Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly.

9. (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements.

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct.

LOC. AMS.—[ALLAHABAD.] In r. 9 (a) for the semicolon after "it" in cl. (1) substitute a full stop and delete the rest of this clause as well as cls. (2) and (3); and (b) re-number cl. (4) as cl. (2) deleting the words "or statements" therein.

[CALCUTTA.] O. 7, r. 9.—For r. 9 (1) substitute:—

"9. (1) The plaintiff shall endorse on the plaint, or annex thereto a list of the documents (if any) which he has produced along with it.

(1-A) The plaintiff shall present with his plaint:—

(i) as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements;

(ii) draft forms of summons and fees for service thereof.

#### NOTES.

to claim the relief of judicial separation, when that relief has not been prayed for in the plaint. Such a relief claiming judicial separation is not a general relief falling under such further and other relief within the meaning of O. 7, R. 7. No such relief can be granted without an amendment of the plaint. 1938 B. 65=39 Bom.L.R. 1146. The decree in a suit should conform with the rights of the parties as they stand at the date of its institution. 44 C. 47=20 C.W.N. 1099. A prayer "for any other relief" may cover any other relief arising out of the same cause of action but not one arising under a different cause of action. 13 I.C. 650=92 P. L.R. 1912. "General or other relief" which can be granted must be one consistent with the main reliefs claimed. Ownership and easement are not rights consistent with each other. 1933 L. 267. An exaggerated claim is no ground for refusing a person the rights which he is found entitled to. 46 I.C. 679=13 P.R. 1919; 33 M.L.J. 63. In a suit for ejectment, a decree for joint possession may be passed. 38 M. 1036=26 M.L.J. 532; 24 M.L.J. 271=21 I.C. 724. But a relief which goes beyond the scope of the suit or the facts proved cannot be granted. 10 L.L.J.

513=112 I.C. 485=1929 L. 126. See also 1937 O.W.N. 1131=1937 Oudh 484. Under R. 7, a prayer for general relief is unnecessary, and a Court may always give general or other relief, as it may think just to the same extent, as if it had been asked for. 76 I.C. 940=5 Pat.L.T. 330. On this section, see also 29 Bom.L.R. 147; 10 Pat.L.T. 630. Suit for possession—Power of Court to grant declaration. 118 I.C. 381=1929 A. 555. A claim as owner is quite distinct from a claim as manager though the plaintiff seeks possession on both grounds and the case falls under R. 8. 1929 N. 347=120 I.C. 404.

O. 7, R. 9.—A suit is instituted on the date when the plaint is filed and not on the date when it is ordered to be registered. 66 I.C. 923=34 C.L.J. 465.

ANNEXING DOCUMENTS TO PLAINT.—None of the rules under O. 7 require or allow documents which are part of the evidence in the suit to be annexed to the plaint. On the other hand, such a course is forbidden by Rr. 2 and 9. Particulars which are too voluminous to be included in the plaint may be annexed thereto and may be delivered separately and these facts should be stated in the plaint. 58 C. 418=1931 C. 458.



[MADRAS.] In r. 9 (1) of O. 7 after the word "and" occurring in the third line *delete* the comma and the five words following, *viz.*, "if the plaint is admitted" and *insert* the expression "along with the plaint" after the words "shall present."

[NAGPUR] *Substitute* the following for r. 9 :—

"9. (1) The plaintiff shall endorse on the plaint or annex thereto, a list of the documents (if any) which he has produced along with it.

(2) The chief ministerial officer of the Court shall sign such lists and the copies of the plaint presented under r. 1 of O. 4, if, on examination, he finds them to be correct."

[OUDH.] In r. 9 (1) for the words "and if the plaint is admitted, shall present," *substitute* the words "and shall, at the same time, present." Also *delete* the words "unless the Court. . . present such statements" as well as sub-rr. (2) and (3) and re-number sub-r. (4) as sub-r. (2) deleting the words "or statements."

[RANGOON.] In O. 7, r. 9 (1) *add* the words "on the day on which the plaint is admitted," after the word "present."

[SIND.] "9. (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it, and shall present along with the plaint as many copies of it on plain paper as there are defendants; on application made the Court may by reason of the length of the plaint or the number of the defendants or for any other sufficient reason accept instead a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, presented along with the plaint."

10. (1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

#### NOTES.

O. 7, R. 10.—R. 10 applies only when it is found that the suit as originally framed was wrongly instituted; it does not apply when it is found at the trial on the evidence that the Court has no jurisdiction to grant the relief prayed for. 1932 S. 67; 1938 A. 39; 1937 Oudh 183. O. 7, R. 10 is not confined only to cases of return of plaint for want of territorial jurisdiction, but also for want of pecuniary jurisdiction. 175 I.C. 684=1938 Sind 124. In many cases, the plaintiff has the choice of forum, but once a plaintiff has selected to choose his forum, he cannot change it at his own pleasure. Having selected the Court in which he proposes to file his case, if that Court has jurisdiction to deal with it, the case must remain there in the ordinary way. If therefore the plaint shows that a particular Court has jurisdiction to deal with the case, the plaintiff cannot be allowed to withdraw the plaint to be filed elsewhere. If a Court has jurisdiction, it is impossible for it to act under O. 7, R. 10; for the Court itself, if it has jurisdiction, is the Court in which the suit should be instituted. 158 I.C. 63=1935 R. 310. A Court cannot return or reject a plaint under O. 7, R. 10, merely because the suit is triable by some other Court. It can do so only if the suit is not triable by itself. 1936 A.M.L.J. 67. *See also* 1940 O.W.N. 1212=1941 Oudh 161; 42 Bom.L.R. 1093. When the Court finds that on the correct valuation the plaint is not cognizable by it, the proper thing to be done is to return the plaint so that it may be presented to the Court having jurisdiction. It is not the function of the Court to direct the plaintiff to amend the

valuation or pay additional Court-fee. They are matters for the Court before whom the plaint should be properly presented. 1931 M. 67=61 M.L.J. 43. (51 B. 236; 8 M. 62; 8 B. 313; 7 M. 171, Rel. on; 8 B. 313, Not Foll.) *See also* 158 I.C. 613=1935 R. 310; 153 I.C. 53=37 P.L.R. 125; 42 P.L.R. 203=1940 Lah. 171. Where a plaint has been returned for presentation to the proper Court and the plaintiff appeals against the order, he is still at liberty to present the plaint to the proper Court subject to the bar of limitation. 27 Bom.L.R. 652=89 I.C. 68. The direction in R. 10 is mandatory. 53 I.C. 308=10 L.W. 525; 8 C. 834. Suit filed in Civil Court instead of before Collector—Proper procedure. 6 P. 358. *See also* 133 I.C. 411=1931 A. 664.

RETURN OF PLAINT—WHEN TO BE MADE AND WHEN NOT TO BE MADE.—If on the face of the plaint the Court finds that it has no jurisdiction to try the case, it will return the plaint at any stage of the case; if the Court fails to detect want of jurisdiction in it to begin with, but where the plaint *prima facie* is triable by the Court and in spite of the challenge of the other side the plaintiff sticks to his own allegations in the plaint, the Court proceeds to try the case on merits and not to decide any preliminary question of jurisdiction. If then the Court comes to the conclusion that plaintiff's contention is false and the suit as laid cannot be maintained, the Court ought to dismiss the suit and no question of returning the plaint under O. 7, R. 10 arises in such a case. If the Court returns the plaint in such a case, instead of dismissing the suit, it will be failing to exercise a jurisdiction vested in it by law. 1940 N.L.J. 380=A.I.R. 1940 Nag. 331. A Court



## NOTES.

can return a plaint for presentation to the proper Court even at the stage of arguments, when the question of jurisdiction is raised, especially when the suit has not proceeded very far. 1937 A.L.J. 1224=1938 All. 76.

**APPLICABILITY.**—R. 10 only applies when it is found that the suit as originally framed was wrongly instituted in Court, but it does not apply when it is found at the trial, whether as the result of admission made by the parties or evidence led by them, that the relief which the plaintiff is really entitled to is different from that claimed in suit and that relief is not cognizable by that Court. In the latter case, the Court cannot decline jurisdiction and order the plaint to be returned but should proceed with the trial to its finish after amendment of pleadings or otherwise, and pass such decree as the circumstances permit. It may in certain cases grant permission for withdrawal of the suit with liberty to file a fresh suit. (Case-law discussed). 1933 S. 296. *See also* 165 I.C. 908=1936 O.W.N. 1228=1937 O. 183; 1933 N. 82; 1930 S. 252. Where at the time of the institution of a suit, a Court had no territorial jurisdiction to entertain it, but before it could pass an order under O. 7, R. 10, it acquired that jurisdiction by virtue of a Government notification it cannot thereafter pass an order under O. 7, R. 10. 1941 O. 161=1940 O.W.N. 1212=191 I.C. 708. R. 10 applies only where the suit is instituted in a wrong Court and not where the necessary relief under S. 20, C. P. Code, was not obtained. 23 Bom.L.R. 1086=46 B. 229. *See also* 1934 C. 565=59 C.L.J. 47=1934 C. 524. O. 7, R. 10 applies to a Small Cause Court. 1926 M. 679=51 M.L.J. 158. Rule applies when the suit as originally framed was wrongly instituted. 54 I.C. 655. It is the duty of a Court to return the plaint for presentation to a proper Court, and not decide the suit on merits if it finds it has no jurisdiction to entertain the suit. 88 I.C. 991=1925 O. 735; 44 A. 686=70 I.C. 98; 10 M. 211; 41 M. 701=35 M.L.J. 27; 41 I.C. 203=27 C.L.J. 510; 10 L.W. 525=1920 M.W.N. 163; 153 I.C. 53. Where a petition for adjudication of a debtor has been presented in a Court having no jurisdiction, the Court should not dismiss it but should return it for presentation to the proper Court. 145 I.C. 755=1933 L. 851. *See also* 42 P.L.R. 203=1940 Lah. 171; 1940 Nag. 331. For passing an order returning plaint to be presented to proper Court, it is not necessary that the Court so returning and the Court to which plaint is ordered to be presented should be exercising the same kind of jurisdiction. If for instance the plaint is preferred in the Revenue Court which has no jurisdiction, the proper course for the Revenue Court to follow, is to return the plaint for presentation in the proper Court which may be the Civil Court. 149 I.C. 109=1934 P. 234. There is nothing in the wording of the rule which forbids the return of the

plaint after a late stage of the case. 8 B. 313 (F.B.). The plaint cannot be returned after a decree has been passed. 8 B. 380. Plaint properly filed—Court sending it to Sub-Judge's Court in course of distribution—Valuation wrongly raised there and returned—Plaint re-filed without delay in proper Court. 1929 L. 409. *See also* 42 Bom.L.R. 1093. Plaint in account suit returned after passing. Preliminary decree returned is improper without a finding by the Court that the amount found due exceeds its jurisdiction—No question also arises of the withdrawal of the suit and institution of fresh suit. 117 I.C. 369=1929 L. 248. *See also* 1933 N. 82=29 N.L.R. 115. Suit for partition—Preliminary decree passed—At final decree suit discovered to be under-valued—Return of plaint for presentation to proper Court—Power of Court. 1930 C. 147 (1). When the appellate Court decides that the lower Court has no jurisdiction to entertain the suit, it should return the plaint to the plaintiff. 1 B. 538; 9 B. 266. But *see* 11 M. 482; 89 I.C. 511=1925 O. 499. Return of plaint cannot be made on the ground that it would be more advantageous to one of the parties to do so. 1927 C. 87; 97 I.C. 979. There is no provision of law which necessitates or even empowers the Court to return a plaint on the ground that the plaintiff has not mentioned therein the list of the documents on which he relies. The Court cannot take action under S. 151 of C. P. Code for such purposes. 122 I.C. 488 (1)=1933 L. 480. As to whether suit is to be deemed to be pending in the Court of filing even after return of plaint, *see* 5 R. 101. Where a plaint filed in one Court is returned to be presented to another Court, whether the latter Court has jurisdiction to return the same to be presented to the former Court. *See* 42 I.C. 483=6 L.W. 239; 145 I.C. 261=1933 N. 221. But *see* 22 L.W. 582=1925 M.W.N. 804; 64 I.C. 496=2 Pat.L.T. 839. *See also* 51 B. 236=29 Bom.L.R. 280=1927 B. 257. Return of plaint—Amendment of plaint by plaintiff himself and representation to same Court—Propriety. 32 L.W. 694=59 M.L.J. 953. *See also* 1940 Lah. 446=42 P. L. R. 684. An application for leave to sue as a pauper is not a plaint and it only reaches the stage of a plaint when it is granted. 52 I.C. 688. Where the plaintiff applied to the munsif and got leave to sue as pauper but subsequently during the course of the trial it was found that the suit was under-valued and the plaintiff was directed to re-present the plaint to the proper Court. *Held*, that the proceedings before the munsif, being without jurisdiction, were mere nullities and that the leave granted by the munsif was of no avail to the plaintiff and that he should once more apply to the sub-Court for leave to sue *in forma pauperis*. 1933 M.W.N. 197. If the cause of action arises within the jurisdiction of the Court the plaint cannot be returned simply because the defendant resides outside the jurisdiction of the Court. 32 C. 146. Court not to decide material issue of question of damages



## Rejection of plaintiff.

11. The plaintiff shall be rejected in the following cases:—

(a) where it does not disclose a cause of action;

## NOTES.

to decide question of jurisdiction. 91 I.C. 737=1926 M. 339. Plaintiff containing different causes of action—Jurisdiction of Court to try one cause of action only—Procedure to be followed. 94 I.C. 783=1926 B. 283=28 Bom.L.R. 521. Plaintiff returned under S. 23, Provincial Small Cause Courts Act—Order of return by Civil Court—Appeal if lies. 1926 C. 83. See also 145 I.C. 261=1933 N. 221. An application to a Court trying the suit to stay a suit is an application in the suit and R. 10 does not apply. 150 I.C. 839=1934 S. 95. When a Court returns a plaintiff for being presented to the proper Court under O. 7, R. 10, neither such Court nor the appellate Court to which an appeal is filed from the order of that Court has power to fix a date or otherwise allow time within which the plaintiff is to be re-filed. It is for the Court in which it is so presented to consider whether the plaintiff is within time, and whether, having regard to the provisions of the Limitation Act, the plaintiff is entitled to the deduction of any time in computing limitation. 45 C.W.N. 524. Order returning plaintiff—Condition precedent for payment of costs before presentation of plaintiff to proper Court—No power of Court to impose such condition. 54 L.W. 315=(1941) 2 M.L.J. 450.

**INHERENT POWERS.**—Although R. 10 does not apply to a chartered High Court, it can, by virtue of its inherent powers, direct the return of a plaintiff for presentation to proper Court on dismissing a suit for want of jurisdiction. 12 R. 432=1934 R. 342.

**LIMITATION.**—A Court returning a plaintiff for presentation to the proper Court cannot fix a time for such presentation, so as to extend the period of limitation for the suit. Such an order allowing a period for presentation is clearly illegal; and if the presentation is made beyond the period of limitation for the suit, the suit will be barred, although it is presented within the time fixed. 1936 A.M.L.J. 67. See also 18 Pat.L.T. 250=1937 Pat. 495. If a plaintiff is returned under R. 10, O. 7 and is presented to another Court in the same condition in which it is returned, it must be deemed to have been instituted on the date on which it was originally filed in the first Court and the date of institution does not alter with the change in the Court. 1941 O.W.N. 713=1941 R.D. 412=1941 A.W.R. (Rev.) 435. See also 45 C.W.N. 524.

**PLEADINGS.**—Plaintiff cannot rely upon the pleas in the written statements for making out a cause of action. 46 I.C. 60; 6 Bur.L.T. 35=20 I.C. 278.

**PRACTICE.**—The question of valuation and jurisdiction is one that should be determined at the earliest possible opportunity and, if the Court finds that it has no jurisdiction it should at once return the plaintiff to the Court having jurisdiction and should not take any steps either to enforce payment of Court-

fees or in any other matter. In such a case the order requiring the plaintiffs to pay additional Court-fees and on their failure to do so rejecting the plaintiff, is *ultra vires* and cannot be upheld. (46 M.L.J. 345, Not Foll.; 51 B. 236, Foll.) 20 N.L.R. 367=1933 N. 312. It is a settled rule of law that the jurisdiction of a Court is initially determined by the allegations to be found in the plaintiff. If the plaintiff as it stood contained allegations making the suit clearly cognizable by the Munsiff and he found against the claim of the plaintiff for rendition of accounts the plain duty of the Court is to dismiss the suit and not to return the plaintiff for representation to some other Court which, on the plea of the defendants, would have had jurisdiction. 1933 A.L.J. 667=1933 A. 745.

**PLAINT RETURNED BY TWO COURTS—REMEDY OF APPLICANT.**—A plaintiff was filed in the Court of the Second Class Subordinate Judge. That Court considered that the case was cognizable by the Court of Small Causes and returned the plaintiff for presentation to the appropriate Court. The latter Court however held that the suit was not triable by it and returned the plaintiff to the applicant. The applicant applied in revision asking the High Court to determine which Court had jurisdiction to entertain the suit. Held, that the correct procedure would have been to make an application to the District Judge under the provisions of O. 46, R. 7. 145 I.C. 261=1933 N. 221 (1).

**APPEAL.**—An appeal lies against an order passed under this rule. See O. 43, R. 1; also 14 M. 462; 27 Bom.L.R. 636=88 I.C. 753; 134 I.C. 203=1931 L. 294; but a second appeal does not lie in such cases. See 1931 L. 294. Also no appeal lies after the plaintiff has been taken back and re-filed in the Court as directed. 5 C.L.J. 580. But see 121 I.C. 668.

**SECOND APPEAL.**—See 1935 M. 574.

**REVISION.**—Order returning a memorandum of appeal to be presented to the proper Court is revisable. 90 I.C. 603=1925 L. 479. See also 131 I.C. 303=32 P.L.R. 737.

**O. 7, R. 11.**—(See also Notes under S. 149, *supra*.) All statements in plaintiff are to be taken as true for argument on preliminary issue as to whether plaintiff discloses a cause of action. 40 C. 598=25 M.L.J. 104 (P.C.). In deciding an application under R. 11 the Court is not entitled to go outside the pleadings. I.L.R. (1937) 1 C. 541=41 C.W.N. 193. "Cause of action", meaning of. See 54 A. 525=1932 A.L.J. 489=1932 A. 543. O. 7, R. 11 is merely a rule of procedure. It is not meant to enlarge any taxing section but only to ensure a proper application of the Court-Fees and other Acts. 34 C.W.N. 870. The provisions of R. 11 are mandatory and where a plaintiff on appeal memo. is written on paper insufficiently stamped, the Court is bound to give the plaintiff



(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

## NOTES.

time to make good the deficiency. 38 B. 41; 2 Pat.L.J. 74; 49 C. 880=27 C.W.N. 566; 44 C. 352=21 C.W.N. 834. See also 39 P.L.R. 199=1939 Lah. 392; 1939 Pat. 137; 1939 Pat. 432; 17 Pat. 687=1939 Pat. 83; 1938 A.W.R. (B.R.) 112; 1938 A.W.R. (B.R.) 89; 1932 M.W.N. 104 (38 B. 41, Ref.; 27 M.L.J. 677, doubted); 133 I.C. 411=1931 A. 664. See also 39 P.L.R. 199. The mandatory provision contained in R. 11 is intended for cases where no other complications intervene and the Court has sufficient inherent power to depart from the normal procedure to suit the exigencies of the situation. 40 C.W.N. 747=1936 C. 221; 41 Bom.L.R. 787=1939 Bom. 354. Dismissal under R. 11 (c) of O. 7 should be regarded in the light of a punishment for contempt of Court for failure to comply with the orders of the Court for payment of the deficiency in stamp. 1938 R.D. 235=1938 A.W.R. (B.R.) 89. The Court's power to correct the valuation is not limited under R. 11 to any particular stage of the suit. It may be exercised by the trial Court at a hearing after remand by the appellate Court. 58 M. 1051=41 L. W. 562=1935 M. 569=68 M.L.J. 755. Where a plaint is insufficiently stamped, the Court is bound under O. 7, R. 11 to give the plaintiff time to make up the deficit; only when he fails to comply with the order, the Court can reject the plaint. That the plaint is presented on the last day of limitation makes no difference at all. Whether the payment of insufficient Court-fee has been by design or due to inadvertence, the Court is bound by the mandatory terms of it to give effect to the provision of law. 47 L.W. 492=A.I.R. 1938 Mad. 542=(1938) 1 M.L.J. 610. A plaint can be rejected at any stage of the suit even after its registration. (12 A. 553; 27 C. 376 and 1922 C. 506, Foll.) The fact that the suit was registered, heard by the trial Court, and by the appellate Court and remanded would be of no moment for a plaint not correctly valued and stamped can be rejected under O. 7, R. 11, at any stage of the suit, the said provisions being mandatory. 1935 C. 764. See also 40 C.W.N. 1390. Where the Court finds that the plaint does not bear sufficient Court-fees, to dismiss it on merits is not proper—Correct procedure pointed out. 152 I.C. 799=1935 L. 75. See also 1937 Lah. 392; I.L.R. (1941) Kar. 102. R. 11 (c) is not confined to a case where the plaintiff himself has properly valued the relief claimed, but has failed to pay the proper Court-fees. It applies as well to a case where the Court finds that the plaint has been undervalued and ascertains the real value and the deficient Court-fee has not been paid by plaintiff. 139 I.C. 520=36 C.W.N. 567=1932 C. 685. R. 11 (d) does not apply when there is no statement in the plaint suggesting the suit to be barred. 27 I.C. 232=18 C.W.N. 1340. Plaint insuffi-

ciently stamped—Court bound to grant time for affixing proper Court-fee. 27 P. L.R. 1917=39 I.C. 766; 3 P.L.T. 142; 56 I.C. 316=4 P.L.J. 703; 6 O.W.N. 1105; 18 Pat.L.T. 665=1937 Pat. 550. Application for leave to sue *in forma pauperis* is not governed by R. 11, because until the application is granted the suit cannot be regarded as instituted. R. 11 applies only to regularly instituted suits and not to other cases. Therefore, a Court is not compelled on its dismissing an application to sue *in forma pauperis* to grant a time within which a properly stamped plaint could be filed. 1935 M. W.N. 863=42 L.W. 655=1935 M. 878. See also 42 P.L.R. 684=1940 Lah. 446; 1936 C. 221. Where a suit has been registered as an ordinary suit and the plaintiff does not pay deficit Court-fee but, subsequently applies for permission to continue the suit as a pauper, the application should not be rejected merely on the ground that the suit has already been registered as an ordinary suit. It should be considered on merits. (Case-law discussed.) 40 C.W.N. 747=1936 C. 221. See also 1936 C. 221. Pauper suit—Dismissal—Appeal by plaintiff paying full Court-fee—Order by appellate Court for payment of Court-fee on plaint — Competency — Non-compliance — “Rejection” of appeal—If warranted. I. L.R. 19 A. 484=1937 A. 280. Return of plaint for payment of deficient Court-fee—Payments beyond the time fixed by the Court—No application to extend the time—But Court has power to excuse delay. 95 I.C. 439=51 M.L.J. 90=1926 M. 676; 1939 Pat. 137. In suits to obtain a declaratory decree or order where consequential relief is prayer for, and in suits to obtain an injunction, where the Court finds the relief claimed as under-valued, it is under R. 11 (b), entitled to require the plaintiff to correct the valuation stated by him in accordance with the provisions of S. 7, Court-Fees Act. But so long as there are no rules framed under S. 9, Suits Valuation Act, the Court would have no standard before it on which it may regard the plaintiff's valuation as an under-valuation, and its powers of correction would have to be exercised on that footing. (Case-law discussed.) 61 C. 796=38 C.W.N. 589=1934 C. 448 (F.B.). Where a Court finds that a suit is under-valued and directs it to be re-valued, and the re-valuation of the suit is beyond the pecuniary jurisdiction of the Court, the proper procedure to be followed by the Court is to return it for presentation to the proper Court; the Court has no power to call on the plaintiff to pay the deficient Court-fee and to reject the plaint on non-payment of the same. 58 M.L.J. 651. Where plaint is defective, plaintiff is to be given an opportunity to cure the defect. 1 Pat.L.T. 188=55 I.C. 445. See also 105 I.C. 881=1927 M. 1002=54 M.L.J. 67; 1939 Pat. 137; 51 B. 236=29 Bom.L.R. 280=1927 B. 257. A



(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so ;

(d) where the suit appears from the statement in the plaint to be barred by any law.

#### NOTES.

Court has jurisdiction to entertain a plaint though it is unstamped. 20 I.C. 767=24 M. L.J. 658. But *see* 1930 N. 224. Court-fee stamps not available in treasury on the day of presentation of plaint and hence Court-fee paid late—Plaint must be deemed to have been presented on the proper date. 115 I.C. 757. *See also* 48 L.W. 244=1938 Mad. 560=(1938) 2 M.L.J. 135. When a plaint is presented insufficiently stamped the Court is bound to give plaintiff time to make good the deficiency; and under S. 149, the deficient stamp when paid within the period allowed, must be taken to have been paid at the time of the original presentation of the plaint. No application is required to be made under O. 7, R. 11. 1938 A.M.L.J. 60. It is competent to a Court to reject a plaint after it has been admitted and duly registered. 34 C. 20 (F.B.). A plaint may be rejected at any stage of the suit. 18 M. 338; 12 A. 553. But *see* 28 I.C. 504=1915 M. W.N. 228 (*contra*). The mere unlikelihood of plaintiff's success is no sufficient ground for rejecting a plaint. 1 M.H.C.R. 240. A suit should not be dismissed on the ground that it cannot be maintained as a mere acknowledgment of debt. 97 I.C. 800=1926 L. 472 (1). If plaint cannot be rejected in part, *see* 29 A. 325; 59 M.L.J. 923 (926). Rule does not apply to the High Court in the exercise of its appellate jurisdiction. 12 A. at 151 (F.B.). *See* 1938 A.W.R. 89. If a wrong date is given for the cause of action and the action is not barred, the plaint cannot be rejected. 7 N.W.P. 354. An appellate Court has the same powers of rejecting plaint under R. 11, as the Court of first instance. 69 I.C. 554 (1)=1924 N. 80 (O. 7, R. 11 applies to memorandum of appeal). *See also* (1938) 1 M.L.J. 514; 1941 Pat. 108. The weight of authority is decidedly against the applicability of the provisions of O. 7, R. 11 (c) to appeals. (27 M.L.J. 677; 61 Cal. 663; 1 Lah. 234; 3 Pat.L.J. 74; 50 All. 980, Ref. to.) 47 L.W. 211=A.I.R. 1938 Mad. 316=(1938) 1 M.L.J. 514. But *see* 1930 N. 224. Where a person claims damages for "deterioration" of the goods from a railway company, but fails to furnish along with the plaint the details of his claim for damages, this omission by itself is not sufficient to dismiss his claim. 27 A.L.J. 859=51 A. 895=1929 A. 597 (2). Plaintiffs not appearing on fixed date and not paying additional Court-fee—Court dismissing suit, noting while dismissing "Plaintiffs have not paid additional Court-fees. Plaintiffs are absent"—Dismissal was under this rule and not under O. 9, R. 8. 117 I.C. 789 (2)=1929 M. 344. O. 7, R. 11 (b), if controls S. 7 (iv) of the

Court-Fees Act, *see* 1936 S. 25; 1937 Sind 241; 31 S.L.R. 37.

DISMISSAL OF SUIT AND REJECTION OF PLAINT are not identical terms. In one case a decree is passed and in the other case, it is merely an appealable order. 54 A. 525=1932 A.L.J. 489=1932 A. 543. Under O. 7, R. 11, where the plaintiff fails to pay the additional Court-fee, required of him within the time fixed, the correct order is to reject the plaint and not to dismiss the suit, though there is very little difference between an order rejecting a plaint and an order dismissing the suit. I.L.R. (1941) Kar. 102. Where the Court directed the plaintiff to pay additional Court-fee before a certain date and the plaintiff applied on that date for permission to continue the suit as a pauper, *held*, the application having been made before the expiry of the period fixed for payment, the plaint could not be considered as having been rejected under R. 11, 37 L.W. 725=1933 M. 498=64 M.L.J. 728. As to rejection of plaint before registration as suit, *see* 62 C. 61. As to costs, *see* 43 Bom.L.R. 475.

REDUCING VALUATION OF PLAINT.—Return of plaint—Re-presentation of plaint with same Court-fee but with reduced valuation valid and allowable—No permission of Court necessary for reducing valuation. 134 I.C. 816=1931 M. 716.

EXTENSION OF TIME to pay Court-Fees—Power of Court to grant, after expiry of time fixed. 40 C.W.N. 747=1936 C. 321.

AS TO ALTERING NATURE OF SUIT on return of plaint, *see* 133 I.C. 654=1931 L. 622.

APPEAL AND REVISION.—*See* 1941 P.W.N. 25. An order holding that a certain Court-fee is payable is revisable. 1925 M. 722=48 M. L.J. 514. *See also* 1936 L. 1021; 1937 Lah. 800. An order of rejection under R. 11 (b) of a plaint is appealable and a revision is therefore incompetent. 80 P.R. 1914=25 I. C. 565. Where a plaint has been rejected by a Court for non-payment of Court-fees, the proper remedy of plaintiff is by way of an application for review under O. 47, R. 11, 2 P. 504=4 Pat.L.T. 261. Order rejecting plaint—Decree—Appeal and second appeal—Appellate Court refusing to entertain appeal—Same whether good ground for preferring revision to High Court against original order. 49 C.L.J. 81. Order demanding additional Court-fee—Cannot be revised by High Court. 1930 P. 227. When a suit is dismissed for non-payment of proper Court-fee within the time allowed, it amounts to a rejection under R. 11, Cls. (b) and (c), and from that order there is an *appeal and second appeal*. When the appeal from the dismissal of the suit is also dismissed on first appeal, the remedy is a second appeal and not a revision application under S. 115, C. P. Code. 60 C.L.J. 197



LOC. AM.—[CALCUTTA.] O. 7, r. 11.—*Add the following as Cl. (e) :—*

“(e) Where any of the provisions of r. 9 (1-A) is not complied with and the plaintiff on being required by the Court to comply therewith within a time to be fixed by the Court, fails to do so.”

12. Where a plaint is rejected the Judge shall  
 Procedure on rejecting plaint. record an order to that effect with the reasons for such order.

13. The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from  
 Where rejection of plaint does not preclude presentation of fresh plaint. presenting a fresh plaint in respect of the same cause of action.

*Documents relied on in plaint.*

14. (1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.  
 Production of document on which plaintiff sues.

#### NOTES.

=38 C.W.N. 1063. As to Court-fee on appeal, *see* 1935 N. 83.

RES JUDICATA.—An order rejecting a memorandum of appeal for deficient Court-fee is not a decree or final order and does not preclude the appellant from presenting a fresh memorandum on proper Court-fee. 59 C. 388=138 I.C. 643=1932 C. 482. *See also* 40 C.W.N. 1390.

PRACTICE AND PROCEDURE.—The question whether a plaint ought to be rejected under R. 11 cannot depend on anything which the defendant may say in his written statement. The defect ought to be apparent on the face of the plaint. It is the duty of the Court under O. 7 to examine a plaint before issuing summons. The discovery of a patent defect should not, as a rule, be deferred until the summons has gone out, and the written statement has come in. 1933 S. 1=142 I.C. 501. Where a suit was by one indeterminate body of one community against a similar body of the same community, and no attempt was made to explain to the Court the true position of the respective bodies, it was held that the plaint was bad and should be rejected under O. 7, R. 11. 1941 A.M.L.J. 15. When once a plaint has been presented, that is final and unless it is rejected or returned according to O. 7, R. 11, it is to be immediately registered and a copy of it forwarded with notice to defendant. Return of plaint for amendments without notice to defendants is not proper inasmuch as the defendant is denied any benefit that might accrue to him from the mistake of the plaintiff. 1940 A.M.L.J. 129. Order dismissing suit against some defendants—Finding that suit cannot proceed against them for want of sanction of Provincial Governor—Decree—Plaint may be rejected as a whole. 1941 P.W.N. 25. *See also* 18 Pat.L.T. 921.

O. 7, R. 11 (d) and C.P.C., S. 80.—The requirement as to notice under S. 80 of the C. P. Code applies to all cases in which the Secretary of State is a defendant. Absence of such a notice entails a failure of the whole suit, irrespective of the existence of other defendants. In such a case the plaint is de-

fective and should be rejected as a whole under O. 7, R. 11 (d). Such a course is preferable to dismissal of the suit. 1937 P.W.N. 694=18 Pat.L.T. 921.

O. 7, R. 11 and S. 140: SCOPE OF.—The provision in the Code which really enables a Court to grant time to make good a deficiency in Court-fee stamp on the plaint is not R. 11 of O. 7, but S. 149; O. 7, R. 11 does not enforce upon a Court, the granting of time to make good the deficiency in Court-fee stamp. It is not an enabling provision but a disabling one. The authority to issue the order granting time lies in S. 149 and the penalty for default in R. 11 of O. 7; S. 149 gives the Court a discretion either to grant time or to refuse to grant time. 190 I.C. 197=1940 O. W.N. 797. *See also* 1938 A.M.L.J. 60.

O. 7, R. 13.—A fresh suit can be instituted provided it is not barred. 14 W.R. 289.

REJECTION UNDER O. 7, R. 13.—Power to restore under S. 151. *See* 1939 A.W.R. (H.C.) 325.

O. 7, R. 14.—It is competent for a witness for the purpose of refreshing his memory to refer to horoscope made at the time although the document has not been included in the list of documents under R. 14. 41 A. 68=23 C.W.N. 577=45 I.A. 284 (P.C.). A document given to a witness to refresh his memory does not come within the meaning of this rule. 1 M.H.C.R. 168. Reception of a document in evidence, which has not been produced at the proper time, is no ground for appeal. 8 M. 373 (374). *See also* 13 M. I.A. 77; 44 C.L.J. 385=99 I.C. 258=1927 C. 168. Refusal to receive it is a good ground. 4 M. 417; 8 B. 377. Sanction of the Court receiving the documents clears the defect of their not having been tendered with plaint. 13 M.I.A. 77. Documents produced by plaintiff in answer to case set up by defendants—No necessity for filing before first hearing. 4 Pat.L.T. 322. Rejection of documents not produced along with plaint if proper. 44 I.C. 21; 46 I.C. 246=27 C.L.J. 119. Good cause to be shown for non-production with plaint or at first hearing. 101 I.C. 911=1927 O. 612. Document sued on, to be produced with plaint; and if it is produced subsequently it can only be treated as evidence. 1 L. 6; 21



- (2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

List of other documents.

LOC. AMS.—[OUDH.] O. 7, r. 14. In Oudh for sub-s. (2) of r. 14, substitute the following :—

“(2) Where he relies on any other documents as evidence in support of his claim, he shall enter all of them in a list to be added or annexed to the plaint and shall produce in Court, when the plaint is presented; such of them as are in his possession or power. In regard to the documents not in his possession or power, he shall, if possible, state in whose possession or power they are, and shall cause them to be summoned for production before the Court on a date to be fixed by the Court for the purpose.

*Explanation.*—A certified copy of a public document is a document “in the power” of a party, but where a document is in the possession of a person other than the plaintiff, it will not be deemed to be “in the power” of the plaintiff.”

[N.W.F.P.]—Add to sub-r. (2) “and shall also produce such documents as are in his possession or power.”

Statement in case of document not in plaintiff's possession or power.

15. Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is.

LOC. AM.—[OUDH.] [Deleted by Oudh Chief Court.]

16. Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

17. (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where the document on which the plaintiff sues is an entry in a shop-book or other account in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies.

- (2) The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and, after examining and comparing the copy with the original, shall, if it is found correct, certify it to be so and return the book to the plaintiff and cause the copy to be filed.

#### NOTES.

C.W.N. 553 (P.C.); 32 M.L.J. 137=39 I.C. 243 (P.C.). See also 1937 A.M.L.J. 75. It should not be sprung upon the opposite party a considerable time after. 44 B. 625. A Court may refuse to admit later on unlisted documents. 1926 L. 527. In a suit on a promissory note for cash consideration, the defendant denied the receipt of consideration and therefore the plaintiff, in answer, produced before recording of evidence bonds not included in the list of documents filed with the plaint. Held, that in these circumstances no inference could be drawn against the plaintiff from the non-production of the bonds with the plaint or the omission from the list of the documents on which the plaintiff intended to rely, which list had also been filed with the plaint. 1936 L. 1016.

RIGHT OF INSPECTION under O. 11, R. 5 extends also to documents entered in a list annexed to the plaint. 1931 M. 825=61 M. L.J. 704 (24 C. 302, Diss.). See also 1938 Nag. 239.

O. 7, R. 14 (2) and O. 11, R. 15 and 18 (2): LIST OF DOCUMENTS RELEVANT AS EVIDENCE—IF PLEADINGS.—Though a defendant can insist on inspection of documents forming part of the pleadings, before he files his written statement, he cannot except in special cases insist upon inspection with reference to documents referred to in O. 7, R. 14 (2). They do not form part of the pleadings and defendant has not to plead to them any more than he has to plead to any other evidence in support of the plaintiff's case. It is therefore entirely unnecessary as a general rule to see these documents before he files his own statement. It may in certain circumstances be necessary, but then the procedure laid down in O. 11, R. 18 (2) must be observed. But whether the application is made under O. 11, R. 15 or O. 11, R. 18 (2), he must act promptly and delay in itself may be a ground for refusing to grant time for filing written statement until after inspection has been made. I.L.R. (1940) Nag. 331.

O. 7, R. 16.—A plaintiff founding his suit on a lost hundi must furnish security against possible claims. 16 I.C. 769; 59 I.C. 363. Document not filed in Court when may be allowed to be used. 60 I.C. 372.

O. 7, R. 16.—A plaintiff founding his suit on a lost hundi must furnish security against possible claims. 16 I.C. 769; 59 I.C. 363. Document not filed in Court when may be allowed to be used. 60 I.C. 372.



LOC. AMS.—[ALLAHABAD AND OUDH.] Add the following proviso to O. 7, r. 17 at the end of cl. (2) :—

"Provided that, if the copy is not written in English or is written in a character other than the ordinary Persian or Nagri character in use, the procedure laid down in O. 13, r. 12, as to verification, shall be followed; and in that case the Court or its officer need not examine or compare the copy with the original."

[LAHORE.] R. 17. Add the following :—

"Explanation.—When a shop-book or other account written in a language other than English or the language of the Court is produced with a translation or transliteration of the relevant entry, the party producing it shall not be required to present a separate affidavit as to the correctness of the translation or transliteration but shall add a certificate on the document itself, that it is a full and true translation or transliteration of the original entry, and no examination or comparison by the ministerial officer shall be required except by a special order of the Court."

18. (1) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(2) Nothing in this rule applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory.

LOC. AMS.—[ALLAHABAD.] Add the following rules to O. 7 :—

"19. Every plaint or original petition shall be accompanied by a proceeding giving an address within in English block-letter at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect and the Court may make such order as it thinks just.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present; a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed, such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

23. Where a party engages a pleader, notices or processes for service on him shall be served in the manner prescribed by O. 3, r. 5; unless the Court directs service at the address for service given by the party.

#### NOTES.

O. 7, R. 18.—Failure to produce a document—Effect of. See 1924 L. 608. See also 44 C.L.J. 385=99 I.C. 258=1927 C. 168; 44 B. 625. Certified copies of public documents may be received, though not produced with plaint. 67 I.C. 686=1922 P. 322. When there could no possible doubt about the existence of a document at the date of suit, it is not proper to refuse to admit it in evidence on the ground that it had not been produced with the plaint. 8 B. 377. The only penalty which the plaintiff incurs is that laid down in this rule. 22 B. 971. The penalty to the non-production of a document under O. 7, R. 14 is contained in R. 18 (1), and sub-rule (2) is an exception to sub-rule (1). 1936 A.L.J. 1195=1936 A.W.R. 983. See also 1937 A.M. L.J. 75. Where the defendant's case is not cleared till the evidence stage, the Court may permit the plaintiff to file a document at that stage if it is otherwise material. 148 I.C. 1040=35 P.L.R. 28=1934 L. 126.

See also 1936 L. 1016. The only ground contemplated by R. 18 for allowing a document which has not been produced in accordance with R. 14 to be produced at a later stage is that it may be used as evidence. The rule does not allow a plaintiff to put forward as creating rights a document which he has not in terms used. 168 I.C. 98=44 L.W. 840=1937 M. 122. No document can be taken after arguments have been heard, unless it be shown that the party, with the exercise of due diligence, could not have obtained a copy of this document at the proper stage, nor is any other reason given for its non-production before he closed his case. 1935 L. 648.

O. 7, R. 18 (2).—"Defendant's witnesses" in R. 18, Cl. (2) includes witnesses who have turned hostile to the plaintiff and may be treated as the adversary's witnesses. 54 I.C. 311. Sub-rule (2) is an exception to sub-rule (1). 1936 A.L.J. 1195=1937 A. 55.



24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

25. Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so."

26. Deleted by Notification 4084/35-A—3 (7) dated 24th July 1926.

[OUDH.] Add the following rules:—

"19. Every plaint or original petition shall be accompanied by an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. This address shall be called the 'registered address' and service thereat shall be deemed to be sufficient service.

20. Any party subsequently added as plaintiff or petitioner shall, in like manner, file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner.

21. A registered address shall be within the local limits of the District Court within which the suit or petition is filed, if the plaintiff or petitioner resides or carries on business within those limits.

22. If plaintiff or petitioner fails to file a registered address as required above, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

23. Where the registered address of the plaintiff or petitioner is within the limits of a headquarters town or of municipality of India (including Burma) or Ceylon, a notice, summons or other process may be served on him at that address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served.

24. In all cases to which r. 23 does not apply, where a plaintiff or petitioner is not found at his registered address and no agent or adult male member of his family on whom a notice or process can be served is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed, such plaintiff or petitioner is not present, another date shall be fixed and a copy of the notice, summons or other process shall be sent to his registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

25. Whenever a plaintiff or petitioner has engaged a pleader to act for him, a notice or process for service on him shall be served in the manner prescribed by O. 3, r. 5, unless the Court directs service at his registered address:

Provided that where a notice is served on a pleader under the above rule, he shall be given sufficient time to communicate with his client and to receive instructions.

*Explanation.*—Where 10 days' time has been allowed under this rule, this shall be deemed sufficient time within the meaning of this proviso in the absence of an application made within such 10 days by the pleader concerned for further time.

26. A plaintiff or petitioner who wishes to change his registered address shall file a verified petition, and the Court shall direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform, and may be either served upon the pleader for such parties or be sent to them by registered post, as the Court thinks fit."

27. Nothing in Rr. 19 to 26 shall prevent the Court from directing the service of a notice or process in any manner, if, for any reason, it thinks fit."

[LAHORE.] Add the following rules:—

"19. Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiff or petitioner subsequently added shall, immediately on being so added, file a proceeding of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the District Court within which the party ordinarily resides, if within the limits of the territorial jurisdiction of the High Court of Judicature at Lahore.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice, summons or other process can be served is present, a copy of the notice, summons or other process shall be fixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice, summons or other process had been personally served.

23. Where a party engages a pleader, notices, summonses or other processes for service on him shall be served in the manner prescribed by O. 3, r. 5, unless the Court directs service at the address for service given by the party.



24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

25. Nothing in these rules shall prevent the Court from directing the service of a notice, summons or other process in any other manner, if, for any reasons, it thinks fit to do so."

(Rules 19 to 25 inserted by High Court Notification No. 567—G., dated 24th November 1927.)

[PATNA.] Add the following rules :—

"19. Every plaint or original petition shall be accompanied by a statement giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner, and every plaintiff or petitioner subsequently added shall, immediately on being so added file a similar statement.

20. An address for service filed under the preceding rule shall state the following particulars :—

- (1) the name of the street and number of the house (if in a town) ;
- (2) the name of the town or village ;
- (3) the post office ;
- (4) the district; and
- (5) the munsiff (if in Bihar and Orissa) or the district Court (if outside Bihar and Orissa).

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post as the Court thinks fit."

[BOMBAY.] The following shall be added as Rr. 19 to 26 in O. 7 :—

Address to be filed with plaint or original petition. "19. Every plaint or original petition shall be accompanied by a memorandum in writing giving an address at which service of notice, or summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a memorandum in writing of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or Nature of address to be filed. if he cannot conveniently give an address as aforesaid, at a place where a party ordinarily resides.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu*, or any party may apply for an order to that effect, and the Court may make such order as it thinks just. Consequences of failure to file address.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, Procedure when party not found at the place of address. summons or other process shall be sent to the registered address by registered post pre-paid for acknowledgment, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

23. Where a party engages a pleader, notice or process on him shall be served in the manner prescribed by O. 3, r. 5, unless the Court directs service at the address for service given by the party. Service of notice on pleaders.

24. A party who desires to change the address for service given by him as aforesaid shall file a fresh memorandum in writing to this effect and the Court may direct the amendment of the record accordingly. Notice of such memorandum shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be served either upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit. Change of address.

25. Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so. Rules not binding on Court.

26. Nothing in these rules shall apply to the notice prescribed by O. 21, r. 22." Applicability to notice under O. 21, r. 22.

[NAOPUR.] Add the following as rr. 19 to 23 :—

"19. Every plaint or original petition shall be accompanied by a memorandum giving an address at which service of process may be made on the plaintiff or petitioner. The address shall be within the local limits of the Civil District in which the plaint or original petition is filed or, Registered address.



if an address within such Civil District cannot conveniently be given, within the local limits of the Civil District in which the party ordinarily resides.

Registered address by a party subsequently added as plaintiff or petitioner.

20. Any party subsequently added as plaintiff or petitioner shall in like manner file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner.

Consequences of non-filing of registered address.

21. (1) If the plaintiffs or the petitioner fails to file a registered address as required by R. 19 or 20, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected.

An order under this rule may be passed by the Court *suo motu* or on application of any party.

(2) Where a suit is dismissed or a petition rejected under sub-rule (1) the plaintiff or the petitioner may apply for an order to set the dismissal or rejection aside and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the registered address at the proper time, the Court shall set aside the dismissal or the rejection upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or petition.

22. Where the plaintiff or the petitioner is not found at his registered address, and no agent or adult male member of his family on whom a process can be served is present, a copy of the process shall be affixed to the outer door of the house and such service shall be deemed to be as effectual as if the process had been personally served.

Affixing of Process and its validity.

23. A plaintiff or petitioner who wishes to change his registered address shall file a verified petition and the Court shall direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform."

Change of Registered address.

[SIND.]—

"19. Every plaint or original petition shall be accompanied by a memorandum in writing giving an address at which service of notice, or summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a memorandum in writing of this nature.

Address to be filed with plaint or original petition.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed or if he cannot conveniently give an address as aforesaid, at a place where a party ordinarily resides.

Nature of address to be filed.

21. Where a plaintiff or petitioner fails to file an address for service he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu*, or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

Consequence of failing to file address.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served is present a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post pre-paid for acknowledgment, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

Procedure when party not found at place of address.

23. Where a party engages a pleader, notice or process on him shall be served in the manner prescribed by O. 3, r. 5, unless the Court directs service at the address for service given by the party.

Service of notice on pleaders.

24. A party who desires to change the address for service given by him as aforesaid shall file a fresh memorandum in writing to this effect and the Court may direct the amendment of the record accordingly. Notice of such memorandum shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be served either upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

Change of address.

25. Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so.

Rules not binding on Court.

26. Nothing in these rules shall apply to the notice prescribed by O. 21, r. 22."

Applicability to notice under O. 21, r. 22.

[N.-W.F.P.]—

"19. Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons, or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall immediately, on being so added, file a proceeding of this nature.



20. An address for services filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or, of the District Court within which the party ordinarily resides, if within the limits of the North-West Frontier Province.

21. Where a plaintiff or petitioner fails to file an address for service he shall be liable to have his suit or his petition dismissed by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. A party who desires to change address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties, or be sent to them by registered post as the Court thinks fit."

## ORDER VIII.

### *Written Statement and Set-off.*

1. The defendant may, and, if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence.

LOC. AMS.—[OUDH.] O. 8, r. 1. *Add the following as r. 1 (2) and read the existing r. 1 as r. 1 (1):—*

"(2) The defendant shall file with his written statement a list of all the documents on which he relies as evidence in support of his case, shall produce with the written statement such of the documents as are in his possession or power, and shall cause the others to be summoned on a date to be fixed by the Court for the purpose.

*Explanation.*—A certified copy of a public document is a document "in the power" of a party, but where a document is in the possession of a person other than the defendant, it will not be deemed to be "in the power" of the defendant."

[LAHORE.] The following was *added*:—

"and with such written statement, or if there is no written statement, at the first hearing shall produce in Court all documents in his possession or power on which he bases his defence or any claim for set-off.

(2) Where he relies on any other documents as evidence in support of his defence or claim for set-off he shall enter such documents in a list to be added or annexed to the written statement or where there is no written statement to be presented at the first hearing. If no such list is so annexed or presented, the defendant shall be allowed a further period of ten days to file this list of documents.

(3) A document which ought to be entered in the list referred to in sub-cl. (2) but which has not been so entered, shall not, without the leave of the Court, be received in evidence on the defendant's behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to documents produced for cross-examination of plaintiff's witnesses or handed to a witness merely to refresh his memory."

[N.-W.F.P.] O. 8, r. 1. *Add the following as sub-cl. (2):—*

"The defendant at the time of presenting a written statement shall, where he relies on any documents (whether in his possession or power or not), enter such documents in a list and produce those documents which are in his possession or power."

2. The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

## NOTES.

O. 8, R. 1.—A written statement cannot be filed by one who is not a party to the suit. 25 W.R. 17. Where a written statement on behalf of defendant is not filed by him personally or on his behalf by a duly constituted agent, but by a third person, the procedure is not regular. 53 A. 466=1931 A.L.J. 181=1931 A. 333 (2). A written statement tendered before, or at the first hearing, need not bear any Court-fee. 5 B. 400. The practice of filing written statements on behalf of persons accused of cri-

iminal offences is improper. 32 I.C. 137=20 C.W.N. 128.

O. 8, R. 2.—Defence to be specific and clear. 76 I.C. 603=1923 C. 578. Limitation should be specifically pleaded. 66 I.C. 287=34 C.L.J. 205; 69 I.C. 194. S. 3 of the Limitation Act makes the question of limitation a material question although not raised by the parties; but a Court is not bound to raise and decide a question of fact of its own motion. Hence where the question of limitation is purely one of law capable of determination on the facts admitted or prov-



3. It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

4. Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

5. Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

#### NOTES.

ed before the Court, the Court is bound under the provisions of S. 3 to raise the question *suo motu* and decide it. But where the question of limitation raises issues of fact not arising from the plaint, the defendant is bound under O. 8, R. 2, to raise such question in his written statement; if he fails to do so, thereafter it is within the discretion of the Court to allow the question to be raised or not. Where the question of limitation was raised by the facts alleged in the plaints themselves, the Court is bound under S. 3 of the Limitation Act to decide the question on the facts stated in the plaints, at whatever stage of the hearing it was raised, or even if it was not raised at all by the parties themselves. 1940 Rang. L.R. 273=A.I.R. 1940 Rang. 207. Limitation under special law cannot be allowed to be raised in appeal. 69 I.C. 194; 60 I.C. 280=32 C.L.J. 236; 46 I.C. 787=28 C.L.J. 216. Plea of want of necessity cannot be raised for the first time in appeal. 1 P. 612=3 Pat.L.T. 367. So also a plea that the suit should have been brought by plaintiff in a representative capacity. 39 Bom.L.R. 917=1937 Bom. 476. A defendant in a suit in ejectment, denying plaintiff's title and tenancy, cannot plead want of notice to quit. 17 M.L.J. 287. Raising of new defence for the first time in appeal not allowed. 95 I.C. 573=28 Bom.L.R. 513. In many cases persons in verifying the pleadings, defendants their written statements or plaintiffs their plaints are often found to say something which is not strictly true, e.g., a defendant may deny the making of a contract in order to force the plaintiff to give evidence and be subjected to cross-examination or to put the matter raised in issue. But by such action he does not render himself liable for prosecution for perjury for making false statement. 1930 C. 639=129 I.C. 111.

O. 8, R. 3.—As to what amounts to an admission of the case in plaint, see 1927 A. 225=95 I.C. 1.

O. 8, Rr. 3 and 5.—Where a lessor of a house sued the lessee for damages for breach of the lease agreement which was reduced to writing, but which though compulsorily registrable was not registered and his allegations in the plaint as to the terms of the lease were not specifically denied the effect is that the suit can be decreed as on an admission. 1938 O. A. 785=1938 O.W.N. 1080.

O. 8, R. 4.—It is a principal underlying R. 4 that the pleadings should be specific. 27 A.L.J. 1153=1929 A. 721 (2).

O. 8, Rr. 4 and 5.—It is enough to say in the written statement that a fact is not admitted in order to put the plaintiff to proof of it. 40 L.W. 366=1934 M. 579=67 M. L.J. 327. See also 55 A. 700=1933 A. 521.

O. 8, R. 5: APPLICATION OF.—R. 5 is limited in its application to cases where there is in fact a pleading before the Court. 20 C.W.N. 1192=43 C. 1001; 115 I.C. 425; 1930 P. 293. For scope of R. 5, see 47 I. C. 589=35 M.L.J. 372. The principle that non-admissions in certain cases are equivalent to admissions does not apply to a case where the averments in the plaint to which the principle is sought to be applied are vague and inconclusive. 30 S.L.R. 233=1937 Sind 11. A defendant who does not put in any defence is bound by all the allegations in the plaint; under R. 5, every allegation of fact in a plaint must be taken as admitted unless denied or stated to be not admitted in the pleading of the defendant. The rule is not confined to a case where a pleading has been put in by the defendant; it equally applies to a case in which the defendant puts in no pleading. 60 B. 788=164 I.C. 189=38 Bom.L.R. 577=1936 B. 285. But it has been well settled that a mere omission to file a written statement does not amount to an admission of the facts stated in the plaint. 14 P. 70=157 I.C. 433=1935 P. 306. There is not a denial by necessary implication of the statements in the plaint when the language which can be looked to to find that denial is a



6. (1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

Particulars of set-off to be given in written statement.

jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

#### NOTES.

statement which is in itself so inconsistent as not to be capable of admitting or denying anything. 190 I.C. 320=A.I.R. 1940 Rang. 190. Where in a suit the defendant has admitted that he executed a bond for certain sum on certain date on taking accounts and has admitted that he agreed to pay the amount on certain date, this is not a case, which falls under O. 8, R. 5 of an implied admission. This is an example of an express admission. A.I.R. 1941 Nag. 95. Where in a suit for dissolution of partnership and accounts the plaintiff stated the proportion of shares, defendants, while alleging that the shares were different, did not specify what the shares were, *held*, that the Court could treat the evasive denial as an admission of the correctness of the statement in the plaint. 113 I.C. 370=1929 S. 7. See also 8 O.W.N. 1080 (Case of no denial). A denial of knowledge of a fact is not a denial of the fact, nor is it even putting the fact in issue. It merely means that the defendant denies that he has any knowledge of it, but any man can, of course, admit a fact of which he has no personal knowledge. Where a defendant in a mortgage suit instead of denying specifically or refusing to admit specifically, the mortgage in favour of the mortgagee, merely denies knowledge of the mortgage, such a procedure is neither a specific denial of the mortgage nor is it a statement that the mortgage is not admitted, and consequently under R. 5, it must be held against such defendant that he has by implication admitted the mortgage in favour of the mortgagee. 152 I.C. 395=1934 R. 278. A recital in the written statement that a certain allegation in the plaint is not admitted cannot be deemed to be an admission, but amounts to denial by necessary implication. 55 A. 700=1933 A.L.J. 998=1933 A. 521. See also 168 I.C. 330=1937 S. 11; 1934 M. 579=67 M.L.J. 327; 1941 Rang. 49 (Statement at certain allegations need no reply, effect of).

CONSTRUCTION.—Strict construction ought not to be placed on the written statements as is placed on pleadings in England. 39 I.C. 460; 45 I.C. 878. In the absence of specific denial, a document relied on by a party must be accepted as admitted between the parties and therefore need not be proved. 41 B. 89=18 Bom.L.R. 946. Allegations in plaint not denied in written statement, effect of. 49 I.C. 733. Such portions of plaintiff's claim as are admitted by defendant need not be proved by plaintiff. 131 I.C. 206=1931 L. 203. A pleading "not

known" cannot be held to be the same thing as "not admitted." 133 I.C. 414=1931 A. 423. The words "stated to be not admitted" in R. 5 means specifically stated to be not admitted. 22 L.W. 26=1925 M. 950. Omnibus clause that defendant denies all allegations not expressly admitted is not sufficient. 1925 M. 950.

O. 8, R. 6: SCOPE OF.—The provisions of R. 6 and O. 20, R. 19 (1) read together, show that the Court must treat the claim of the defendant exactly as if the defendant had filed a plaint and the Court must pass a decree in favour of the defendant, if his claim is established, even though the claim of the plaintiff against the defendant is dismissed. Nature of set-off discussed. 150 I.C. 433=1934 A.L.J. 393=1934 A. 543. According to O. 8, R. 6, before a set-off can be claimed, it must be presented in a written statement which shall have the same effect as a plaint, and it must be shown that it is an 'ascertained' sum of money legally recoverable by the defendant from the plaintiff, and that both parties fill the same character as they fill in the plaintiff's suit. A claim for commission over reduction of losses, stated approximately, was held to be not an 'ascertained sum' of money. 1940 N.L.J. 176=A.I.R. 1940 Nag. 177. If the accounts are of one and the same person, the mere fact of the accounts being separate or in different names would not attract the provisions of O. 8, R. 6, and a set-off can be claimed. 42 P.L.R. 201=A.I.R. 1940 Lah. 290. The rule only provides for set-off in suits for recovery of money but makes no provision for counter-claim. 1922 C. 1. This rule is not exhaustive but Courts can allow an equitable set-off if the amount claimed arises out of the same transaction though not an ascertained amount. 92 I.C. 787=1926 O. 301. Set-off is a creature of statute and is governed by O. 8, R. 6, although the latter part of the rule indicates that there may be a set-off other than that provided by the rule. Under this rule, a claim barred by the law of limitation cannot be pleaded by the defendant by way of set-off. The fact that the transactions which were the subject-matter of the claim and of the set-off were with regard to the same estate is immaterial. 181 I.C. 1006=A.I.R. 1939 Pat. 567. Where defendant makes a counter-claim to the plaintiff's suit and the Court decides to hear two together but the plaintiff withdraws his suit with liberty to bring a fresh one, the counter-claim can be continued as a plaint and proceeded on its



(2) The written statement shall have the same effect as a plaintiff in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

## NOTES.

merits. (2 R. 486, Ref.) 152 I.C. 552=1934 R. 160. In a suit for accounts defendant counter-claimed—Court dismissed plaintiff's suit and passed decree in favour of defendant—*Held* equitable set-off was rightly allowed and R. 6 is no bar. 35 C. W.N. 17=132 I.C. 195=1931 C. 358. See also 128 I. C. 763=1930 A. 875; 27 A. 145; 59 C. 833 (counter-claim by defendant allowed by way of equitable set-off). "Debt" in this rule means a present obligation to pay a liquidated sum of money. 42 M. 873=37 M.L.J. 193. "Ascertained sum" means a conclusive and indisputable amount. 37 I.C. 367. See also 130 I.C. 87=1931 N. 12. It does not include unliquidated damages and mesne profits. 130 I.C. 87. See also 19 Pat.L.T. 585=1938 Pat. 484. Specified sums are not necessarily ascertained sums of money "legally recoverable" within the meaning of the rule. 16 C. 71; 95 I.C. 358=1926 S. 225. A sum to be ascertained on a settlement of account is not an ascertained sum. 49 I.C. 193; 57 C. 855. A counter-claim for a definite amount by way of set-off though not admitted is a claim for an ascertained sum. 1933 R. 13. O. 8, R. 6 is no way referable to matters arising in *insolvency or liquidation proceedings*. 1939 M.W.N. 1231=1940 Mad. 266. See also 1941 O.W.N. 548. If the defendant is sued by the agent he cannot set-off a debt due from the principal, unless it can be shown that the agent has assented to such a set-off. A receiver appointed under S. 69-A of the T. P. Act is an agent of the mortgagor, and if he sues the defendant to recover a sum of money on the basis of a new contract entered into by him, the defendant cannot seek to set off against the plaintiff's claim a debt incurred by the mortgagor prior to the date of his appointment. Such a debt is not legally recoverable by the defendant from the plaintiff—it is recoverable from the plaintiff's principal who is not a party to the suit. 45 C.W.N. 169.

**DISTINCTION BETWEEN SET-OFF AND 'COUNTER-CLAIM'.**—24 Bom.L.R. 998=1923 B. 113; 47 B. 182=24 Bom.L.R. 328. A set-off is either legal or equitable. R. 6 is restricted to legal set-off. Equitable set-off is allowed if the demands arise out of the same transaction or are so connected that they can be looked upon as part of the same transaction and when the amount is unascertained. O. 20, R. 19 (3) recognises equitable set-off. A set-off may be purely defensive, that is, it may amount to an adjustment or satisfaction of the plaintiff's claim or it may be a counter-claim under which the defendant claims a decree for the sur-

plus amount due to him. In a defensive set-off, the set-off claimed must be recoverable at the date of the plaintiff's suit. In a counter-claim the sum claimed by the defendant should be legally recoverable at the date when he makes the claim, i.e., at the date when he files the written statement. The words "legally recoverable" in R. 6, mean legally recoverable at the date of the institution of the suit in one case and mean legally recoverable at the date when the counter-claim is made in the other case. Although in R. 6 and O. 20, R. 19, there is no clear distinction between a mere set-off, i.e., a defensive set-off and a counter-claim, a distinction has been made in Indian Courts in accordance with the law of England, as it is based on a sound principle. 1936 C. 277. See also 34 Bom. L. R. 1401=1932 B. 617; 1937 Nag. 210=171 I.C. 502; 1939 Pat. 142. There is a different *terminus ad quem* for the case of a mere set-off and the case of a counter demand. In the former case the amount claimed must be legally recoverable by him on the date of the suit, while in the latter it must be legally recoverable by him on the date of his written statement. The result is that he can get a set-off up to the amount of the plaintiff's claim provided his claim was not time-barred at the time of the suit. But if he wants to have a decree for the excess amount, he must show that it was not time-barred at the time when he filed the written statement. A claim for set-off cannot be allowed in respect of an unascertained amount. 1934 A.L.J. 286=1934 A. 427; 1936 N. 290. In the case of a regular set-off, such as is contemplated by O. 8, R. 6, if the plaintiff's claim breaks down for any reason including withdrawal then the defendant would be entitled to have his set-off considered by the same Court and he could be given a decree for a set-off in the same suit, but where his claim is not a regular set-off but is a counter-claim, then, if the counter-claim lies in the Small Cause Court he cannot agitate it in the regular Court. 1941 N.L.J. 382. Before a set-off can be allowed the parties must fill the same character as they fill in the plaintiff's suit. 8 L. 105=101 I.C. 762=1927 L. 228. See also 1940 Lah. 290; 44 C.W.N. 924. It is not open to a defendant to claim a set-off in respect of unliquidated damages for alleged breaches of contracts. 24 Bom. L. R. 998=1923 B. 113; 130 I.C. 87=1931 N. 12; 1933 R. 13, or unascertained sums. 1939 A.M.L.J. 159. Plea of set-off as distinct from equitable set-off. 9 N.L.J. 227. Set-off not pleaded in written statement, effect of. See 102 I.C. 688=1927 L. 431. The right of set-off exists not only in cases



(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

#### NOTES.

of mutual debts and credits but also of cross demands arising out of the same transaction. 21 I.C. 716=19 C.W.N. 1183; 17 C.W.N. 1060=19 C.L.J. 152; 126 I. C. 444=1930 L. 808.

**LEGAL AND EQUITABLE SET-OFF.**—A legal set-off requires a Court-fee because it is a claim that might be established by a separate suit in which a Court-fee would have to be paid. But there is no such fee required in the case of an equitable set-off which is for an amount that may equitably be deducted from the claim of the plaintiff where a Court-fee has been paid on the gross amount. An equitable set-off may however only be claimed by the defendant for a claim arising out of the same transaction as the plaintiff's claim. 1934 A.L.J. 421=1934 A. 115. *See also* 1936 A.M.L.J. 60 (Court-fees necessary). When there are different demands arising out of the same transaction or so connected in their nature and circumstances that they can be looked upon as part of one transaction, there arises an equitable set-off on which no Court-fees are payable. 1936 A.M.L.J. 10; 39 P.L.R. 345=1937 L. 73. It is not the law that a claim to set-off a definite sum of money can only be put forward under R. 6. Nor is it the case that an equitable set-off can only be urged when the claim is to an unascertained amount. The claim by way of equitable set-off can be urged when the claim of the defendant is to an ascertained amount also. But a claim for equitable set-off will not, however, arise simply because there are cross-demands; there must be some connection between them which will make it inequitable to drive the defendant to a separate suit. The two claims must arise out of the same transaction, and there must be knowledge on both sides of an existing debt due to one party and a credit by the other party, founded on and trusting to such debt as a means of discharging it. 40 C.W.N. 751. R. 6 applies only to a legal set-off and not to any other set-off that a party may equitably claim. 39 I.C. 508=62 P.R. 1917. R. 6 not a bar to equitable set-off. 35 C.W.N. 17; 1930 A. 875. An equitable set-off which is barred by limitation cannot be allowed. 42 M. 873=37 M.L.J. 193; 22 M. 139; 28 M.L.J. 294; 39 M. 939=30 M.L.J. 59=32 I.C. 80. *See also* 44 I.C. 428=34 M.L.J. 32; 62 C.L.J. 430=40 C.W.N. 75; 1936 N. 290; 160 I.C. 908=1936 Pesh. 57; 8 L. 105=101 I.C. 762=1927 L. 228; 122 I.C. 490. But *see* 21 I.C. 716=19 C.W.N. 1183. Equitable set-off cannot be claimed as of right and the Court has a discretion to refuse to allow it. If a protracted enquiry is necessary for determination of the sum due, it may be a ground for refusing it. 1940 N.L.J. 176=1940 Nag. 177. Where in a suit on a promissory note the defendant

puts in a counter claim that he had pledged gold with plaintiff as security for the promissory note and prays for a decree for the excess of gold value over plaint amount, but does not stamp his counter claim, on his admission of the execution of the suit note, the suit must be decreed as the two transactions are separate. But if the defendant stamps his counter claim properly, the two cases can be tried together in one suit. But the filing of the stamp paper in the appellate Court will not validate the counter claim in the trial Court and the defendant's remedy is only to file a separate regular suit on his counter claim. 156 I.C. 425=1935 R. 116. A claim to set-off must be adjudicated according to common sense and equity. 82 P.R. 1914=25 I.C. 560. Time-barred claim by a coparcener against joint family cannot be set-off. 41 M.L.J. 370=62 I.C. 852. In case of legal set-off, defendant is not bound to put forward his counter-claim and a separate suit by him will lie. 60 I.C. 226=12 L.W. 173. The Court is bound to try a claim to set-off which falls under O. 8, R. 6. 57 I.C. 656=12 L.W. 85; 40 M. 688=30 M.L.J. 655. A plea of set-off cannot be raised without filing a written statement. 25 I.C. 361=16 M.L.T. 122; 28 P.L.R. 297=1927 L. 431. Conditions as to right to set-off. 2 Pat.L.J. 451=40 I.C. 350. Failure to plead equitable set-off is not bar to suit. It is not obligatory to plead an equitable set-off. 49 M.L.J. 14=1925 M. 830. *See also* 179 I.C. 828=1939 Pat. 264. Defendant making a statement that he would make a separate counter-claim is not estopped from claiming a set-off in the same suit. 20 L.W. 531=1925 M. 228. R. 6 does not apply to unascertained sum, but if cross demands are very closely connected, set-off can be pleaded. 49 M.L.J. 14=1925 M. 830. The whole of the sum claimed as set-off should be within jurisdiction. 2 R. 349=84 I.C. 956. *Court-fees* on claim of set-off. *See* 1927 N. 74=97 I.C. 916. Even in suit on negotiable instrument, defendant can claim set-off. 130 I.C. 87=1931 N. 12.

**ATTORNEY'S LIEN.**—The question whether an attorney's lien should or should not be allowed to intercept a set-off between the parties to a suit, is, in India, a matter for the Court's discretion. The lien has no overriding priority. 34 Bom.L.R. 1429=1932 B. 619. *See also* 40 C.W.N. 458. The Civil Procedure Code does not contain exhaustive general principles of law applicable to a question of *attorney's lien for his costs*. That question is governed by the relevant principles of law, inasmuch as the C.P. Code does not in terms say that the pre-existing law (English law) is to be abrogated. 38 C.W.N. 1031; 40 C.W.N. 458. *Claim arising out of territorial jurisdiction* can be the subject-matter of set-off. In this respect it differs from a counter-claim. 34 Bom.L.R. 1401=1932 B. 617.



LOC. AM.—[PATNA.] R. 6 (1)—Add the words :—

“and the provisions of O. 7, rr. 14 to 18 shall, *mutatis mutandis*, apply to a defendant claiming set-off as if he were a plaintiff.”

#### Illustrations.

(a) A bequeaths Rs. 2,000 to B and appoints C his executor and residuary legatee. B dies and D takes out administration to B's effects. C pays Rs. 1,000 as surety for D; then D sues C for the legacy. C cannot set-off the debt of Rs. 1,000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of the Rs. 1,000.

(b) A dies intestate and in debt to B. C takes out administration to A's effects and B buys part of the effects from C. In a suit for the purchase-money by C against B, the latter cannot set-off the debt against the price, for C fills two different characters, one as the vendor to B, in which he sues B, and the other as representative to A.

(c) A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set-off. The amount not being ascertained cannot be set-off.

(d) A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims being both definite pecuniary demands may be set-off.

(e) A sues B for compensation on account of trespass. B holds a promissory note for Rs. 1,000 from A and claims to set-off that amount against any sum that A may recover in the suit. B may do so, for, as soon as A recovers, both sums are definite pecuniary demands.

(f) A and B sue C for Rs. 1,000. C cannot set-off a debt due to him by A alone.

(g) A sues B and C for Rs. 1,000. B cannot set-off a debt due to him alone by A.

(h) A owes the partnership firm of B and C Rs. 1,000. B dies, leaving C surviving. A sues C for a debt of Rs. 1,500 due in his separate character. C may set-off the debt of Rs. 1,000.

7. Where the defendant relies upon several distinct grounds of defence or set-off  
 Defence or set-off founded on separate grounds.      founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.

8. Any ground of defence which has arisen after the institution of the suit  
 New ground of defence.      or the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement.

9. No pleading subsequent to the written statement of a defendant other than  
 Subsequent pleadings.      by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

#### NOTES.

“SUIT FOR RECOVERY OF MONEY”.—A suit on a promissory note accompanied by deposit of title-deeds is a claim for recovery of money within the meaning of R. 6, as the words “suits for recovery of money” do not necessarily mean a suit for recovery of money pure and simple. Moreover a suit in which it is asked that the defendant may be called upon to pay a certain amount of money, and in default a certain property should be sold, is a suit for money. 1933 R. 13=147 I.C. 134. (8 C.W.N. 174, Dist.; 10 A. 587, Foll.).

COURT-FEES.—Where in a suit for rent by a landlord against his tenant, the tenant makes a counter-claim for damages on account of his having been dispossessed by the landlord, but does not pay Court-fee on the amount claimed by him as damages, he is not entitled to any relief in the suit in respect of the damages claimed. 1941 Pat. 106=21 Pat.L.T. 821. It is clear from Art. 1 of Sch. I of the Court-Fees Act that fees must be paid on a set-off, and it must be paid on

the full amount of the set-off and not only on the amount claimed in excess of that claimed by the plaintiff court-fees should be paid also on an equitable set-off. 1940 N. L.J. 176=1940 Nag. 177. In a suit when the defendant claims an equitable set-off by claiming damages arising out of the same contract on which the plaintiff bases his claim, no separate Court-fee is necessary. 39 P.L.R. 345=A.I.R. 1937 Lah. 73. See also 1940. Nag. 177, *supra*.

O. 8, R. 9.—Court's permission is necessary for filing pleading in reply to defendant's written statement. 27 Bom.L.R. 890=1925 B. 390. There is no special provision in the Code which entitles a *minor defendant* to file an additional written statement on attaining majority. The matter can only fall under R. 9, and under that rule, an additional written statement otherwise than by way of a defence to a set-off shall only be presented by leave of the Court and on such terms as the Court thinks fit. The Court has, therefore, discretion either to grant or refuse permission and if it refuses leave except in the case specifically



10. Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

Procedure when party fails to present written statement called for by Court.

LOC. AMS.—[ALLAHABAD.] Add the following rules to O. 8 :—

"11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall, on or before the date fixed in the summons or notice served on him as the date of hearing, file in a Court a proceeding stating his address for service, written in English in block letters and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just.

12. Rules 20, 22, 23, 24, 25 and 26 of O. 7 shall apply, so far as may be, to addresses for service filed under the preceding rule."

[Note.—R. 26 has been deleted by Allahabad High Court.]

[BOMBAY.] "11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court, a memorandum in writing stating his address for service, and if he fails to do so, he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks fit :

Provided that this rule shall not apply to a defendant who has not filed a written statement but who is examined by the Court under S. 7 of the Dekhan Agriculturists' Relief Act, 1879, or a date later than that specified in the rule.

Applicability of Rr. 20 and 22-26 of O. 7 to addresses for service. 12. Rules 20, 22, 23, 24, 25 and 26 of O. 7 shall apply, so far as may be, to addresses for service filed under the last preceding rule."

[LAHORE.] Add the following rules :—

"11. Every party whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons, notice or other process served on him as the date of hearing, file in Court a proceeding stating his address for service ; and if he fails to do so, he shall be liable to have his defence, if any struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

12. Rules 20, 22, 23, 24 and 25 of O. 7 shall apply so far as may be, to addresses for service filed under the preceding rule."

[NAGPUR.] Add the following as Rr. 11 to 13 :—

"11. Every defendant in a suit or opposite party in any proceedings shall, on the first day of his appearance in Court, file a memorandum giving an address for service on him of any subsequent process. The address shall be within the local limits of the Civil District in which the suit or petition is filed, or if an address within the limits of such Civil District cannot conveniently be given,

Registered address.

NOTES.  
named, it is final and cannot be interfered with in revision. 1935 M. 117=41 L.W. 640=68 M.L.J. 155. See also 1937 P.W.N. 720=1937 Pat.625. Where no harm has resulted from not filing proceedings for registered address and the case is going on normally, and the address is thereupon put in, which appears to have been accepted by all the parties and by the Court as a sufficient address, the Judge is wrong in ordering the defence to be struck out and he cannot proceed against the defendant *ex parte* and decree the suit. 1935 L. 791.

O. 8, R. 10.—R. 10 relates back to R. 1 as well as to R. 9, and the rest are of the nature of an explanation to R. 1. 40 I.C. 223=1917 M.W.N. 241. But see 1 B. 217; 43 C. 1001.

APPLICABILITY.—Rule applies only to specific requirement by the Court to the filing of

a written statement and not to a general direction in the summons that such a written statement may be filed. 12 O.L.J. 532=88 I.C. 540=1925 O. 567. Vakil refusing to file is sufficient cause to excuse delay in filing written statement. 41 M.L.J. 213=44 M. 978. As O. 8 in terms applies only to a written statement and a set-off, the plaintiff could not be called upon to put in the counter-written statement. Where a Court thinks it necessary to clear up the ground further, the proper procedure to be followed is that laid down in O. 10, R. 1 of the Code. 31 Bom.L.R. 1118=1929 B. 413.

APPEAL.—Where the Court refuses to strike out the plaint on the ground that the plaintiff has sufficiently set out the particulars of fraud alleged the order is not subject to appeal. 131 I.C. 129=1931 L. 77.



within the local limits of the Civil District in which the party ordinarily resides. This address shall be called the "registered address" and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution.

Consequence of non-filing of registered address.

12. (1) If the defendant or the opposite party fails to file a registered address as required by R. 11, he shall be liable, at the discretion of the Court, to have his defence struck out and to be placed in the same position as if he had made no defence.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

(2) Where the Court has struck out the defence under sub-rule (1) and has adjourned the hearing of the suit or the proceeding and where the defendant or the opposite party at or before such hearing, appears and assigns sufficient cause for his failure to file the registered address he may upon such terms as the Court directs as to costs or otherwise be heard in answer to the suit or the proceeding as if the defence had not been struck out.

(3) Where the Court has struck out the defence under sub-rule (1) and has consequently passed a decree or order, the defendant or the opposite party, as the case may be, may apply to the Court by which the decree or order was passed for an order to set aside the decree or order; and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the address, the Court shall make an order setting aside the decree or order as against him upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or proceeding:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant or opposite party only it may be set aside as against all or any of the other defendants or opposite parties.

13. Rules 20, 22 and 23 of O. 7 shall apply, so far as may be, to addresses for service filed under R. 11." (*Notifications Nos. 7390 and 7391, dated the 19th September, 1929.*)

[OUDH.] "11. Every defendant in a suit or opposite party in any proceeding shall, on the first day of his appearance in Court, file an address (to be called the 'registered address') for service on him of any subsequent notice, summons or other process; and, if he fails to do so, shall be liable, at the discretion of the Court, to have his defence or reply, if any, struck out, and to be placed in the same position as if he had made no defence or reply.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

12. Rr. 21, 23 and 25 to 27 of O. 7 shall apply so far as may be, to addresses for service filed under the preceding rule, and R. 24 shall, in the same manner, apply, but as if the words at the beginning "In all cases to which R. 23 does not apply" were omitted.

13. Nothing in Rr. 11 and 12 shall apply to the notice prescribed by O. 21, R. 22."

[PATNA.] Add the following rules:—

"11. Every party, whether original, added or substituted, who appears in any suit or other proceedings shall, at the time of entering appearance to the summons, notice or other process served on him, file in Court a statement stating his address for service and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

12. Rr. 20 and 22 of O. 7 shall apply, so far as may be, to addresses for service filed under the preceding rule."

[SIND.] "11. Parties to file address.—Every party whether original, added or substituted, who appears in any suit or other proceeding shall, on or before the date fixed in the summons or notice served on him, as the date of hearing, file in Court, as a memorandum in writing stating his address for service and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just:

Provided that this rule shall not apply to a defendant who has filed a written statement, but who is examined by the Court under S. 7 of the Dekhan Agriculturists' Relief Act, 1879, or otherwise, or in any case where the Court permits the address for service to be given by a party on a date later than that specified in this rule.

12. Applicability of Rr. 20 and 22-26 of O. 7 to addresses for service.—Rr. 20, 22, 23, 24, 25 and 26 of O. 7 shall apply, so far as may be, to addresses for service filed under the last preceding rule."

[N.-W.F.P.] "11. Every party, whether original, added or substituted, who intends to appear and defend any suit or original petition shall on or before the date fixed in the summons or notice served on him as the date of hearing file in Court a proceeding stating his address for service, and if he fails to do so, he shall be liable to have his defence, if any, struck out and be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just.

12. Rules 20 and 22 of O. 7 shall apply, so far as may be, to addresses for service, filed under the preceding rule."



## ORDER IX.

*Appearance of Parties and Consequence of Non-appearance.*

1. On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court.

Parties to appear on day fixed in summons for defendant to appear and answer.

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.

2. Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed :

## NOTES.

O. 9, R. 1.—O. 9 does not apply to execution proceedings. 35 I.C. 337. See also 13 L. 761; 1931 M. 656=61 M.L.J. 348 (F.B.); 1931 A.L.J. 622=1931 A. 594; 133 I.C. 65=1931 S. 97 (F.B.); 17 A. 106; 41 I.C. 586=21 C.W.N. 769; 47 C.L.J. 87; 51 M.L.J. 219=1926 M. 980; 1926 M. 412=50 M.L.J. 200; 50 M. 67=51 M.L.J. 219; 100 I.C. 518=1927 C. 420; 53 C. 679; 1929 L. 744. The provisions of O. 9 do not in terms apply to execution proceedings but execution applications can be restored under the inherent powers of Court. 13 L. 761=142 I.C. 686=1933 L. 99. See also 145 I.C. 995=1933 A.L.J. 1032=1933 A. 783 (F.B.). Desirability of framing a new rule making O. 9 applicable to execution proceedings pointed out. 1931 M. 656=61 M.L.J. 348 (F.B.). O. 9 does not apply to the special set of circumstances contemplated by O. 10, R. 4. 1921 M.W.N. 390=63 I.C. 961=14 L.W. 15. As to applicability of O. 9 to application under S. 84, Madras Hindu Religious Endowments Act, see 45 L.W. 695=1937 Mad. 653=(1937) 2 M.L.J. 175; and to application under O. 34, R. 5, C.P. Code. See 31 S.L.R. 180=1937 Sind 273. The Court has power to order a case to be set down for hearing if the defendant enters appearance before the time for appearance fixed in the summons. 4 Beng.L.R. App. 75. For the meaning of the words "day fixed", see 2 A. 67. A defendant has a right to appear at the hearing of the case although he has not been served. 15 B. 160. The provisions of O. 9, by themselves, do not apply to a case in which the plaintiff or the defendant has already appeared but has failed to appear at an adjourned hearing of the case. For such a case the procedure laid down in O. 17, which deals with adjournments. 1935 A.L.J. 209=156 I.C. 754=1935 A. 210.

INSOLVENCY COURT.—The Insolvency Court in the mofussil has by virtue of S. 5 of the Provincial Insolvency Act, the same powers of setting aside orders passed *ex parte* as it has under O. 9. 61 M.L.J. 719.

REVENUE COURT.—A Civil Court to which an issue has been sent by the Revenue Court for decision under S. 271, Agra Tenancy

Act, 1926, and which has decided that issue *ex parte* has jurisdiction under S. 141 and O. 9, to entertain an application for the setting aside of the *ex parte* decision and to decide the issue on the merits. 147 I.C. 721=1934 A.L.J. 831=1934 A. 86.

MORTGAGE SUIT—NECESSARY PARTY IMPLEADED AFTER LIMITATION—DISMISSAL.—R. 9 of O. 1 of the Code is subordinate to O. 34, R. 1. A mortgage is indivisible and if all the parties entitled to share in the money due on the mortgage are not on the record the suit must be dismissed in its entirety. When a necessary party has not been impleaded at the time of the institution of the suit but has been brought on the record after the period of limitation has expired, the whole suit must be dismissed. (1 Pat.L.J. 468, Foll.) 37 C.W.N. 478=1933 C. 621.

O. 9, R. 2.—Court ordering summons in the ordinary way and by registered post—Plaintiff paying process-fee and not postal charges—Dismissal of suit—Illegal. 90 I.C. 909=1927 L. 157; 99 I.C. 909. The Court is bound to fix a time within which the process-fee is to be paid into Court as provided for in O. 48, R. 2, C.P. Code; and the failure to so fix a time amounts to a material irregularity; when no such time has been fixed, the dismissal of the suit under O. 9, R. 2, for failure to pay process-fee is illegal and unjustified. 158 I.C. 250. This rule does not authorise the Court to dismiss a suit merely for the reason that the process-fee which is required for fresh summons is not filed promptly along with the application for the issue of such summons. 1933 P. 582. The rule has no application to a case where the plaintiff did not furnish the correct address of the defendants or did not go with the process server to serve the summons. 99 I.C. 898=1927 L. 170. See also 132 I.C. 524=1931 L. 655. (To such a case O. 9, R. 5 applies and the plaintiff has three months' time to supply the correct address for fresh summons). The Court cannot dismiss the suit before the date fixed for hearing. 2 A. 318. The rule will apply where there are more defendants than one, and the plaintiff fails to pay process-fees for one or some of the defendants only. 5 Bom.H.C. (A.C.) 119. But see R. 11.



Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.

LOC. AM.—[ALLAHABAD.] After the words "for such service" in the first paragraph insert the words "or that the plaintiff has failed to comply with the rules for filing the copy of the plaint for service on the defendant."

Where neither party appears, 3. Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

#### NOTES.

Reasonable time for compliance with Court's order to be given. 55 I.C. 650. If a plaintiff does not deposit sufficient process-fees for service on all the defendants and fails to deposit the balance of fee before the date fixed for the hearing of the suit, the Court will be justified in dismissing the suit for default. The fact that the defendants are not present on the date of hearing makes no difference, because their absence is due to the non-payment of the process-fee. It is not open to the plaintiff to contend that the Court should serve at least the defendants for whose service the money paid will be sufficient. If the plaintiff wishes the Court to issue process to some of them he must specify which of them he desires to serve. It is not for the Court to decide which of the defendants are to be served, because the plaintiff might afterwards complain that the Court had exercised an unwise discretion by serving unsubstantial defendants and omitting to serve notice on substantial defendants. The plaintiff cannot be allowed to put the Court in such a position. 194 I.C. 47. Failure to file affidavits of service of summons on guardian of minor defendants—Dismissal for default is not proper. 55 I.C. 826=1 Pat.L.T. 125. The fact that the plaintiff through his negligence failed to get a minor defendant properly served and to get a guardian appointed for him, does not justify the dismissal of the suit under O. 9, R. 2, as against the other defendants who had been duly served. 1937 O. W.N. 977=1937 Oudh 502. A fresh application can be made where an application for a final decree in a mortgage suit is dismissed for default of appearance of both parties. 43 I.C. 518=16 A.L.J. 1431. The mere fact that a case had been previously dismissed for default is no reason for refusing to restore it after a second dismissal. 43 I.C. 180. On this rule, see also 9 C. 163; 20 B. 541. No appeal lies from an order dismissing a suit under O. 9, Rr. 2 and 4 for default, as it is not a decree, plaintiff could seek relief under R. 4. 38 A. 357; 9 C. 627. Dismissal of an application for insolvency is not a bar for the making of a fresh application. 1928 P. 116 (49 I.C. 229, Foll.) A Court has no power to require a plaintiff to file process fees or copies of the plaint before fixing a date for the appearance of the defendant. Such an order is illegal and failure to comply with it does not entail dis-

missal of the suit. A dismissal of the suit for failure to comply with such an order is without jurisdiction. 19 Pat.L.T. 854=A.I.R. 1939 Pat. 160.

REVISION.—See 8 O.W.N. 1179.

O. 9, R. 3.—Rule applies only to a case where a date is fixed for the appearance of the defendant. 49 A. 592=25 A.L.J. 437. See also 130 I.C. 771=1931 L. 69; 1925 L. 96=78 I.C. 15; 94 I.C. 237=1926 L. 320. The provisions of O. 9, R. 3 are not obligatory, but merely give the Court a discretion to make an order in suitable circumstances that the suit be dismissed. 162 I.C. 557=1936 P. 437. Unless a date has been fixed for the appearance of the defendant and neither party appears when the suit is called on for hearing on that date, O. 9, r. 3, would not apply. 159 I.C. 226=1935 L. 656. Where an application to restore a suit dismissed for default under O. 9, R. 3 is also dismissed in default, a second application to restore it is competent. 148 I.C. 917=1934 Pesh. 13. Day fixed for hearing preliminary issue—Parties absent—Dismissal of suit, if proper. 1929 L. 830=31 P.L.R. 441. As to whether a suit dismissed under this rule can be restored, see 103 I.C. 620. The mere physical presence of a pleader not instructed to proceed with the case is not an appearance. 9 I.C. 842. Notice of application for restoration of a suit dismissed under this rule in the absence of both the parties need not be sent to the other side. (10 A.L.J. 399, Foll.) 24 O.C. 347=1923 O. 55. When the parties state that the case be struck off as settled it amounts to withdrawal and no suit can lie again. 32 I.C. 624=(1916) 1 M.W.N. 171. Application for amendment of issues—Parties absent—Suit cannot be dismissed. 6 Pat.L.J. 331=63 I.C. 746. See also 102 I.C. 416=1927 S. 228. Where an application is made for the amendment of issues and the Court fixes a day for the consideration of the application for amendment but the parties do not appear on the fixed date the Court has no right to dismiss the suit for default. It can only dismiss the application for amendment. 35 P.L.R. 342=1934 L. 237. On an application of plaintiff to amend the plaint, the amendment was allowed and fresh summons was ordered to be issued to the defendants along with copies with amended plaint which plaintiff was asked to file in a certain time. Plaintiff failed to file the copies of the amended plaint and on the date fixed,



4. Where a suit is dismissed under R. 2 or R. 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the Court-fee and postal charges (if any) Plaintiff may bring fresh suit or Court may restore suit to file.

## NOTES.

both parties were absent, whereupon the suit was dismissed. *Held*, that the case fell under R. 3 and not under R. 5 and that the order of dismissal was proper. 146 I.C. 1031=1934 P. 18. Failure to appear must be on the day fixed for hearing, or on the date to which the hearing is adjourned. 2 A. 67 (P.C.); 4 M.H.C. 56. *See also* 1933 N. 234. But the suit is not to be dismissed for failure to appear on the day fixed for judgment. 100 I.C. 472=9 L.L.J. 178. Where in a mortgage suit a preliminary decree was passed and the judgment-debtors failed to pay up the amount and thereupon the plaintiff applied for a final decree but the parties were absent on that date and the Court dismissed the suit under O. 9, R. 3 and the plaintiffs subsequently applied under S. 151 praying for the setting aside of the order, *held*, that the Court had no power to dismiss the suit but should have proceeded to pass the final decree. *Held also*, that the order of dismissal was an abuse of the process of the Court and could be rectified in an application under S. 115. 10 O.W.N. 293=1933 O. 229=8 Luck. 496. Where a preliminary decree for partition has been passed and the Court takes proceedings for passing the final decree, the suit should not be dismissed for default. The suit should be adjourned *sine die* and made revivable on payment of costs. 176 I.C. 32; 1938 Pesh. 27. A Judge is not bound to wait until the Court is about to close for the day. 7 M. 356. When neither party appears, the Court should dismiss the suit, and not strike the case off the file. 10 M. 270. The trial Court refused to restore to file a suit which was dismissed under R. 3 without giving due weight to the facts that plaintiff had been taken ill, that his Counsel was only a few minutes late, and that a fresh suit would be barred. *Held*, that the suit should be restored to file and proceeded with according to law. 148 I.C. 175=1934 L. 34 (1). The rule applies to execution applications. 20 B. 541. *See also* 9 C. 163. No appeal lies from an order under this rule. 10 M. 270.

**O. 9, Rr. 3 and 4.**—Where in the course of adjustment of business a case was transferred to the file of another Court but no notice of the transfer was given to the plaintiff, and when the case came up for hearing none of the parties was present and the suit was dismissed under R. 3, the Court should, on the application of the plaintiff, restore the case. 165 I.C. 563=38 P.L.R. 1118. Failure to give a list of witnesses within the time fixed would only involve in Court declining to hear evidence subsequently called. It could under no circumstances result in the

dismissal of a suit. O. 9, Rr. 3 and 8 refer to the dismissal of a suit on the failure of parties to appear when the suit is called on for hearing, and clearly a date fixed solely as the last day on which a list of witnesses may be filed is not a date fixed for hearing. The word 'hearing' in these rules although does not mean solely the recording of evidence, it means what it says, that is, "when the suit is called for hearing before the Court" and does not include the disposal of a routine matter which is within the powers of an officer of the Court and need not come before the Court at all. A.I.R. 1938 Rang. 360.

**O. 9, R. 3 and O. 22, R. 4.**—Where after a suit was dismissed under O. 9, R. 3, it was found that the defendant had died a day earlier and an application for restoration and substitution was made more than 30 days after the dismissal but within 90 days of the death of the defendant and it was allowed in the lower Court, it was *held* that in the circumstances of the case there was no reason to interfere in revision with the order passed. 1941 O.A. (Supp.) 609=1941 R.D. 662 (2).

**O. 9, R. 4: APPLICATION.**—R. 4 does not create but declares the right of bringing a fresh suit while at the same time permitting the plaintiff in the alternative to proceed with his original suit. The alternative provisions of the rule are not mutually exclusive; and a plaintiff whose application for restoration of the dismissed suit has been rejected is not thereby precluded from bringing a fresh suit, subject to the law of limitation. 15 P. 716=17 Pat.L.T. 644. Where order for costs will sufficiently compensate the other side, restoration must generally be ordered. 41 P.L.R. 571=1939 Lah. 592. *Ex parte* suit is as much a judicial proceeding as a contested suit. Plaintiff has to prove his case by evidence and it is for the judge to hear and decide on it. This cannot be left to the Reader of the Court. 1939 A.M.L.J. 72. R. 4 expressly applies to suits, and cases under O. 21, Rr. 100 and 101 are not suits within this rule. 52 I.C. 416. But *see* 2 P. 372, *infra*. Where a previous application for amendment of decree was dismissed for default on account of the plaintiff failing to file the process papers, a second application for amendment was held to be maintainable. 12 P. 179; 144 I.C. 59=1933 P. 208. (39 C. 265, Foll.) An application under O. 21, R. 100 is not an application in execution, the proceedings being in the nature of a summary suit. R. 4 can well apply to proceedings under O. 21, R. 100. 4 Pat.L.T. 93=2 P. 372. O. 9, R. 4 does not apply to the dismissal of an application under O. 21,



required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

LOC. AM.—[BOMBAY.] This rule shall be numbered as R. 4 (1) and the following sub-rule (2) shall be added to it :—

“(2) The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications made under this rule.”

5. [(1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of three months from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons

Dismissal of suit where plaintiff, after summons returned unserved, fails for three months to apply for fresh summons.

#### NOTES.

R. 90. 53 C. 679=1926 C. 773. Application under, to restore suit—Applicability of S. 5, Limitation Act—Power of Court to extend time. 51 A. 487=27 A.L.J. 323.

“SUFFICIENT CAUSE”, WHAT IS.—A *bona fide* mistake which is not unreasonable amounts to sufficient cause. 96 I.C. 881 (1)=1926 L. 634; 3 Bom.H.C. 60; 135 I.C. 199=1932 L. 176 (*Bona fide* mistake as to the date of hearing is good cause to set aside order). See also 130 I.C. 542=1931 P. 87. (Where plaintiff was not able to attend on account of picketing by volunteers it would be a sufficient cause to set aside order of dismissal of suit. 130 I.C. 542). If there are minor plaintiffs or defendants, represented by a next friend or guardian *ad litem*, and the next friend or guardian is absent, through whatever cause, at the trial and the Court makes an order of dismissal of suit or an *ex parte* decree, the absence of the next friend or guardian, as the case may be, is alone a sufficient reason for setting aside the order of dismissal in the case of minor plaintiffs or the *ex parte* decree against the minor defendants. 152 I.C. 163=1934 M. 616=67 M.L.J. 387. Whether absence of counsel amounts to sufficient cause, see 26 M. 599; 1929 L. 882 (1). Where the non-service is due to the process being mislaid in Court, the suit should be restored. 100 I.C. 595 (1). Grounds for restoration of suit dismissed under R. 3. See 103 I.C. 620. As to carelessness of petitioner, see 27 Punj.L.R. 264. An application under this rule need not always be accompanied by an affidavit. 3 Bom.L.R. 130. Default to pay process-fees for the attendance of one of several defendants—Suit cannot be dismissed against all. 60 I.C. 377=2 Pat.L.T. 256. The mere fact that the District Judge put down in his order of remand that the parties were to appear before the Subordinate Judge on a certain date does not prove that this direction is actually conveyed to the counsel of the parties or to the parties by the counsel concerned and there is “sufficient cause” within the meaning of O. 9, R. 4 for the absence of the plaintiffs on such date. 1935 L. 163. Duly authorised agent present—Suit cannot be dismissed for default. 3 Pat.L.T. 447

=68 I.C. 659. A Judge when restoring a suit to file under this rule cannot pass an order as to the general costs of the suit. 26 B. 201. An order of dismissal for default can under R. 4 be set aside only by the Court which passed the order. 2 L.L.J. 48=56 I.C. 884. The two remedies provided by O. 9, R. 4 are not mutually exclusive. 96 I.C. 187=1926 A. 678. See also 26 A.L.J. 776=1929 A. 131. Suit by shebait in name of idol dismissed for default—Application for restoration under O. 9, R. 4 is maintainable by another shebait who is the shebait at the time of the application. The real plaintiff in the suit must be held to be the idol and not the shebait who was suing in his name. 177 I.C. 401=42 C.W.N. 806=A.I.R. 1938 Cal. 547. One out of several plaintiffs may appear on behalf of all and the non-appearance of the other plaintiffs may be excused. The restoration of a suit is entirely a matter of discretion for the Court and the mode of its exercise cannot be interfered with by a Court of appeal where the lower Court has restored the suit for certain reasons. 27 A.L.J. 1103. Court is bound to consider application to set aside order under this section even though there has been a compromise in the case. 28 N.L.R. 295.

NOTICE.—On an application under R. 4 notice to a defendant is unnecessary. (10 A.L.J. 399, Foll.) 64 I.C. 767=1923 O. 55. Where a suit is restored after its dismissal on the ground that neither the plaintiff nor the defendant had appeared on the date fixed originally for the hearing of the case, the defendant is entitled both in equity and as of right to notice of the date fixed for hearing the case after its restoration by the plaintiff. (17 I.C. 292, Dist.) 55 A. 684=1933 A.L.J. 962=1933 A. 522.

APPEAL.—No appeal lies from an order under R. 4 refusing to set aside the dismissal of a suit under R. 3. 43 I.C. 180; 42 I.C. 613=2 Pat.L.W. 172. Fresh application can be made although the application to sue in *forma pauperis* is once dismissed. 2 Bur.L.J. 217=1924 R. 161; 53 C. 679=96 I.C. 705.

O. 9, R. 5.—R. 5 does not give the appellant the right to apply for fresh summons at any time within a year (now three months)



the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that—

(a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or

(b) such defendant is avoiding service of process, or

(c) there is any other sufficient cause for extending the time, in which case the Court may extend the time for making such application for such period as it thinks fit.]<sup>1</sup>

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

Procedure when only plaintiff appears.

6. (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then—

#### LEG. REF.

<sup>1</sup> Sub-rule was substituted by Act XXIV of 1920.

#### NOTES.

from the date of return to the Court. 17 I.C. 294. It gives the Court power to dismiss the suit if after a summons has been issued to the defendant and returned unserved, the plaintiff fails for a period of three months to apply for the issue of a fresh summons, unless within that time the plaintiff shows cause for extending the time. An order dismissing the suit before the expiry of three months to which plaintiff is entitled for tracing out defendant, is premature and irregular. 1933 P. 557=147 I.C. 179. Dismissal for default—Absence of petitioner—Non-service—Effect of. 1926 C. 112=90 I.C. 675. Order for issue of fresh notice to *pro forma* defendant—Plaintiff not complying with order—Dismissal of suit even as against contesting defendant not proper. 1937 R. D. 384. An order staying proceedings under O. 9, R. 5, C.P. Code, is illegal, where the report on the summons which was attempted to be served is that the defendant is absconding. 38 P.L.R. 197. Where the defendant's address is not furnished by the plaintiff for service of summons the Court cannot dismiss the suit under O. 9, R. 2. Under R. 5 he has three months to supply the correct address for fresh summons. 132 I.C. 524=1931 L. 655. The provisions of O. 9, R. 5 giving one year's time (now three months' time) for the issue of first summons would not apply to appeals. 50 B. 815=100 I.C. 147=1927 B. 68, dissenting from 25 M.L. J. 451. See also 21 I.C. 420. A summons ought not to be ordered after the lapse of one year (now three months) unless the plaintiff shows that there has been no laches on his part. 15 Beng.L.R. (App.) 12. See also 5 C. 126; 3 Bom.L.R. 402. This rule applies also to application for final decree in mortgage suit. 1931 M. 795=135 I.C. 377.

O. 9, Rr. 5 and 6: NON-SERVICE OF SUMMONS—DISMISSAL OF SUIT FOR LACHES—APPLICATION FOR RESTORATION.—The question of exercising inherent powers comes when the exhausted. A summons was returned unpowers expressly conferred by the Code are

served with the note that it had reached only after the expiry of the date fixed. Thereupon plaintiff applied for issue of fresh summons, but the Court rejected his application and dismissed the suit for laches of the plaintiff. This order was ought to be supported as being passed under inherent power, as no provision of the Code was mentioned. Held, that the Court was empowered to act under either R. 5 or 6 and that the order of dismissal passed under inherent power should be set aside. 147 I.C. 200=1933 P. 582.

O. 9, R. 6: SCOPE OF RULE—PROCEDURE.—See 1 P. 188=69 I.C. 837. R. 6 lays down when the Court may proceed *ex parte* but there appears to be no explanation in the Code what *ex parte procedure* is. 69 I.C. 619=1923 N. 83. A decree passed on merits in the absence of the plaintiff and his pleader reporting no instructions is an *ex parte* decree. 1927 M.W.N. 897=1928 M. 234. See also 1937 All. 347; 1938 Nag. 213. A decree passed in the presence of the pleader for defendants is not an *ex parte* decree. 6 P. 383=103 I.C. 711=1927 P. 291. Where the witnesses came to Court late on account of heavy rain and the defendant not being present when the case was called the Court treated the case as closed. Held, that the case fell under this rule and an application under O. 9, R. 12 was sustainable. The fact that the defendant's pleader was physically present when the case was taken up will not make any difference. 149 I.C. 512=30 N.L.R. 94. The application of the rule is not limited to defendants residing within British India. 23 A. 99. O. 9, R. 6 is not meant to be penal, but only intended to prevent undue delay. 134 I.C. 268=1931 N. 122. The words "*proceed ex parte*" in R. 6 mean proceed to take and determine evidence. 42 C. 1001=20 C.W.N. 1192. The appearance referred to in this rule is an appearance in an answer to a summons to appear and answer the claim on a day specified therein. 7 A. 538. "When a suit is called on for hearing" in connection with O. 9 refers to the first day's hearing and in connection with O. 17, R. 2 means "when the suit is first called on for hearing." 26 L.W. 76=104 I.C. 371=1927 M. 799. *Ex*



- When summons duly served. (a) if it is proved that the summons was duly served, the Court may proceed *ex parte* ;
- When summons not duly served. (b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;
- When summons served, but not in due time. (c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.
- (2) Where it is owing to the plaintiff's default that the summons was not duly served, or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.
7. Where the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.
- Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.

## NOTES.

*parte* proceedings cannot be taken on the basis of a service effected through registered post. 1926 L. 579=95 I.C. 874. Plaintiff ready—Defendant applying for adjournment—Court granting same—Plaintiff's evidence taken all the same and *ex parte* decree passed—Legality. 50 C.L.J. 549=1930 C. 251 (1). The mere fact of a case, being *ex parte* does not render bad evidence otherwise reliable. 37 I.C. 27. A decree cannot be passed *ex parte* merely because the defendant does not appear. The plaintiff must prove *prima facie* that his claim is true. 91 I.C. 119=1926 O. 192; 1937 O.W.N. 620; 118 I.C. 527 (1).

O. 9, Rr. 6 and 7.—The object of Rr. 6 and 7 of O. 9 will be frustrated if defendants could be allowed to absent themselves with impunity at the earlier stages of a litigation. But where, by reason of causes for which none of the parties is responsible, the case has not made much progress, there is no reason why these rules should be applied as penal provisions depriving parties of the opportunity of putting forward their defence. It will not in any sense, be reopening what has happened in the past if a defendant who has been declared *ex parte* should be permitted to file a written statement, when the case is only at a stage when the other defendants has filed their written statements and certain issues framed but no evidence has yet been recorded, even if the filing of the proposed written statement might raise other issues. In such a case a defendant who has been declared *ex parte* is entitled to file a written statement and proceed with the trial by cross-examining the plaintiff's witnesses and also by leading evidence on his own behalf. In the absence of a statutory restriction in the Code corresponding to O. 6, R. 2 of the High Court Original Side Rules, mofussil Courts cannot impose any restriction on a

defendant set *ex parte* continuing the suit at the stage at which it stands when he appears so long as he does not thereby reopen anything that has been done already. 49 L.W. 372=1939 Mad. 385=(1939) 1 M.L.J. 64.

O. 9, R. 6 and O. 17, R. 2.—Applicability—Date fixed for hearing of suit after framing of issues—Defendant absent—Application by pleader for adjournment—Refusal of—Pleader withdrawing—Decree is *ex parte*—"Appearance." It is open to defendant to apply to have the *ex parte* decree set aside. 1937 A.L.J. 239=1937 A. 347; 1939 Nag. 213; 185 I.C. 247. O. 17, R. 2 applies only to a case where a suit comes on for hearing on a date to which it is adjourned and any party fails to appear. It does not apply to a case where the suit comes up for disposal on the date which is the date for the first hearing. A distinction has to be made between a first hearing and an adjourned hearing. 1937 A.L.J. 239=1937 All. 347.

O. 9, R. 7.—Rule should be construed liberally. 131 I.C. 447=1931 O. 159. See also 185 I.C. 247. "Good cause" in R. 7 of O. 9, includes non-service of summons. 1936 A.M.L.J. 18. If a defendant does not show good cause to set aside *ex parte* order he cannot claim a re-hearing; and what has already taken place must stand. This does not mean that he should not participate in future proceedings. He can appear in subsequent proceedings and contest the suit. 134 I.C. 268=1931 N. 122. An application to the Court under R. 7 can be made through a vakil notwithstanding that the Court had decided to proceed *ex parte* owing to the non-appearance of the defendant in person pursuant to an order of the Court. 55 I.C. 945=11 L.W. 289. In the absence of good and sufficient cause for previous non-appearance the defendant cannot be allowed to appear and defend the suit; and the case should proceed *ex parte* against him. 1 B.



8. Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

## NOTES.

217; 9 B.L.R. App. 15. But see also 26 M. 599. Defendant declared *ex parte*—Appearance on adjourned day—Application to appear is not necessary. 92 I.C. 493=1926 S. 181; 91 I.C. 545=1925 M. 1275; 185 I.C. 247; 106 I.C. 664=1928 M.W.N. 103 (1). But see 115 I.C. 310=1929 S. 46. A guardian's laches is a sufficient cause for setting aside an *ex parte* decree or order in the case of minors. (27 M.L.J. 166, Foll.) 11 L. W. 289. Good cause not shown—Application need not be allowed. 26 O.C. 10=73 I.C. 591. An appeal lies from an order dismissing a suit for default where part of the claim is rejected. 45 M.L.J. 497=4 L. 284=50 I.A. 162 (P.C.). Where an application to set aside an order declaring a defendant *ex parte* is dismissed under R. 7 and an *ex parte* decree is passed against a defendant, it is open to the defendant to apply under O. 9, R. 13, to set aside that order or to prefer an appeal from the *ex parte* decree. 113 I.C. 409. In setting aside *ex parte* proceedings the Court has no jurisdiction to order payment of costs when the defendant does not want re-hearing of the proceedings previous to his appearance. 134 I. C. 1107=1931 L. 616. Where in the case of an *ex parte* order, the applicant to set it aside states that he did not receive the summons. Held that, if the applicant knew of the suit, the *ex parte* order should not be set aside and if the applicant did not know, she ought not to be made to pay costs. 1937 A.M. L.J. 70.

O. 9, R. 8: SCOPE OF.—53 C. 844. The Court is not competent to bring its inherent powers into play in order to restore an order made under R. 8 in a case where no sufficient cause for non-appearance has been established. 143 I.C. 158=1933 Pesh. 59. Failure to appear—Procedure. 24 Bom.L.R. 775=46 B. 1026. Absence of plaintiff—Court cannot hear cases on merits. 20 A.L.J. 123=1923 A. 68; 55 I.C. 966; 37 A. 466=29 I.C. 553. See also 1940 R.D. 402=(1940) A.W.R. (B.R.) 214; 1938 R.D. 614. Where the plaintiff is absent but he has been adjudged insolvent, whether formal notice to Official Assignee necessary even though he has actual knowledge of the suit. 1927 C. 76=31 C.W.N. 22=53 C. 844. Where there are several defendants jointly interested in a particular matter, an admission by some of them is relevant against all the defendants. (4 C. 133; 45 C. 159, Ref.) 69 I.C. 35=1923 L. 123. Order fixing date for appearance invalid—Non-appearance on such date does not entitle the Court to throw

out the suit. 33 P.L.R. 804. Person not being legal guardian instituting suit—Dismissal of suit under O. 9, R. 8—Suit by minor on attaining majority not barred. 15 R.D. 394. Dismissal for default—Propriety—Suit transferred to another Court—Notice of hearing served on pleader. 164 I.C. 142=1936 L. 560. Dismissal of suit for default on date fixed for submission of Commissioner's report—Legality—Hearing of the suit—Meaning of. 161 I.C. 790=1936 L. 280.

MEANING OF TERMS.—The word "claim" in R. 8 being synonymous with the amount sued for, refers to the right claimed irrespective of the amount stated in the relief column. 35 I.C. 65. The words "admits the claim or part thereof" applicable to the cases where the Court can consider on the examination of the plaintiff and defendant's written statement that the defendant is ready to pay the admitted claim there and then or submit to the relief claimed in the plaint. 35 I.C. 65.

"APPEAR," MEANING OF.—The word 'appear' in the rule means "appearing in the suit". A party may be present in the precincts of the Court or he may be found present in the Court room but if he does not take part in the suit it cannot be said that he has 'appeared'. If the plaintiff comes to Court and files an application for adjournment and when it is refused he retires from the suit, he is not considered any longer to be present in the suit, though he may not have physically retired from the Court and even if he had been questioned by the Court regarding the *bona fides* of his application. 59 C. 756=138 I.C. 87=36 C.W.N. 158=1932 C. 418. (34 C. 403 and 51 M.L.J. 290, Foll.; 23 B. 414 and 33 B. 475, Not foll.) See also 36 C.W.N. 160. Where the plaintiff's counsel confines himself to asking for an adjournment and, when it is refused, retires from the case and states that he has no further instructions. R. 8 of O. 9 applies and the plaintiff will not be held to have appeared. However, exact language used by the counsel to that effect is not of great importance and one must look at all the circumstances to see in any particular case whether counsel retired from the case so as not to prejudice his client by appearing or whether he, for reasons which commended themselves to him, abandoned his claim in the suit. I.L.R. (1938) 1 Cal. 213=174 I.C. 657=1938 Cal. 74.

COURT'S POWER TO PASS ORDERS.—The provisions of O. 9, Rr. 8 and 13 are exhaustive in respect of cases where the plaintiff makes default in appearance in a suit. 103 I.C. 425=1927 L. 622. In dismissing a suit



9. (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

## NOTES.

for default, a Court has no jurisdiction to provide that the order shall not prejudice a minor plaintiff. 63 I.C. 736=6 Pat.L.J. 317. A Court has jurisdiction to direct a plaintiff to appear in person and to dismiss his suit if he fails to appear. But it cannot dismiss the suit against the other plaintiffs. 50 I.C. 323=4 Pat.L.J. 152. A person added as additional plaintiff on the objection of the defendant was ordered to appear personally—Order dismissing suit for default of appearance is erroneous. 95 I.C. 865 (1)=1926 L. 577. Where a plaintiff and his witnesses were absent and his pleader had instructions only for an adjournment the Court can dismiss the suit only under O. 9, R. 8 and not under O. 17, R. 3. 23 I.C. 614=1914 M.W.N. 344; 1926 C. 246=90 I.C. 768. When the pleaders appear and intimate to the Court that they have no instructions from their client, it is tantamount to default of appearance by the party. [22 A. 66 (F.B.), Foll.] 1936 L. 1000. Where a sole plaintiff dies before trial, the dismissal of the suit for non-appearance is improper. 35 A. 331=40 I.A. 1150=25 M.L.J. 148 (P.C.). See also 162 I.C. 842=1936 R. 204 (Non-appearance on account of missing of train—Restoration proper). When all the evidence has been adduced but plaintiff and his pleader do not appear at a subsequent hearing, the suit cannot be dismissed. 7 Bom.L.R. 201. Dismissal for default—If plaintiff dead on the date of hearing order is a nullity. 73 I.C. 230=1924 O. 114. The date fixed for the settlement of issues is a date fixed for the hearing of the suit within R. 8. 48 I.C. 192=1919 P.H.C.C. 32. In a pre-emption suit, evidence of the parties was recorded after the issues had been framed and then a Commissioner was appointed to report as to the value of land. On the date fixed for the return of the report the plaintiff was absent from the Court and the report also was not submitted by the Commissioner and the suit was dismissed under R. 8. Held, that the case really fell under O. 17, R. 2 which gives a discretion to the trial Court either to proceed under R. 8, or to make such order as it thinks fit, that the suit should not have been dismissed but adjourned. 1934 L. 56=148 I.C. 521.

**PRELIMINARY DECREE PASSED—SUBSEQUENT DISMISSAL OF SUIT.**—After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed in appeal. The parties on the making of a decree acquire rights or incur liabilities which are fixed unless and until the decree

is varied or set aside. After a decree any party can apply to have it enforced. It is not competent to the trial Court to dismiss the suit on the ground of non-appearance of one of the plaintiffs after a preliminary decree has already been drawn up. 144 I.C. 383 (2)=1933 S. 200.

**APPEAL.**—Dismissal under R. 8—Appeal does not lie. 1922 M.W.N. 483=1922 M. 416. As to powers of appellate Court, see 1926 A. 284=92 I.C. 496.

**O. 9, Rr. 8 and 9.**—Date fixed for payment of costs of adjournment by defendant to plaintiff—Suit dismissed for non-appearance of plaintiff—Application for restoration by his counsel on same day—Plaintiff, entitled to restoration. 38 P.L.R. 484. Case transferred to another Court and adjourned *sine die*—Plaintiff not notified of date of hearing—Dismissal for default—Restoration proper. 1935 Pesh. 186.

**O. 9, Rr. 8 and 9 and O. 17, R. 2.**—Where in the absence of the plaintiff, his counsel puts in an application for adjournment and that application is refused, the Court should, in view of the Explanation to O. 17, R. 2, proceed as though the plaintiff is present, and decide the suit on the merits. Where, however, this is not done and the Court dismisses the suit for default, it must be deemed to decide the matter upon its merits and not act merely under O. 9, R. 8. The proper remedy of the plaintiff in such circumstances, is to file an appeal, and not to make an application under O. 9, R. 9. 164 I.C. 1059=1936 A.L.J. 635=1936 A. 659. See also 1935 A.L.J. 724=1935 All. 398. Courts should not lightly dispose of litigation without going into the merits. It is also equally plain that Courts are bound in certain circumstances to dismiss cases for default. One case is that indicated in O. 9, R. 8. It is true that when a case reaches the stage where the issue stage has in part been passed, the Court is not compelled to exercise its powers under O. 9, R. 8 but is given power to make another order under O. 17, R. 2 and in any doubtful case the Court should so act. I.L.R. (1939) Nag. 574=1939 N.L.J. 351=1939 Nag. 213.

**O. 9, Rr. 8 and 9 and O. 22, R. 3.**—Where a suit is dismissed for default of appearance of a plaintiff who is already dead, the dismissal can be set aside without a formal application to that effect being made by the legal representative of the deceased plaintiff under O. 9, R. 9. An application by the legal representative to bring him on record falls under O. 22, R. 3. 31 N.L.R. 374=158 I.C. 602=1935 N. 189.

**O. 9, R. 9: SCOPE OF.**—See 41 I.C. 905; 29



(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

### NOTES.

I.C. 902; 55 I.C. 481=23 O.C. 18. See also 1 Pat.L.J. 547=38 I.C. 53; 8 L.R. (Rev.) 281. Under O. 9, R. 9 when sufficient cause is shown re-opening is mandatory, but when sufficient cause is not shown it is discretionary with Judge. 164 I.C. 236=1936 R. 335. In an application for restoration under O. 9, R. 9 the plaintiff must show some fact which was either not known to the Court when it dismissed the suit, or at least at that stage lacked satisfactory proof. I.L.R. (1938) 1 Cal. 213=174 I.C. 657=1938 Cal. 74. Where a plaintiff appears with only one day's delay and files an affidavit explaining his absence and this explanation is not contested by the other party at the subsequent hearing, it should be accepted as adequate ground for restoration. 1940 A.W.R. (B.R.) 132 (2)=1940 O.A. 783. In deciding whether a suit dismissed for default should be restored under O. 9, R. 9, what has really to be considered is whether the party was really trying to appear on the date fixed for the case and if he honestly intended to be represented though in his own stupid way, not being guilty of anything in the way of misconduct or gross negligence, then he should not be deprived of his chance of being heard. (1923 Mad. 63, Foll.) 164 I.C. 236 (2)=1936 R. 335. Where counsel appears on behalf of a party and presents an application for adjournment which being refused he retires from the case, the party should be taken as not having appeared in the suit and an application under O. 9, R. 9 is competent. 59 C. 756=36 C.W.N. 158=1932 C. 418. Where the plaintiff's pleader applies for adjournment which is disallowed and the suit is dismissed, the order amounts to a decree dismissing the suit for want of evidence on the merits and not one dismissing it for default of appearance. The remedy is review or appeal and not an application under O. 9, R. 8. 1933 A.L.J. 4=1933 A. 41. See also 27 A.L.J. 391; 1933 A. 118. A suit for profits against the lambardar was adjourned on several occasions. On one of such adjourned hearings the Assistant Collector dismissed the suit for "want of prosecution". Held, the decision was not on the merits. 1933 A. 118=143 I.C. 307.

**APPLICABILITY.**—R. 9 is applicable to an application for final decree for foreclosure dismissed for default. 26 O.C. 194=1924 O. 30. R. 9 is applicable to the dismissal of an application for probate which had under S. 83 of the Probate and Administration Act been treated as a suit. 52 I.C. 639; 38 P.L.R. 973=1936 L. 863; 164 I.C. 334=38 P.L.R. 263=1936 L. 712. But see 53 I.C. 578. See also 20 Pat.L.T. 768=1939 P.W.N. 699=1940 Pat. 58 (Applicability of R. 9 to proceedings under Provincial Insolvency Act). Also applies to dismissal of ap-

plication to sue *in forma pauperis*. 140 I. C. 226=36 L.W. 586; Court has a duty to decide even a pauper petition on its merits and cannot decline to exercise its jurisdiction, merely because there is an alternative remedy. 49 L.W. 543=(1939) 1 M.L.J. 728. Dismissal of suit for non-payment of deficit Court-fee—Fresh suit—If barred. 1935 C. 764; 40 C.W.N. 1390; 158 I.C. 942=1935 S. 198 (Non-payment of process fee). Where a suit under S. 37 of the Agra Tenancy Act is dismissed for default, the remedy of the plaintiff is under R. 9, and not to file a fresh suit. 15 L.R. 59 (Rev.)=18 R.D. 24. In order to make R. 9 applicable, it is necessary to show (1) that the subsequent suit is instituted by the same plaintiff or by person claiming under him, and (2) that the cause of action is the same. 14 L. 485=34 P.L.R. 73=1933 L. 365, sub-rule (3) to O. 9 made by the Bombay High Court applying S. 5, Limitation Act, to proceedings under R. 9, is not *ultra vires*. The rule being one affecting practice and procedure only it will apply retrospectively. 53 B. 453=31 Bom.L.R. 484=1929 B. 262.

**APPLICABILITY OF RULE TO PROCEEDINGS IN EXECUTION AND IN INSOLVENCY.**—Rule has no application to proceedings in execution. 17 A. 106; 13 C.L.J. 532; 41 C. 1; 38 M. 199; 35 I.C. 337 (2); 21 C.W.N. 769; 4 Pat.L.J. 135=49 I.C. 617 (F.B.); 47 I.C. 154=4 Pat. L.J. 230; 1941 Mad. 17=(1941) 2 M.L.J. 37; 100 I.C. 343=45 C.L.J. 60; 50 B. 457=1926 B. 377=28 Bom.L.R. 686=96 I.C. 411; 1929 B. 217=31 Bom.L.R. 400. A fresh application for execution is competent when a previous application is dismissed for default as R. 9 does not apply. 21 C.W.N. 769; 99 I.C. 954=1927 M. 355=52 M.L.J. 123; 1928 O. 478. R. 9 does not apply to an application under O. 21, R. 2 (2). 63 I.C. 855. An application for setting aside a sale under S. 47 and O. 21, R. 90 is not an application for execution. 29 I.C. 395=19 C.W.N. 758; 59 I.C. 575=23 O.C. 349. See also 1937 O. W.N. 503=1937 Oudh 337. Where an application for setting aside an execution sale under O. 21, R. 90 is dismissed for default another application lies under R. 9. 19 C. W.N. 758. The provisions of O. 9, R. 9, must be held to be applicable to insolvency proceedings under the Provincial Insolvency Act, in view of the provisions of S. 5 of the latter Act. 1939 P.W.N. 699=20 Pat. L.T. 768=1940 Pat. 58.

**BAR OF SUIT.**—A second petition to have a person declared an insolvent is not barred under this rule. 101 I.C. 349 (1)=1927 M. 579. R. 9 bars a suit where the cause of action is the same. 39 M.L.J. 412=60 I.C. 201; 1929 P. 685. See also 44 C.W.N. 1179. Where the cause of action is different a second suit is maintainable. 5 R. 471=104 I.C. 313=1927 R. 281; 5 R. 785; 6 Luck. 106=130 I.C. 65=1930 O. 510. But



## NOTES.

when a suit in ejectment is dismissed under R. 8 a fresh suit cannot be instituted in a subsequent year. 4 O.W.N. 1202. See also 17 R.D. 199=14 L.R. 197 (Rev.). Where a previous suit for ejectment has been dismissed, a second suit is barred whether the previous suit has been withdrawn without permission to bring a fresh suit or for plaintiff's default if the defendant has put up a defence in the previous suit claiming rights of a permanent character no matter whether he is a tenant or *sir* or *shikmi* tenant. 18 R.D. 1=15 L.R. 1 (Rev.). If a suit for ejectment, in which the defendant claims "special rights of a permanent character" is dismissed for default, no fresh suit will lie. But this applies only as against that defendant or those privy in estate to him. Where the defendant in the second suit claims under an invalid will and he was not a relative who would have inherited the land, there is no privity of estate between him and the defendant in the first suit and the second suit for ejectment is not therefore barred. 14 L.R. 246 (Rev.)=17 R.D. 313. When the mortgagees fraudulently allow their suit for possession to be dismissed for default the attaching creditors are not bound by the dismissal. A fresh suit for possession by the attaching creditors who have purchased the mortgagee's rights in the meanwhile against the former defendants is not barred under R. 9. 1929 A. 861. See also 42 C.W.N. 853. Application under R. 9 must be disposed of on evidence and not on the ground that it is *bona fide* or otherwise. 42 I.C. 649=22 C.W.N. 671. Fresh suit, when barred. 45 A. 81=1923 A. 408. The rules or orders dealing with the case of the new appearance of a suitor do not apply to the situation arising from the death of suitor. 35 A. 331=40 I.A. 150 (P.C.); 6 O.W.N. 1002. The dismissal for default of a suit for partition does not bar a second suit for partition. 5 R. 785=49 M. 939=51 M.L.J. 254. See also 156 I.C. 109. An order dismissing an appeal for default is not a decree and therefore the decree of the Court of first instance is not superseded by it nor does it merge into it. [39 A. 13; 36 A. 350 (P.C.), Foll.] 39 A. 393. An order under R. 9 setting aside an order of dismissal for default made on the application of some of the plaintiffs may operate in favour of all of them, as the Court setting aside the order may direct. 55 I.C. 481=23 O.C. 18. See also 1938 A.W.R. (B.R.). 322. Subsequent application for assessment of rent where the application failed for default, is not barred under S. 158 of the Bengal Tenancy Act. 2 P. 192=4 Pat.L.T. 705. See also 8 Pat.L.T. 789=103 I.C. 615=1927 P. 375.

**INHERENT POWERS OF COURT.**—See (1940) 2 M.L.J. 374; 1937 All. 691. Apart from the powers under O. 9, R. 9 the Court cannot exercise the inherent jurisdiction under S. 151, in a case to which O. 9, R. 9 does not apply. Hence, where sufficient cause is not shown for non-appearance there can be

no grounds for the application *ex debito justitiae* of any inherent power outside the rule. 1940 Rang.L.R. 512=A.I.R. 1940 Rang. 162 (F.B.). An order of dismissal in default should not be passed till the end of the day when the Court was rising, because there could be no default until the Court rose for the day. Where an application under O. 21, R. 97 was dismissed in default early in the day, and the party in default was late only by 15 minutes and applied at once for its restoration, it was held that there was in fact no dismissal for default at all and that the Court had perfect jurisdiction to revoke its own order passed under a misapprehension and restore the application. 1940 O.W.N. 1086=1940 A.W.R. (C.C.) 457. As to inherent powers see also 1933 Rang. 406; 65 M.L.J. 193; 1941 O.A. 427; 1941 O.A. 743=1941 O.W.N. 1045. Rangnekar, J.—O. 9, R. 9, does not take away the inherent power of the Court to restore a suit or summons, if there is just and reasonable cause for restoring it, even if no sufficient cause is shown within the meaning of the rule for the non-appearance of the plaintiff. The Code is not exhaustive and it is for that purpose that the Legislature by S. 151, has indicated that the Court has an inherent power to act *ex debito justitiae* in order that real and substantial justice may be done. Rules of procedure are meant to secure the ends of justice and not override them. 40 Bom.L.R. 238=A.I.R. 1938 Bom. 199 (S.B.).

**LIMITATION.**—Application to restore suit dismissed for default must be made within 30 days of the order and the limitation does not cease to run by making an application for review. (2 C.W.N. 318, Rel.) 1 Pat.L.J. 547=38 I.C. 53.

**RESTORATION.**—The law contemplates that when a suit is dismissed in default, it should be restored only when sufficient cause for the default is made but not otherwise. (43 M. 94; 1927 L. 622; 1930 N. 48 and 48 M.L.J. 152, Foll.) 141 I.C. 188=1933 L. 169. Where an application to set aside an *ex parte* decree is dismissed for default, the Court has inherent power to deal with an application to set aside the above order of dismissal and for restoration of the previous application. 1933 R. 406. See also 1937 O.W.N. 372=1937 Oudh 344. But the Court has no inherent power to restore an application to restore a suit after that application was itself time-barred. The Court has no right to interfere to override a lawful bar of limitation. 145 I.C. 240=1933 M. 258=65 M.L.J. 193. See also 37 L.W. 48. The law contemplates that when a suit is dismissed in default, it should be restored only when sufficient cause for the default is made out but not otherwise. 141 I.C. 188=1933 L. 169. A Court can under its inherent powers restore a suit dismissed for default of appearance on a ground other than sufficient cause for non-appearance. 34 A. 426; 44 B. 82=53 I.C. 252; 20 S.L.R. 266; 40 Bom.L.R. 238=1938 Bom. 199 (S.B.); 99 I.C. 151=1927 R. 58. See contra 103 I.C. 425=



## NOTES.

1927 L. 623; 1930 N. 48; 1930 R. 65. Dismissal of suit for non-payment of deficient Court-fee is one under O. 7, R. 11 and not under O. 9, R. 8; and so second suit is not barred under this rule. 133 I.C. 449. Appearing in Court on the same day after the case has been disposed of *ex parte* cannot entitle a party to restoration. 103 I.C. 129 = 1927 S. 223. See also 100 I.C. 313; 40 C.W.N. 1390; 1935 C. 764. There is no rule that enables the Court to restore an application made under R. 9 which has been dismissed for want of prosecution. Even S. 151 does not apply in such a case. 1923 B. 386. Where the Court found as a fact that the plaintiff had undergone a serious operation and was unfit to attend the Court when the suit was posted but dismissed his application for restoration on the ground that there was no hurry for the operation and that he could have waited some time longer, *held*, the Court had approached the case from a mistaken point of view; the only question which should have been decided was whether plaintiff's inability to attend was 'sufficient cause' and that the suit should have been restored. 148 I.C. 329 (2). Where the plaintiff exonerates certain defendants from liability and the suit is subsequently dismissed for default, it cannot be restored as against the exonerated defendants. 25 O.C. 67 = 1922 O. 160. Subsequent suit on a different cause of action is not barred. 6 Luck. 106 = 130 I.C. 65. A difference in the mode of relief claimed does not affect the identity of the cause of action. 15 C. 422 (P.C.); 96 I.C. 287 = 1926 L. 562. The dismissal of a suit for redemption does not bar subsequent suit for possession. 10 B. 28.

**SUFFICIENT CAUSE.**—No rigid rule can be laid down that in all cases where a party arrives late in Court and finds his suit dismissed, he is entitled to have as of course his suit restored on payment of such costs as may be incurred by reason of his default. Each case must be dealt with on its merits bearing in mind that O. 9, R. 9 requires that "sufficient cause" be shown and that the dismissal of a suit for non-appearance of the plaintiff is a heavy penalty. What is "sufficient cause" in each case must quite obviously depend upon the particular facts. 158 I.C. 942 = 1935 S. 198. A *bona fide* mistake which is not unreasonable amounts to sufficient cause. 3 Bom.H.C.R. 60. Per *Beaumont, C.J.* and *Rangnekar, J.*—In cases of discretion it is very undesirable to act on precedents, as every Judge has to deal with the cases which come up before him on the particular facts of each case. If a person whose case has been dismissed for non-appearance summarily, appears on the same day, and produces some not unreasonable excuse for his absence, *prima facie* the Court ought to exercise its discretion in his favour. Of course the applicant has no absolute right to ask the Court to waive its rules in his favour, but it is a good working rule that if he applies at once, and thereby shows that his failure to appear was

not due to a desire to cause delay, but was *bona fide*, he ought generally to be given the right to have his case restored on payment of costs thrown away. It is, after all, a very serious matter to dismiss a man's suit or summons or whatever it may be without hearing it, and that course ought not to be adopted unless the Court is really satisfied that justice so requires. There is nearly always some degree of negligence or carelessness on the part of an applicant whose case has been dismissed for non-appearance, but that by itself would not disentitle him to have his case restored to the file. Where the negligence is exceedingly slight, the case ought to be restored, if he is not guilty of either careless conduct or gross negligence. If the Court exercises its discretion on a wrong basis, the appellate Court will interfere and make the necessary orders. 40 Bom.L.R. 238 = 1939 Bom. 199. *Blackwell, J.*—Whether the matter is to be dealt with as falling under O. 9, R. 9 or under S. 151, and the inherent jurisdiction of the Court, it is in every case a matter for the discretion of Court. 1939 Bom. 199. Dismissal of suit under R. 8 precludes those claiming through the plaintiff from bringing a fresh suit. 9 P. 447 = 1929 P. 685. Whether absence of counsel amounts to sufficient cause, see 7 A. 542; 100 I.C. 313; 100 I.C. 793; 6 R. 471 = 1927 R. 281; 9 L. L.J. 80 = 101 I.C. 444; 101 I.C. 880 = 1927 O. 211; 50 L.W. 430. Advocates who are engaged in cases which are fixed for hearing at a given time and place cannot be allowed to treat the Court before which the hearing is to take place with contumacy or indifference, and then apply casually for reinstatement of a suit dismissed in their absence merely because they hoped or believed that they might attend the hearing. They must take reasonable precautions, and the provisions of O. 9, R. 9 become meaningless if it can afterwards be urged that although none were taken and there was no sufficient cause for their non-attendance the suit can still be restored to the file because the litigant would suffer if it were not. 1940 Rang. L.R. 512 = A.I.R. 1940 Rang. 162 (F.B.) Minority is not in itself "sufficient cause" for restoration under R. 9 (1), unless the guardian has been guilty of laches or gross neglect. The Court is bound to enquire into the question. (26 M. 599; 30 M. 274, Foll.; 24 M.L.J. 235, Dist.) 25 I.C. 450 = 27 M.L.J. 167; 1939 A.W.R. (C.C.) 141 = 1939 O.W.N. 787. Gross negligence on the part of a next friend in the conduct of a suit prevents the effect of the bar contained in the rule. 23 C. 8. See also 24 B. 547 at 552; 19 B. 571. Where a suit by a minor represented by a guardian is dismissed for default and a petition is put in to restore the suit to file, the suit has to be restored to file whether or not the guardian had sufficient reasons for his non-appearance. 155 I.C. 575 = 41 L.W. 117 = 1935 Mad. 196. Where a minor's suit is dismissed for default owing to the neglect of his next friend who represents him, such dismissal can be set aside under O. 9, R. 9, C. P. Code,



## NOTES.

if the absence of the guardian is *bona fide*. There must be some limitation to this rule, where it is shown that the guardian absents himself deliberately in pursuance of a plan in order to obstruct a litigation or where the absence of the guardian is not *bona fide*. 58 M. 929=41 L.W. 649=1935 M. 565=68 M.L. J. 615. Illness of a brother was held not sufficient cause to set aside a dismissal for default. 2 P. 784. Non-appearance on account of missing of train. 162 I.C. 842=1936 R. 204. Where a party's agent attended Court and after disposing of some work went away under a *bona fide* belief that he had no more cases in the Court and where his suit was dismissed for non-appearance, such *bona fide* mistake would amount to "sufficient cause". 1929 R. 224. "Sufficient cause"—Pleader sitting in the next room not hearing call. 102 I.C. 416=1927 S. 228. See also 117 I.C. 382; 10 L. 570=114 I.C. 76. Appearance of counsel two minutes late. 103 I.C. 313. Late arrival of train. 98 I.C. 868=1927 L. 40. Counsel engaged but remaining absent—Case should be restored. 95 I.C. 260=1926 N. 409. See also 50 L.W. 430. Each case has to be decided on its own facts but the exercise of discretion should not be divorced from equitable considerations arising from those facts. The pleaders are sometimes busy elsewhere and if the suit is dismissed in the meantime the rule as to restoration should not be so rigorously enforced as to sacrifice the ends of justice. 1932 A.L.J. 480=1932 A. 450. Where the plaintiff was doing his best and acting very strenuously in collecting his witnesses and producing them in Court on the morning of the date of hearing but nevertheless was an hour too late, held, that the Court was not debarred from giving him his remedy when in a wrong headed and muddle-headed way he was doing his best to have his witnesses before the Court. 56 C.L.J. 12. Illness of plaintiff is a sufficient cause. 95 I.C. 240 (1)=1926 L. 541. Date of hearing declared holiday by Government notification. 14 N.L.J. 147. An application under R. 9 should not be dismissed *in limine*. 106 I.C. 821. Few minutes' delay due to plaintiff's going to call his pleader is sufficient cause. 96 I.C. 821=1926 L. 650 (2). See also 98 I.C. 211 (1)=23 L.W. 430; 96 I.C. 402=8 L.L.J. 422. Plaintiff's delay on the way to Court, due to a puncture of the tyre of his motor-car, is sufficient cause under O. 9, R. 9, C. P. Code. 150 I.C. 735=1934 L. 416. Where the case had been eight times postponed to suit the convenience of the Court and on the final date fixed for hearing, the plaintiff was unavoidably absent, but there was nothing to suggest he had any intention of dropping his suit, held, that there was sufficient cause for restoring the suit. 14 L.R. 214 (Rev.)=17 R.D. 346. On the day fixed for hearing of a suit, plaintiff who was a *pardanashin* lady was not present when the case was called. Her "pairokar" who was present in Court went to fetch the plaintiff's counsel as soon as it was called and the latter arrived in about five minutes

and found that the suit had been dismissed for default. The dismissal was at an early hour (at 11 A.M.). Held, there was sufficient cause for setting aside the dismissal for default; equity was on the side of *pardanashin* lady who was dependent on the efficient discharge of their duties by her "pairokar" and counsel. 152 I.C. 110=1934 O. 491.

PRACTICE AND PROCEDURE.—When a suit is dismissed in default it cannot be restored until and unless a valid cause is established or non-service of the notice is proved. 158 I.C. 922=1935 Pesh. 145. Before dismissing an application for restoration of suit, Court should give plaintiff an opportunity to prove the allegations contained in the petition. 33 P.L.R. 804. It is not right to say that orders of dismissal in default should not be passed till the end of the day when the Court rises when only there can be a default. Litigants are ordinarily required to attend the Court at 10 A.M. and when they fail to do so without sufficient cause, there is no reason why they should not be penalised. To allow them to attend at any time of the day before the Court rises, might make it impossible to carry on the work of the Court properly, by putting it in the power of litigants to obstruct it. 1941 O.W.N. 1045=196 I.C. 257. See also 1940 O. W.N. 1086=1941 Oudh 91. When a case is dismissed for the absence of the plaintiff under O. 9, R. 8 and he applies for restoration of the case, under R. 9, notice must be given to the opposite party. The provisions of O. 2, R. 9 (1) are mandatory and the grave irregularity in not issuing a notice to the opposite party before the suit is restored is one that cannot be condoned. 1937 R. D. 521. See also 1941 R. D. 418. An application under R. 9 for the restoration of a case dismissed for default, made on the same date as the dismissal and within a very short time of the dismissal ought not to be summarily rejected by the Court on the ground that it is not accompanied by an affidavit. Neither R. 9 nor any rule having the force of law prescribes or requires an affidavit. Applications under the rule are not to be disposed of summarily and it is the duty of the Court to give the applicant an opportunity to remove any doubts in the mind of the Court. The hasty rejection of applications for restoration merely increases the work of the Court in the long run instead of clearing the file of the Court. 1937 R.D. 7. Application under O. 9, R. 9—Pleader on record, can make—Fresh appointment and vakalat not necessary. 1938 N.L.J. 98=1938 Nag. 272. Where notice of hearing issued to the plaintiffs was not served and the notice issued to their counsel was tendered to him but he declined to accept it on the ground that he was no longer representing them and no further steps were taken to have the party served and the Court held on the date fixed for hearing that counsel was entitled to withdraw and dismissed the suit, held, that the dismissal was erroneous and that the party should not be penalized



LOC. AMS.—[BOMBAY.] R. 9. The following shall be added as sub-r. (3):—

"(3) The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications made under this rule."

[CALCUTTA.] O. 9, r. 9. *Re-number* sub-r. (2), as sub-r. (3) and *insert* therein after the words 'notice of the application' the words 'with a copy thereof (of concise statement as the case may be)'. *Insert* the following as sub-r. (2), r. 9, of O. 9.

The plaintiff shall, for service on the opposite parties present along with his application under this rule either—

- (i) as many copies thereof on plain paper as there are opposite parties, or,
- (ii) if the Court by reason of the length of the application or the number of opposite parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements.

[LAHORE.] To O. 9, r. 9 (1), the following proviso shall be added:—

"Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default."

for the default of the counsel, 146 I.C. 944=1934 L. 91. On a day to which the case was adjourned for plaintiff's reply, the plaintiff's pleader filed a written reply and an application for amendment. The Court accepted the same, but wanted the pleader to make some further statements. The pleader being not properly instructed was unable to make any statement. The Court, thereupon holding the plaintiff absent, dismissed the plaintiff's suit. The case was however restored on application under R. 9. The defendant came up in revision. *Held*, that the inability of the pleader to answer further questions arising out of the reply did not constitute either his withdrawal from the suit or non-appearance on behalf of the plaintiff. The Court ought to have proceeded under O. 10, R. 4 by adjourning the case to a suitable date and calling upon the plaintiff to appear in person on such date for answering material questions with reference to his written reply and the application for amendment of the plaint. [1925 M. 21 and 34 C. 403 (F.B.), Dist.] 149 I.C. 881=1934 N. 101. If the Court dealing with the matter cannot be said to have acted either capriciously or in disregard of any legal principle in exercise of its discretion, the appellate Court ought not to interfere, though it may come to a different conclusion if it were to deal with the same matter. 40 Bom.L.R. 238=1938 Bom. 194 (S.B.).

REVIEW.—Plaintiff is entitled to apply for review of judgment when his suit is dismissed for default and he has not applied under R. 9 to set aside the order. (26 C. 598; 16 C.W.N. 643, Foll.) 37 M.L.J. 59=50 I.C. 327; 20 S.L.R. 266.

REVISION.—A revision lies against an order re-admitting a suit dismissed for default. 29 I.C. 1004. *See also* 132 I.C. 431=1931 A.L.J. 962=1931 A. 452. R. 9 explicitly permits the plaintiff to apply for restoration of a dismissed petition. Being so, he has necessarily the right to question the correctness of the order on it in appeal and on revision. It may be that there are no adequate grounds for interference in revision. But the fact that an appeal lies against the decree in the suit is no bar to the maintainability of the revision petition. 40 L.W. 774=1934 M. 669=67 M.L.J. 485. An application in revision

against an order setting aside an *ex parte* decree and for restoration of the suit under R. 9 cannot be entertained for the simple reason that the validity of such an order can be attacked under section 105 in an appeal from the final decree passed in the suit. 143 I.C. 222=1933 O. 331. *See also* 146 I.C. 750=1933 A. 539. Where pending a revision petition against an interlocutory matter, the suit was dismissed for default and then restored, the interlocutory order is also restored, and the revision petition is competent. It is different in a case where the suit is dismissed by the first Court and is decreed on appeal. The appellate decree does not revive the interlocutory orders which ceased to be effective on the dismissal of the suit by the first Court. (53 M. 334, Dist.) 38 L.W. 887=65 M.L.J. 844. Decision on merits instead of dismissal under the rule—Revision. *See* 4 O. W.N. 644. But an appellate or revisional authority should not lightly interfere with an order of restoration. 17 M.L.J. 225. *See also* 46 C.L.J. 182. Application under R. 9—Extension of time not known to law—Illegality—Interference in revision. 52 C.L.J. 23.

APPEAL.—No appeal lies from an order rejecting an application to set aside the dismissal of an application for restoration of a suit dismissed for default. 139 I.C. 296=1932 N. 101. The provisions of R. 9 apply to probate proceedings, and an appeal lies from an order refusing to set aside a dismissal in default of an application for grant of probate. 164 I.C. 334=38 P.L.R. 263=1936 L. 712. *See also* 38 P.L.R. 973=1936 L. 863; 161 I.C. 840=1936 A.L.J. 305=1936 A. 737. A suit for profits against the lambardar was adjourned on several occasions. On one of such adjourned hearings the Assistant Collector dismissed the suit for "want of prosecution." The Assistant Collector did not make any reference in that order to the evidence that had already been produced in the case, nor did he deal with the validity or otherwise of the defence raised by the contesting defendants. *Held*, that such a decision could not be characterised as a



10. Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

Procedure in case of non-attendance of one or more of several plaintiffs.

11. Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

Procedure in case of non-attendance of one or more of several defendants.

12. Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear.

Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.

#### NOTES.

decision on the merits. The order dismissing the suit therefore did not come within the purview of O. 17, R. 3 but was one under O. 9, R. 8 of the Code, and could be set aside by the Assistant Collector under O. 9, R. 9 or under the inherent jurisdiction vested in Courts by section 151. *See also* 1938 Bom. 199 (S.B.); 1940 A.L.J. 200. In either case the order was not appealable. 143 I.C. 307=1932 A.L.J. 1100=1933 A. 118. Although a person against whom an *ex parte* decree has been made is entitled to appeal against it instead of resorting to the procedure prescribed by O. 9, R. 13, yet his contentions on appeal must be limited either to questions of law or to such arguments as arise upon the record as it stood when the *ex parte* decree was passed. He is not entitled to ask the appellate Court to accept the appeal on ground which could be urged in an application under O. 9, R. 13 and to remand the suit for rehearing. (12 O.C. 25, Foll.) 11 O.W.N. 256=1934 O. 131 (1). Order refusing to set aside the dismissal for default. 100 I.C. 343=45 C.L.J. 60. *See also* 143 I.C. 307=1933 A.L.J. 1100=1933 A. 118; 51 B. 67=99 I.C. 384=1927 B. 1. Conditional order—Order to restore on payment of costs—Appeal lies. 26 I.C. 895=12 A.L.J. 1270; 49 C. 616. *See also* 151 I.C. 402=1934 R. 192; 1932 A. 595.

O. 9, R. 9 and S. 141.—An application lies under O. 9, R. 9, read with section 141, for restoration of a previous application under that order and rule which has been dismissed for default. (1923 O. 146, Foll.) 168 I.C. 47=1937 O.W.N. 372.

O. 9, R. 9 and S. 148.—Where a Court passes an order for restoration of a suit dismissed for default on condition of payment of costs to the opposite party within a time fixed by the order and directs that in case of default the application for restoration is to stand as dismissed, the order is

legal and valid. The effect of the order on the expiry of the time fixed for the payment of the costs is that the application stands as dismissed, and the Court no longer remains seized of the application but becomes *functus officio*, and has, therefore, no power to extend the time for payment of costs. 163 I.C. 554=1936 A.L.J. 566=1936 A. 477.

O. 9, R. 9 and O. 43, R. 1 (c).—Where on dismissal of a suit for default of appearance, the plaintiff applied for restoration of the suit, and his application for restoration was dismissed for non-prosecution, the order of dismissal of the application is one under O. 9, R. 9, and an appeal therefore lies against that order to the District Judge under O. 43, R. 1 (c). There is no warrant for confining the operation of R. 9 of O. 9 to an application dismissed on the merits. 161 I.C. 840=1936 A.L.J. 305=1936 A. 737. *See also* 52 L.W. 375=(1940) 2 M.L.J. 374.

O. 9, R. 9 and O. 47, R. 1: REVIEW.—Where a suit is dismissed for default, the remedy of the plaintiff is by way of application under O. 9, R. 9, and not an application for review. 1938 R.D. 184=1938 A.W.R. (B.R.) 115.

O. 9, R. 12.—The dismissal of a suit under this rule is a highly penal matter, and ought not to be done unless after a distinct order to attend, he has deliberately disobeyed the order. 17 W.R. 141. *See also* 4 P.L.J. 152; 6 L.W. 337. A defendant, a minor represented by a guardian, is a party to the suit whose production in Court can be compelled by a direction to his guardian. (23 M.L.J. 670 Dist.) 55 I.C. 945=11 L.W. 289. The presence of a pleader or vakil when a plaintiff has been directed to appear in person does not amount to an appearance of the party. 137 I.C. 792=1932 M. 414. The Court is not bound to have recourse to all the processes



*Setting aside Decree ex parte.*

13. In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed

Setting aside decree *ex parte* against defendant.

for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he

was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

## NOTES.

prescribed by law for compelling the attendance of the defendant as a witness. 5 C. 353. See also 8 A. 20. The non-filing of a written statement does not justify the Court in proceeding *ex parte*. 2 M.H.C. R. 311. If a defendant appears and files a written statement he ought not to be placed *ex parte*. 3 M. 264. On an application by the plaintiff under O. 3, R. 1 to have first defendant examined as *his witness*, the Court directed the first defendant to appear. The first defendant failed to appear on the day fixed and thereupon the Court, purporting to proceed under O. 9, R. 12, struck out the defence and gave a decree to the plaintiff. Held, that (i) striking off of the defence was a highly penal procedure and the order, disobedience to which is made the ground for doing so, should be free from any possible ambiguity; (ii) the application, though under O. 3, R. 1, was made to have the defendant examined as *witness* for plaintiff, and disobedience to the order thereon was only disobedience to a witness summons which did not justify the striking out of the defence; (iii) the disobedience to the order of Court could not be made to prejudice of the other minor defendants. (23 M.L.J. 676, Ref.) 146 I.C. 536=1933 M. 821=65 M.L.J. 734.

O. 9, R. 13: SCOPE.—Applicability to an order under section 53 and proceedings under Provincial Insolvency Act. 103 I.C. 381=1927 M. 879. See also 187 I.C. 794=1940 Pat. 623; 1936 M. 161=70 M.L.J. 90. O. 9, R. 13 has no application to execution proceedings, but only to decrees in suits or in proceedings in administration or guardianship akin to suits. (17 All. 106, Rel. on); 1939 Rang.L.R. 134=1939 Rang. 115. O. 9, R. 13 deals only with default in appearance and not in the doing of any act ordered by the Court. 105 I.C. 842=1928 N. 75. Rule applies to every case in which a decree is passed *ex parte* against defendant either by reason of his non-appearance at the first hearing, or by reason of his non-appearance at an adjourned hearing. 23 C. 738 (F.B.); 20 B. 380. Rule applies also to *ex parte* final decree for foreclosure. 14 Luck. 435=179 I.C. 928

=1939 Oudh 111. The provisions of O. 9, C.P.Code, by themselves do not apply to case in which the plaintiff or the defendant has already appeared but has failed to appear at an adjourned hearing of the case; for such a case the procedure is laid down in O. 17, which deals with adjournments. 1935 A. L. J. 209=1935 A. 210. See also 37 C.W.N. 1045. As to the meaning of the term "*ex parte decree*", see 41 L.W. 196=68 M.L.J. 123. The rule contemplates the case of a Court setting aside its own decree, and not that of another and higher tribunal. 4 C.W.N. 456. R. 13 is an enabling one which prescribes what is to be done in the ordinary course to get an *ex parte* decree set aside. 42 M.L.J. 344=1922 M. 10. The word "*appearance*" implies that the party is present at the trial either in person or through pleader for the purpose of conducting the case. 1922 P. 485=1 P. 188. See also 59 C. 456 under R. 9. The mere sitting in Court of the pleader for the party having no instructions but to ask for time is not an appearance. 3 P.L.J. 481=46 I.C. 488. Where the pleader for the defendants applied for examination of witnesses on commission, and on its rejection withdrew and the case proceeded on merits, decreeing the claim against the defendants, held that the suit could not be said to be decided *ex parte*. 1931 A. L.J. 377=1931 A. 294=53 A. 612 (F.B.). The words "*prevented by any sufficient cause from appearing*" in O. 9, R. 13, mean causes other than lack of knowledge of the proceedings. 1939 Rang.L.R. 606=A.I. R. 1939 Rang. 436. Where the plaintiff who takes time to produce evidence fails to appear on the date fixed for hearing, the proper course is to pass an order of dismissal for default of appearance. In such a case even if the Court purports to deliver judgment on the merits, the order should be treated as an *ex parte* decree for setting aside which the procedure mentioned in the rule will apply. 138 I.C. 200=1932 L. 477. The words "*was prevented by any sufficient cause from appearing*" must be liberally construed to enable the Court to exercise powers *ex debito justitiæ*. 101 I. C. 632=1927 O. 173. See also 32 C.W.



LOC. AMS.—[ALLAHABAD.] Add the following further proviso :—

Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.

[BOMBAY]. Rule 13. This shall be numbered as R. 13 (1) and the following sub-R. (2) shall be added to it, namely :—

(2) "The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications made under this rule."

[CALCUTTA]. O. 9, R. 13. Re-number R. 13, O. 9, as R. 13 (1) and add the following as R. 13 (2) :—

(2) The defendant shall, for service on the Opposite Party present along with his application under this rule either—

(i) as many copies thereof on plain paper as there are Opposite Parties, or

(ii) if the Court by reason of the length of the application or the number of Opposite Parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements.

[LAHORE]. To sub-rule (1) the following further proviso shall be added :—

Provided further that the cost of such certified copy shall be recoverable as a fine from the party at whose instance the original document has been produced :

Provided also that no *ex parte* decree shall be set aside under this rule on the ground that the summons was not duly served, if the Court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff's claim.

*Explanation.*—Where a summons has been served under O. 5, R. 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule.

#### NOTES.

N. 10; 185 I.C. 663. The "sufficient cause" referred to in R. 13 may be the suppression of the summons by means of fraud so as to prevent the defendant from having any knowledge of the suit against him and thus to enable the plaintiff to obtain an *ex parte* decree. 10 P. 516=132 I.C. 355 (F.B.). Where the defendant's absence was not intentional, but was due to absence of knowledge of the date fixed and the counsel *bona fide* believed that the defendant would be personally served and would give him fresh instructions there was sufficient cause for defendant's non-appearance. 1933 L. 114=144 I.C. 1021. *Ex parte* decree—Defendants appearing late on the date of hearing and applying for restoration—Court not bound to restore as a matter of course but must exercise discretion—Interference by High Court in revision. 31 Bom.L.R. 468=119 I.C. 187=1929 B. 250. Counsel engaged before another Court—Party being pardanashin lady—Application made without delay—Restoration of suit proper. 31 P.L.R. 550. A service of summons on the *karta* is not a service on other members of the family who are impleaded in the suit as they may have their own defence to make. 166 I.C. 635=18 Pat.L.T. 72=1937 P. 17. The service of summons against a major defendant upon a person who is described to be his guardian cannot be said to be a proper service on the defendant though the supposed guardian may be his brother. 166 I.C. 635=18 Pat.L.T. 72=1937 P. 17. "Duly served"—Summons by registered post returned as "refused"—Application to set aside *ex parte* decree on the ground of non-service—Onus of proof on defendant. 39 C.W.N. 934. See also 34 C.W.N. 1119. The word

"duly" does not mean personally. 102 I.C. 243=1927 M. 507=52 M.L.J. 477. The mere fact that the defendant knew that a suit had been instituted would not dispense with the necessity of proper service of summons. 135 I.C. 110=1932 P. 150. See also 43 C. 447=23 C.L.J. 183. Appearance before registration of suit in a proceeding for appointing a guardian *ad litem* does not dispense with service of summons. 35 A. 163=18 I.C. 711. Where on the death of a defendant in a pending suit, summonses were issued against his three sons, the first described as the guardian of the other two and the first son returned the summons with the endorsement that he could not accept service as there was no separate summons in his own name and he was not the guardian of his brothers but the Court nevertheless passed an *ex parte* decree, held, that the summons was not "duly served" and that the *ex parte* decree should therefore be set aside. 12 Pat.L.T. 911=1932 P. 150=135 I.C. 110. The defendant can show that he has not been duly served in the sense that knowledge of his opponent's claim has been brought home to him, even though the formalities of substituted service have been carried through. 134 I.C. 1202=1931 M. 813=6 M.L.J. 920. See also 1939 Rang.L.R. 606. Where the first summons was duly served and it appeared that the defendant intentionally neglected to ascertain the dates of hearing after the suit was transferred, the *ex parte* order could not be set aside for want of due service. 139 I.C. 354=1932 L. 539. But where a suit is transferred without notice to defendant, the *ex parte* decree must be set aside. 1923 L. 444. Mere misdescription of plaintiff in an application under this rule is not reason for refusal to hear



[MADRAS.] Re-number R. 13, as R. 13 (1). Insert the following as proviso to sub-rule (1) of R. 13, of O. 9 :—

“ Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim.”

Add the following as sub-rule (2) to R. 13 :—

“(2) The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1).”

[NAGPUR.] Rule 13. Add the following as an additional proviso to R. 13 :—

“ Provided also that no such decree shall be set aside merely on the ground of irregularity in service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.”

*Explanation.*—Where a summons has been served under O. 5, R. 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule.”

R. 13. In R. 13 of O. 9, for the words “ he was prevented by any sufficient cause from appearing” the words “ there was sufficient cause for his failure to appear ” shall be substituted.

Rule 13. In R. 13 of O. 9—

(a) Existing R. 13 shall be re-numbered as sub-rule (1), and

(b) after sub-rule (1) so re-numbered the following shall be inserted as sub-rule (2), namely :—

“(2) The provisions of S. 5 of the Indian Limitation Act, IX of 1908, shall apply to applications under sub-rule (1).”

[ODDH.] In R. 13 between the words “ was not duly served or that ” and the words “ he was not prevented by any sufficient cause,” insert the words “ notwithstanding due service of the summons ” and at the end of the rule add the following proviso :—

“ Provided also that no *ex parte* decree shall be set aside under this rule on the ground that the summons was not duly served, if the Court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff's claim.”

*Explanation.*—Where a summons has been served under O. 5, R. 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule.”

[RANGOON.] In O. 9, R. 13, substitute ‘ decree or order ’ for the words ‘ decree ’ wherever it occurs in that rule.

#### NOTES.

the application on merits. 23 N.L.R. 71 = 102 I.C. 24 = 1927 N. 251. Substituted service—Several modes prescribed by Court—Plaintiff's failure to comply with all the modes is sufficient cause for setting aside *ex parte* decrees 1930 L. 560 = 128 I.C. 55. O. 9, R. 13 applies to proceedings under O. 34, R. 6. 124 I.C. 729 = 1930 A. 841 = 52 A. 839. Before the falsity of the claim on which an *ex parte* decree is based can be gone into in a fresh suit filed for the purpose of getting it vacated, it must be shown that the decree was obtained from the Court either by collusion of both parties, or by fraud committed by the plaintiff which prevented the defendant from appearing in the first suit. But where the defendant has been duly served with the summons and has failed to appear for no fault of the plaintiff, it is not open to him to file a fresh suit and challenge the decree on the ground of the falsity of the claim on which it is based. His remedy if any in such a case is to apply in the same proceedings to have the decree set aside within the time allowed by law. If he satisfies the Court that he had sufficient reason for not attending the Court when the decree was passed he may obtain relief but not otherwise. 30 S.L.R. 405 = 166 I.C. 906 = 1937 S. 18. See also 39 C.W.N. 894.

APPLICABILITY TO ORDERS IN EXECUTION AND OTHER PROCEEDINGS.—O. 9 applies only

to suits and not to execution proceedings. An *ex parte* order under section 47 may be a decree by virtue of section 2 (2) but it is not a decree in a suit. 1931 M. 656 = 61 M.L.J. 348 (F.B.) (Overruling 37 M. 462 and approving 1926 M.W.N. 245). An application to have an *ex parte* order in execution proceedings set aside is not maintainable under O. 9, R. 13 and section 141 does not operate to make O. 9, R. 13 applicable to execution proceedings. An application, however, to have the *ex parte* order passed in execution proceedings set aside must at least be held to be entertainable in the discretion of the Court under its inherent powers. 1929 A. 485 = 121 I.C. 552. See also 13 L. 761. Order 9, R. 13 does not apply to delivery proceedings under O. 21, Rr. 97 to 101 as they are execution proceedings. 92 I.C. 533 = 50 M.L.J. 200 = 1924 M. 412; 1929 A. 485. As to the application to decrees passed under Sch. II, para. 21 (2), see 12 I.C. 927.

INHERENT POWERS.—Inherent powers of Court under section 151 cannot be invoked to set aside an *ex parte* decree long after the limitation prescribed by Art. 164 has passed. 1 P. 277 = 65 I.C. 341; 53 I.C. 147; 78 I.C. 660 = 1923 L. 147 (1). [But see also next case.] There is no inherent power in a Court apart from O. 9, R. 13 to set aside an *ex parte* decree on an application made for that purpose. The scope of the inherent power of a Court pointed



Add the following as second proviso :—

" Provided also that no decree or order shall be set aside under this rule merely on the ground that there has been an irregularity in the service of the summons, if the Court is satisfied that the defendant was aware of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim."

[N.-W.F.P.] Add :—

" Provided further that no decree passed *ex parte* shall be set aside merely on the ground of an irregularity in the service of summons, if the Court is satisfied for reasons to be recorded that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim."

[SIND]. Add the following further proviso :—

" Provided also that a decree passed *ex parte* shall not in the absence of good cause be set aside on the ground merely of irregularity in the service of the summons unless upon the facts proved the Court is satisfied that the defendant did not have notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim."

#### NOTES.

out. See 43 M. 94=37 M.L.J. 599 (F.B.) (26 M. 599, Overr.; 24 M.L.J. 235, Affirm.) See also 40 L.W. 665=1934 M.W.N. 1312=1934 M. 699; 1938 Bom. 199 (F.B.). An order refusing exercise of such powers by Court is not appealable. 1 P. 277=65 I. C. 341. A Court has no power apart from the provisions of O. 9, R. 13, to set aside an *ex parte* decree passed by itself, and an applicant seeking to avail himself of the rule must comply with the conditions laid down in the rule, i.e., he must satisfy the Court either that the summons was not duly served or that he was prevented by any sufficient cause from appearing in Court when the suit was called on for hearing. 1937 A.L.J. 831=A.I.R. 1937 All. 691. See also (1940) 2 M.L.J. 374; 1940 Rang. 162; 1938 Bom. 199.

COURT TO WHICH APPLICATION IS TO BE MADE.—Where there is transfer of territorial jurisdiction after decree, the new Court can entertain application to set aside *ex parte* decree. 42 M.L.J. 344. Though an appeal is pending against an *ex parte* decree, an application to set it aside should be made to the Court which passed the decree and not to the Court hearing the appeal. 44 M. 731=41 M.L.J. 90. (30 M. 535, Dist.; 27 M. 602; 39 A. 13 and 38 C. 394, Foll.). A Court passing an *ex parte* decree is competent to deal with an application to set aside such a decree even if an appeal had been subsequently preferred. (12 C.W. N. 885; 30 M. 535; 13 C.W.N. 846; 38 C. 394, Foll.) 26 I.C. 412; or even after an appeal therefrom has been dismissed. 1927 M. 722 (2)=53 M.L.J. 110.

DECREE WHEN *EX PARTE*.—The question whether a particular decree is or is not *ex parte* is a mixed question of law and fact. The Court must examine the records of the case and examine the circumstances under which the decree was passed, and if it is found that a particular defendant was not present at the time of hearing of suit, the decree must be taken to be *ex parte* against him, in spite of the fact that decree as drawn up mentions his presence. The recital in the records is not conclusive. 166 I.C. 635=18 Pat.L.T. 72=1937 P. 17. "*Ex parte*" decree—Meaning of—Appearance by pleader

—Pleader reporting no instructions after commencement of hearing—Decree—Remedy is not application but appeal. 58 M. 817=156 I.C. 403=41 L.W. 196=1935 M. 210=68 M.L.J. 123. A decree passed owing to defendant's default of appearance in spite of the Court's direction to him to appear on that day, amounts to an *ex parte* decree. 27 I.C. 882=2 L.W. 105. There can be no *ex parte* proceedings against a defendant who has entered appearance and filed his defence. 45 A. 618=21 A.L.J. 495. Where a defendant is directed to file a written statement by a certain date but fails to do so, and his application for further time is rejected, the Court should direct the case to be heard in default of written statement. An order fixing the case for hearing *ex parte* is not justified. A defendant is not bound to put in a written statement; if he does not file it, he is taken to admit the allegations in the plaint. He is, however, entitled to appear at the hearing and submit any argument open to him on the plaint, for instance that the plaint discloses no cause of action, or that the claim is time-barred. If at the hearing the defendant and his pleader are present and are not prevented in any way from addressing the Court, and a decree is passed after hearing the evidence on behalf of the plaintiff, there is no *ex parte* decree which can be set aside on an application under O. 9, R. 13. 40 Bom.L.R. 972=A.I.R. 1938 Bom. 470. An application to set aside a final decree in a mortgage suit passed *ex parte* is maintainable under O. 9, R. 13. 48 I.C. 71=35 M.L.J. 375. See also 51 A. 634=1929 A. 279. A decree based on a compromise cannot be treated as an *ex parte* decree and consequently O. 9, R. 13 does not apply. 27 I.C. 227=19 C.W.N. 118. *Ex parte* decree cannot be re-opened except upon ground of fraud which must be alleged in particular form. 58 I.C. 317.

*EX PARTE* DECREE IN SMALL CAUSE SUIT—SETTING ASIDE—PROCEDURE.—The Code governs the procedure of Small Cause Courts to some extent, and O. 9, R. 13 applies to such Courts. When a Small Cause Court sets aside an *ex parte* decree, it is really under O. 9, R. 13. S. 17 of the Provincial Small Cause Courts Act itself makes the procedure under the Code applicable. The Provincial Small Cause Courts Act is supplemental to the Code. The proviso to S. 17



## NOTES.

of the former Act does not add to the section but only cuts down the very wide discretion which Courts have under O. 9, R. 13, in imposing terms on the petitioner. 58 M. 687=1935 M. 380=68 M.L.J. 466 (F.B.).

CONDITIONS FOR SETTING ASIDE.—Conditional order, when proper. Where there has been no default on the part of the party asking for re-hearing, *e.g.*, where he has not been duly served, it is inequitable for the Court to impose conditions. 57 I.C. 300=5 Pat.L.J. 420. *See also* 1938 A.M.L.J. 43. A Court should not as a condition precedent to setting aside an *ex parte* decree require the deposit of a large sum of money. 74 I.C. 86=1924 O. 229. An order setting aside an *ex parte* decree under O. 9, R. 13 is not *ultra vires* if it does not impose any conditions as to costs. 32 I.C. 984. Where an *ex parte* decree is set aside on condition of defendant's furnishing security the Court must adjourn the case in order to take security and must pass final orders only after the party has tendered or failed to furnish security. 43 I.C. 1=6 L.W. 767. Where an *ex parte* decree is set aside, the defendant is entitled to be restored to his original position under S. 144. 72 I.C. 912=2 P. 277.

WHO CAN APPLY.—The words "*against a defendant*" do not necessarily imply that the only defendant against whom relief has been in terms granted by the decree can apply for an order to set it aside. They are comprehensive enough to include a case in which the decree adversely affects the rights of a contesting defendant. Where therefore in a suit the real question is whether the plaintiff or the contesting defendants are really entitled to the claim in suit, and an *ex parte* decree is passed the contesting defendants are competent to apply under O. 9, R. 13. 1934 A. 163=56 A. 578. Heirs of a defendant against whom an *ex parte* decree is passed before his death have a right to apply to set aside the *ex parte* decree. (27 A. 274, Doubted): 1933 A. 80. It is competent to executor of a defendant since deceased, to apply to set aside an *ex parte* decree against him. 38 M. 442. A Court has no jurisdiction to set aside an order setting aside an *ex parte* decree at the instance of a person not a party to the suit. 61 I.C. 534. A Court has no jurisdiction to set aside an *ex parte* decree at the instance of a person not affected by the decision, who has been expressly exempted from the decree. 61 I.C. 484. Application by Official Receiver—Dismissal—Separate suit by creditors to declare decree is not binding—Maintainability. *See* 1936 M.W.N. 79=1936 M. 161=70 M.L.J. 90.

PROCEDURE.—Under O. 9, R. 13, it is necessary that the Court should find that the defendants were prevented by any sufficient cause from appearing when the suit was called on for hearing. 155 I.C. 249 (1)=1935 A.L.J. 377=1935 A. 565. O. 9, R. 13, merely requires an applicant seeking to set

aside on *ex parte* decree to satisfy the Court that summons was not duly served on him or that he was prevented by any sufficient cause from appearing. It does not require the Court to record a finding to that effect and it is not obligatory on the Court to record an express finding that the applicant was prevented by sufficient cause from appearing, before setting aside the *ex parte* decree. Merely because a Court does not set forth the reasons for passing an order setting aside the *ex parte* decree, the order cannot be said to be one passed without jurisdiction, and the absence of such a finding is no ground for interference in revision. 52 L.W. 809=(1940) 2 M.L.J. 977. A Court has no power, pending trial of an application under O. 9, R. 13, to order the applicant to deposit the costs of the suit or furnish security for the decree amount or to dismiss the application for failure to furnish the security ordered. 51 L.W. 574=A.I.R. 1940 Mad. 585=(1940) 1 M.L.J. 710. Where an application for restoration is made under O. 9, R. 13 an opportunity should be given to the other side to contest it, before it is sanctioned. 1941 R. D. 418. *See also* 1937 R. D. 521. Where a party seeks to set aside an order under O. 17, R. 2, the proper course is to apply under O. 9, R. 13 and not under O. 47, R. 1. 37 C.W.N. 1045. *See also* 1935 A.L.J. 209=1935 A. 90; 18 R.D. 421=15 L.R. 519 (Rev.); 1940 A.L.J. 200; 1940 A.L.J. 269=1940 All. 305=I.L.R. (1940) All. 192; 40 L.W. 665=1934 M. 699 (Application under C.P. Code, O. 21, R. 58 dismissed for default.) Under O. 9, R. 13, it is clearly illegal for the Court to proceed with the suit on the same day on which it restored the suit to file. 41 L.W. 117=1935 M. 196. Where a Court decides to set aside an *ex parte* decree under O. 9, R. 13, although it is not obligatory on the Court to state reasons, it is most desirable that it should state why it thinks the *ex parte* decree should be set aside. 163 I.C. 732=1936 M. 524. Where on the day fixed, the defendant appeared and asked for time to enable him to file the written statement, but the Court refused it and passed an *ex parte* decree, the defendant is entitled only to appeal against the *ex parte* decree, and not to apply under O. 9, R. 13 to set it aside. The reason is, that in view of the Expl. (Allahabad) to R. 2 of O. 17, the defendant could not be said to have not appeared, or failed to appear. I.L.R. (1940) All. 192=1940 A.L.J. 269=A.I.R. 1940 All. 305. Where a case is adjourned after the framing of issues on which date parties were to produce their evidence, and on that date the plaintiff appears but the defendant fails to appear, and the Court passes a decree on a consideration of the evidence, the case is governed by O. 17, R. 2 and hence it could be restored under O. 9, R. 13. 1940 A.W.R. (B.R.) 95. Where a decree passed against several defendants, is *ex parte* as against one, and an appeal is preferred against the



## NOTES.

decree by the other defendants without impleading the *ex parte* defendant, which was dismissed, and thereafter the *ex parte* defendant applied to the Court which passed the decree to set it aside, *held*, that there was no legal bar to the Court's setting aside the *ex parte* decree. 1938 O. 11=171 I. C. 617=1937 O.W.N. 1141. Application under O. 9, R. 13—Also appeal against *ex parte* decree—Appeal dismissed—Effect on *ex parte* decree. *Held*, that the *ex parte* decree ceased to exist as soon as the appeal was dismissed and hence the lower Court was right in holding that it had no jurisdiction to deal with the application to set aside the *ex parte* decree. 1937 Nag. 381. *See also* 41 C.W.N. 1278=1937 Cal. 548; 1937 O.W.N. 1141=1938 O. 11.

OMISSION TO NAME SOME DECREE-HOLDERS AS PARTIES—IF FATAL.—The Code contains no provision for naming the persons in whose favour an *ex parte* decree has been passed as parties in the application to set aside the *ex parte* decree. All that is necessary is an indication should be given in the application of the particulars of the suit in which the *ex parte* decree has been passed. The fact that the application omits to mention the names of some of the decree-holders or that notice of the application is served on them beyond the period of limitation prescribed for the application will not make the application defective or invalid. 62 C. 1057=39 C.W.N. 863=1935 C. 506. *See also* 1937 P. 49=18 P.L.T. 278.

BURDEN OF PROOF.—Where a person applies to have an *ex parte* decree set aside, the onus is on such person to show affirmatively that the summons was not duly served or that he was prevented by sufficient cause from appearing when the suit was called on for hearing. 145 I.C. 370=1933 B. 156. Under O. 9, R. 13 it is for petitioners applying to have an *ex parte* decree set aside to satisfy the Court that the service was not duly effected. 1933 L. 288.

JURISDICTION.—*See* 67 C.L.J. 519=1938 Cal. 797. Where the appellate Court has adjudicated regarding the rights and liabilities of the person against whom an *ex parte* decree has been passed, the *ex parte* decree against such person cannot be set aside by the trial Court, but where there has been no adjudication regarding the rights and liabilities of such person in the appellate Court, the trial Court is entitled to entertain an application for the setting aside of the *ex parte* decree against him. The fact that a person has been impleaded as a *pro forma* respondent in the appeal does not in any way affect the jurisdiction of the trial Court so far as the setting aside of the *ex parte* decree against such person is concerned. 35 P.L.R. 675=1934 L. 1016. Application under O. 9, R. 13—Right of—Necessary parties not impleaded in suit—Application by them after *ex parte* decree for addition as parties and for setting aside decree if competent. *See* 18 Pat.L.T. 278

=A.I.R. 1937 Pat. 49.

REVIEW.—Application to set aside an *ex parte* decree cannot be altered to one for review by merely changing the description to avoid limitation. 57 I.C. 15.

LIMITATION.—Under O. 9, R. 13 as amended by the Madras High Court, though time can be extended still it should be extended on justifiable grounds. 42 M.L.J. 12=1922 M. 33. Except where there are special rules made by the High Court extending the provisions of S. 5 of the Limitation Act to applications for setting aside *ex parte* decree the Courts do not have the power to have recourse to the provisions of S. 5, or enlarge the period prescribed by Art. 164 by resorting to section 151 of the Code. The Nagpur Judicial Commissioner's Court has not framed any rules under S. 122 extending the application of S. 5 of the Limitation Act to applications for setting aside *ex parte* decrees and so that Court has no such power. 144 I.C. 394=1934 N. 43. *See also* 1939 A.W.R. (B.R.) 121. Justice, equity and good conscience cannot be invoked to overrule the law of limitation. Where on an application for setting aside an *ex parte* decree under O. 9, R. 13 on the ground that the applicant had not been properly served with summons, the opposite party contends that the application is barred by limitation, and the Court without touching on the question of limitation, passes an order setting aside the *ex parte* decree on the ground that it considers it justifiable in the interest of justice, equity and good conscience that the applicant should be given a chance to contest the suit, the order cannot be sustained. (1935 R. 466, Rel. on.) 164 I.C. 286=1936 R. 305. *See also* 1939 R.D. 215=1939 A.W.R. (B.R.) 121; 1939 A.W.R. (B.R.) 225=1939 R.D. 525. An *ex parte* decree was passed on 5th April 1939. The defendant applied by way of motion to have the decree set aside and presented the application in the Court on 5th May, 1939. The application was endorsed by the Assistant Registrar of the Court having been made on 5th May, 1939, i.e., the date of presentation, but notice of motion was served on 9th May, 1939. *Held*, that the application was made within 30 days of the decree and was therefore in time. A.I.R. 1940 Cal. 373.

GROUND FOR SETTING ASIDE—ILLUSTRATIVE CASES.—Where a summons is personally delivered to the defendant but the defendant refuses to sign the acknowledgment and no substituted service is effected, though there is irregularity in the service of the summons the *ex parte* decree passed cannot be set aside on that ground. 1933 A.L.J. 165=1933 A. 165. There is no *due service of summons* under O. 9, R. 13, where substituted service has been ordered by the Court and effected on a misrepresentation of facts. 152 I.C. 830=60 C.L.J. 106=38 C.W.N. 1066=1934 C. 745. Defendant's want of knowledge of the date of hearing, no specific date having been fixed is suffi-



## NOTES.

cient cause to set aside *ex parte* decree. 144 I.C. 154=1933 A. 276. See also 147 I.C. 759. Notice of date of hearing directed to be but not served on defendant personally. See 144 I.C. 1021=34 P.L.R. 911=1933 L. 114. Suit transferred to another Court after service of summons on defendant—*Ex parte* decree—Absence of notice of hearing in transferee Court—If ground for setting aside *ex parte* decree. 1936 P. 490. Death of defendant's mother preventing appearance is sufficient cause. See 1933 A.L.J. 1289=1933 A. 601. Defendant's illness. 147 I.C. 1186=1934 A. 163. Break-down of lorry on the way. 1938 Pesh. 39. Due to hot weather, the Court sat from 6 A.M. to noon. But on the day in question, the parties waited till noon, the Judge did not turn up and the parties left. The Judge turned up at 2 P.M. Party and pleader were absent but the Court passed an *ex parte* decree. Held, that there was sufficient cause for setting aside the *ex parte* decree. 1933 A.L.J. 1298=1933 A. 652. Counsel waiting in bar room—Instructions to clerk to call him when case was called—Clerk remaining absent when case was called is sufficient cause to set aside *ex parte* decree. 1938 Nag. 370. As to non-service of summons on defendant owing to plaintiff giving a wrong address, see 60 C. 98=143 I.C. 710=1933 C. 274. See also 153 I.C. 80=37 P.L.R. 121=1935 L. 129. (Substituted service, order for, obtained by fraud practised on Court.) The defendant was present in person in Court premises on the day of hearing. The suit was twice called and on both occasions, defendant asked for an adjournment as his Counsel was not available. On the second occasion the Counsel sent his clerk to ask the Court for consideration. Held, that the fault, if any, lay with the Counsel and not the defendant, and that there was sufficient ground for showing latitude to the respondent and for setting aside the *ex parte* decree. 11 R.D. 583=15 L.R. 687 (Rev.). A defendant had no knowledge about the date fixed for hearing of the suit and was not informed about the progress of the suit by his attorney owing to the attorney's grave illness and subsequent death. The suit was decreed *ex parte* against him. Held, that the defendant, had shown sufficient cause for not appearing on the date the suit was taken up for hearing. A.I.R. 1940 Cal. 373. Where an application under O. 9, R. 13 is allowed and on defendant's failure to file a written statement within the time fixed by the Court the suit is again decreed *ex parte*, the defendant's failure to receive information as to the result of his prior application from his attorney is not a sufficient cause within the meaning of O. 9, R. 13 for setting aside the *ex parte* decree when the failure is due to the defendant's own deliberate action in not seeing that informations were sent to him. The defendant's position however would be stronger if he could show either that the intimation had

not been sent by his attorney or had been wrongly addressed and therefore not delivered. A.I.R. 1941 Cal. 254. If the minor defendants were not represented there is sufficient cause for their non-appearance and the Court could set aside the *ex parte* decree. 21 A.L.J. 185=1923 A. 213. See *contra* 66 I.C. 460 (N.); 49 A. 123 (F.B.). See also 4 O.W.N. 356=1927 O. 173. The mere absence of a guardian *ad litem* of a minor defendant is not by itself a sufficient cause for allowing an application under R. 13, when there is nothing to show that the guardian has betrayed the interests of the minor. 44 L. W. 702=1936 M. 961=(1937) 1 M.L.J. 36. See also 166 I.C. 635=1937 P. 17. The default of a guardian *ad litem* who wrongfully allows a claim against a minor defendant to be decreed *ex parte* constitutes sufficient cause for non-appearance within the meaning of R. 13. But where the minor defendant has no case to put forward and the guardian, realising that and exercising his judgment honestly and deliberately and in the interests of the minor, decides that no good purpose can be served by putting an appearance, there is no sufficient cause under the rule, so as to entitle the minor to apply to have the decree set aside. 58 M. 1045=41 L.W. 654=1935 M. 435=68 M. L. J. 693. *Ex parte* decree against minor defendants—Sufficient cause for setting aside—Not only gross negligence of guardian *ad litem*, but also prejudice to minor's interest. 32 L.W. 662=59 M.L.J. 918. Court is bound to decide whether summons was not duly served. 1926 M. 558=94 I.C. 420 (1)=23 L.W. 319; 57 M. 1069=37 L.W. 653=1934 M. 428=66 M.L.J. 683. Where a suit by a minor represented by a guardian is dismissed for default and a petition is put in to restore the suit to file, the suit has to be restored to file whether or not the guardian had sufficient reasons for his non-appearance. 44 L.W. 117=1935 M. 196. The trial Court cannot set aside an *ex parte* decree on grounds other than those mentioned in O. 9, R. 13. 24 L.W. 439=97 I.C. 936 (1). See also 1931 A.L.J. 377=1931 A. 294 (F. B.). *Ex parte* order cannot be set aside when no reason is given for non-appearance. 34 C. W.N. 419=1930 C. 488; 1950 R. 152 (2). A Court can restore a suit only when it is satisfied that defendant was prevented by sufficient cause from appearing. 64 I. C. 965=1 Pat.L.T. 69. On an application to set aside an *ex parte* decree, the Court should give its finding on the question whether the defendant was prevented by any sufficient cause from appearance. In the absence of such a finding, the Court has no jurisdiction to set aside the *ex parte* decree. 1931 M.W. N. 239. Service on the son of pardanashin lady living in the same house is proper. 94 I.C. 228=1926 C. 845. Application for time to compromise by both parties—Rejection and *ex parte* decree—Application to set aside—Defendants not ready owing to illness of one of them in charge of case—Dismissal



## NOTES.

not proper—*Ex parte* decree—to be set aside. 167 I.C. 496=17 Pat.L.T. 793=1937 P. 85.

APPEAL.—Erroneous order accepting application to set aside *ex parte* decree—Appealability. 29 Bom.L.R. 925. See also 149 I.C. 777=1934 R. 202; I.L.R. (1940) Nag. 496. An order setting aside an *ex parte* decree is not appealable. 1931 A.L.J. 377=1931 A. 294 (F.B.). Where an application is made for re-opening a case decided *ex parte*, that application must either be allowed or disallowed. If it is allowed no appeal will lie. If it is disallowed an appeal will lie. When a conditional order, that the application to set aside an *ex parte* decree will be allowed if the defendant deposits the full decretal amount within 15 days, but if he fails it would be dismissed, is made and the condition is complied with, then the application is allowed and no appeal will lie. If the condition is not complied with, then it is open to the party concerned to ask for a final order dismissing the application, and then an appeal will lie. 1933 R. 63=144 I.C. 186. An appeal lies against an order dismissing for default an application to set aside *ex parte* decree. 36 I.C. 798. There is no warrant for limiting the right of appeal to the case where an application under O. 9, R. 13 is dismissed on the merits. 8 P. 533=117 I.C. 317=1929 P. 529 (2). Where an application to set aside an *ex parte* decree is dismissed for failure to pay process fee this is in substance a dismissal for default and an appeal lies from the order. 69 I.C. 713. See also 51 B. 67=28 Bom.L.R. 1245; 1926 A. 142 (2)=48 A. 199; 1926 O. 118=90 I.C. 745. No appeal lies against an order refusing to set aside an *ex parte* decree made in a reference under the Land Acquisition Act. 94 I.C. 330=1926 C. 816. See also 36 C.W. N. 352. (39 C. 393 and 54 C. 312, Foll.) *Ex parte* order set aside on condition of deposit of costs—No cost deposited—Suit decided—Order under O. 17, R. 3 and not under O. 9, R. 6—No appeal lay. 1930 O. 351. An order under the rule setting aside an *ex parte* decree against some of the defendants can be attacked in appeal. 9 P. 102=1930 P. 266.

CONDITIONAL ORDER SETTING ASIDE EX PARTE DECREE.—An order was passed directing that the *ex parte* decree should be set aside on certain terms, viz., that the defendant would pay into Court within ten days a certain sum plus certain costs. Before the ten days had completely elapsed, an appeal was filed against the order. Held, that the order was not a judgment within cl. (13), Letters Patent, and that no appeal lay from it. (2 R. 469, Rel. on; 6 R. 703 and 35 M. 1, Ref.) 151 I.C. 402=1934 R. 192. See also 26 I.C. 895=12 A.L.J. 1270; 1932 A. 595.

COSTS.—Where there is no service and an improper *ex parte* order is passed, an applicant seeking to set it aside should not be

required to pay costs. 1938 A.M.L.J. 43. In proceedings to set aside an *ex parte* decree, it was found that neither the plaintiff nor the defendant was to blame. The *ex parte* decree was passed on account of the negligence of the clerk of the defendant's counsel who also was not to blame. Held, that the defendant who had employed the offending agency, i.e., the clerk, should pay the costs. A.I.R. 1938 Nag. 370. Where an application for restoration of a suit after setting aside an *ex parte* decree, is made on the next day the Court ought not to make the payment of punitive costs by way of damages to the other party, as a condition precedent to the restoration of the suit. The Court should first satisfy itself, that under O. 9, R. 13, there was a *prima facie* case and then fix a reasonable payment as costs. 1938 R.D. 939=1939 A.W.R. (B.R.) 84 (2).

REVISION.—The High Court is entitled to interfere in revision where the order setting aside an *ex parte* decree has been passed in defiance of the provisions of this rule. 1931 A.L.J. 377=1931 A. 294 (F.B.). See also 1934 A.L.J. 552=148 I.C. 893=1934 A. 134. It is true that whether there was sufficient cause for non-appearance is a question of fact and the High Court cannot interfere in such matter in revision in the absence of perversity or something of the like nature. But where the Judge has concentrated his attention on the negligence of counsel instead of on the conduct of the party, interference is called for. A.I.R. 1938 Nag. 370. The question whether a party was prevented by "sufficient cause" within the meaning of O. 9, R. 13, from appearing when the suit was called on for hearing is essentially one of fact; and the High Court cannot interfere in its revisional jurisdiction in a case where the Courts below have come to the conclusion that the party was himself to blame for not appearing before the Court. 1937 A.L.J. 831=A.I.R. 1937 All. 691. *Mockett, J.*—The position of the Judge sitting in appeal against the decree passed *ex parte* to canvass the correctness of refusal to adjourn is very similar to that of Judge sitting in revision considering an application under O. 9, R. 13. A.I.R. 1937 Mad. 922=(1937) 2 M.L.J. 666.

POWERS OF APPELLATE COURT.—An appellate Court can set aside an *ex parte* order passed by the original Court against some of the defendants when an appeal by the other defendants is pending before it. (30 M. 535; 32 M. 416, Foll.) 29 I.C. 458=2 L.W. 529. See also 42 M.L.J. 12=1922 M. 33. After an appeal has been filed against a decree of the lower Court, the power to set aside the original decree becomes vested in the appellate Court. 30 M. 535. When a decree of the lower Court is superseded by a decree of a superior Court, the former cannot alter or amend it, on the application of defendants against whom the *ex parte* decree was passed. 37 A. 208=13 A.L.J. 283; but see 53 M.L.J. 110; 1932 A.L.J. 257=1932 A. 340. Where a defen-



## NOTES.

dant against whom an *ex parte* decree is passed is not joined as a party to the appeal preferred by other parties to the suit and the Appellate Court does not adjudicate upon his case the *ex parte* decree against him does not merge in the decree of the Court of Appeal so as to preclude him from applying under O. 9, R. 13 to the Court which passed the *ex parte* decree to set aside the decree. 36 C.W.N. 747=1932 C. 773. See also 1940 O. 81=1939 O.W.N. 950; 15 Luck. 150=1940 Oudh 81. Appellate Court cannot go beyond R. 13. 48 A. 165=1925 A. 610. Powers of appellate Court. See 1925 P. 534=7 P.L.T. 381. Power of appellate Court to go into sufficiency of order for substituted service. 52 M.L.J. 477. In an appeal from an *ex parte* decree the only question with which an appellate Court is concerned is ordinarily whether the evidence in the record is sufficient to support the decree. In such an appeal it is however open to the Court to go into the question of an improper refusal by the Court of an application for time. 10 P.L.T. 589=1929 P. 609. Application to set aside *ex parte* decree—Dismissal of—Non-preferring of appeal—Final appeal against decree—Raising the same points—Validity. See 100 I.C. 553 (1).

EVIDENCE.—Where a summons has not been personally served, but served on the gumasta, the plaintiff has to prove that such service was valid since it was not so *prima facie*. 1913 M.W.N. 1028=21 I.C. 922. Burden of proof of sufficiency of service—Defective report of the process-server. 23 N.L.R. 166. It is for the petitioners applying to have an *ex parte* decree set aside to satisfy the Court that the service was not duly effected. 1933 L. 288. In the case of a substituted service of summons the Court is not bound by the return of the process-server alone, but can declare the service good from other circumstances of the case. 23 I.C. 14=26 M.L.J. 368. Under this rule the question to be considered is whether the defendant honestly intended to be present at the hearing of the suit and did his best to do so. 43 M.L.J. 632=46 M. 60. See also 5 R. 80=102 I.C. 379=1927 R. 150.

OTHER REMEDIES.—Difference in procedure in an application under the section and appeal pointed out. 32 C.W.N. 101. The person against whom an *ex parte* decree is passed can apply to have it set aside under O. 9, R. 13, or he can appeal from the decree; but he cannot start a fresh proceeding to set aside the decree. 57 I.C. 551=22 Bom.L.R. 798; 56 C. 21=1929 C. 322. To impeach an *ex parte* decree on grounds other than fraud, the proper remedy is by an application under O. 9, R. 13 or an application for review or an appeal to a superior Court. A separate suit to set aside the decree will not lie. 1 L. 344. A plaintiff whose application to set aside an *ex parte* decree has proved infructuous, can maintain a suit to set aside the decree on the ground of fraud or any other valid reason. (28 C.

475; 29 C. 395, Rel. on.) 15 C.L.J. 446=17 C.W.N. 219; 55 I.C. 412; 10 P. 516=1931 P. 204 (F.B.); 35 C.W.N. 303=1931 C. 649. See also 60 C. 98=1933 C. 274. A subsequent suit to set aside the decree apart from fraud is not maintainable. 3 L.W. 522=36 I.C. 128. A separate suit to set aside an *ex parte* decree on ground of fraud will lie, even when an application for setting an *ex parte* decree has been dismissed. 144 I.C. 1013=1933 R. 123. Suit to set aside *ex parte* decree on the ground of false claim and perjured evidence is not maintainable. 97 I.C. 879=31 C.W.N. 258=1927 C. 84.

PROVISO.—An application under O. 9, R. 13 if granted will re-open the suit only as against the successful applicant and not against other defendants. 9 I.C. 835=8 A. L.J. 364. *Ex parte* decree against one defendant—Suit dismissed by consent against another—Court cannot restore suit against that other while setting aside the *ex parte* decree. 104 I.C. 216=1927 S. 245. Where there is an *ex parte* decree against one of several defendants mortgagors, and an application is made to set it aside, the better course would be to set it aside against all defendants and direct the suit to be tried. 33 A. 264=38 I.A. 37=21 M.L.J. 1140 (P.C.). See also 33 C.W.N. 679. 1938 A.M.L.J. 59; 1938 Lah. 823. Where a suit against one of the defendants is dismissed after contest but an *ex parte* decree is given against the others, one of whom applies to have the *ex parte* decree set aside, the Court has power under proviso to R. 13 of O. 9 to set aside the whole decree, if the decree is one and indivisible. 151 I.C. 963=1934 A. 1051. A Judge cannot set aside an *ex parte* decree against the judgment-debtor without also setting it aside as against the surety. 40 I.C. 400. An indivisible order is to be set aside *in toto*. 32 L.W. 662=59 M.L.J. 918. A mortgage debt being indivisible, a mortgage decree passed *ex parte* cannot be set aside in part, because complications will arise at the time of execution and anomalous results may follow. 166 I.C. 635=18 Pat.L.T. 72=1937 P. 17. The fact that the decree is the result of a compromise is no bar to the application of the proviso. 101 I.C. 98=1927 M. 550. Where the decree is indivisible in its nature, for example, for the possession of a house the whole decree must be set aside, subject to the payment of the money due by the person bound by the decree. (*Ibid.*) Reasons for acting under the proviso to be given. 1927 M. 507=52 M.L.J. 477. *Ex parte* decree against several defendants whether can be set aside at the instance of some of them alone. See 92 I.C. 776=1926 M. 256. An *ex parte* decree having been passed against a Hindu and his son on the basis of a trust deed executed by them, both of them applied to have the decree set aside under O. 9, R. 13. The Court in appeal set the decree aside as against the son, but not against the father. Held, in



No decree to be set aside without notice to opposite party.

14. No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

LOC. AMS.—[CALCUTTA.] O. 9, R. 14. Cancel the word "thereof" in R. 14, O. 9, and substitute therefor the following words:—

"together with the copy thereof (or concise statement as the case may be)."

[BOMBAY.] Add the following as R. 15.

15. In the application of this order to appeals, so far as may be the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

[MADRAS.] Add the following as R. 15.

15. (1) Rr. 6, 13 and 14 shall apply *mutatis mutandis* to those proceedings in execution falling within S. 47 of the Code in which notice to the opposite party is required under the provisions of the Code.

(2) Subject to the provisions of sub-R. (2) of R. 13, an application under this rule shall be made within thirty days of the date of this order, or, where the notice was not duly served, of the date when the applicant has knowledge of the order." (6—3—1933.)

#### NOTES.

revision, that the decree was indivisible, and that the order refusing to set aside the decree as against the father being erroneous and in contravention of the proviso to R. 14, must be interfered with in revision. 155 I.C. 837.

**O. 9, R. 13, proviso (Peshawar).**—There is no legal justification for proceeding *ex parte* against the defendant on the ground that the summons was sent to him by post irrespective of the fact whether he received it or not. And O. 9, R. 13, as amended by the Judicial Commissioner's Court, Peshawar, does not apply to an *ex parte* decree so passed. For, that rule applies only when there is irregularity in the service of summons. 165 I.C. 947=1936 Pesh. 199. The proviso to R. 13 of O. 9, shows sufficiently that in cases where a decree is passed against the karta and members of a joint Hindu family, the point for consideration is not the identity of the defences of the defendants, but the nature of the decree passed. 1938 A.M.L.J. 59.

**MISCELLANEOUS.**—A pleader duly appearing in a suit is not obliged to file a fresh vakalat for the purpose of an application to set aside the *ex parte* decree in the suit. 47 B. 11=24 Bom.L.R. 744. An application under O. 9, R. 13 to set aside an order passed on a previous application of the same nature lies. Thus the proceedings may go on *ad infinitum*, 76 I.C. 583=1923 C. 552. Where an appeal against an order under O. 9, R. 13 is dismissed for non-prosecution second application under the same rule may be allowed subject to terms. (*Ibid.*) Where an application to set aside an *ex parte* decree is consigned to the record room on account of non-payment of process-fee, it is tantamount to dismissal for default. 102 I.C. 754=1927 L. 883 (2).

**O. 9, R. 13 and O. 17 R. 2.**—Where the defendants entered an appearance in the suit and filed a written statement and on the date fixed for final hearing failed to appear but their pleader asked for an adjournment which was refused and the pleader then

stated that he had no instructions, and the Court passed a decree *ex parte* the defendants must be held to have actually appeared on the date in question, and the Court has no jurisdiction to set aside the *ex parte* decree and the remedy open to the defendants is only an appeal against the decree as it stood. 155 I.C. 249 (1)=1935 A.L.J. 377=1935 A. 565. See also 1940 A.L.J. 200.

**O. 9, R. 13 and O. 23, R. 1.**—Suit against several defendants—One remaining *ex parte*—Plaintiff withdrawing against others and getting *ex parte* decree against one only—Subsequent setting aside of *ex parte* decree—Right of plaintiff to proceed against others—Procedure. Permission to file fresh suit can be granted. 51 L.W. 631=1940 Mad. 765=(1940) 1 M.L.J. 811.

**O. 9, R. 14.**—R. 14 is imperative and an *ex parte* decree against the defendant can be set aside only after notice has been served on the plaintiff. 24 M.L.J. 482=19 I.C. 241. See also Notes under R. 13. "Opposite party", meaning of. See 31 C. W.N. 906=103 I.C. 860=1927 C. 692. The principle of representation cannot be urged as against the definite provisions of R. 14, 149 I.C. 153=1934 P. 396. "Opposite party"—Mortgage suit—*Ex parte* decree for sale—Application to set aside—Subsequent purchaser of part of mortgaged property—Not entitled to notice. 163 I.C. 226=1936 A.L.J. 544=1936 A. 410.

**O. 9, R. 15.**—New R. 15 of is not retrospective and cannot be made applicable to *ex parte* orders passed prior to its coming into force because, the effect of such application would be to deprive persons of the rights already vested in them by the orders not having been appealed from and thus having become final. 157 I.C. 985=42 L.W. 497=1935 M. 585. The executing Court has no power to set aside an *ex parte* order in execution passed by it prior to the coming into force of O. 9, R. 15 (M.). Its power is limited by the law as it stood before the new rule was enacted. 156 I.C. 141=42 L.W. 50=1935 M. 714.



## ORDER X.

*Examination of Parties by the Court.*

1. At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (of any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.  
Ascertainment whether allegations in pleadings are admitted or denied.
2. At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person or companion of party, able to answer any material questions relating to the suit by whom such party or his pleader is accompanied may be examined orally by the Court; and the Court, may, if it thinks fit, put in the course of such examination questions suggested by either party.  
Oral examination of party, or companion of party.
3. The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.  
Substance of examination to be written.
4. (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.  
Consequence of refusal or inability of pleader to answer.

## NOTES.

**O. 10, R. 1.**—Admission on a question of fact made by pleader binds his client. 9 W.R. 485. See also 2 M.I.A. 253. Erroneous consent of vakil upon a mistaken view of the law cannot bind the client. 16 W.R. 246. Pleader cannot relinquish any portion of his client's case without express authority. 12 W.R. 279. Admissions made by a party under R. 1 are conclusive against him. 49 A. 219=97 I.C. 176=1926 A. 710. Under R. 1 it is obligatory on the Court to examine them only when there is no clear express or implied denial of any statement of fact in their pleadings. 92 I.C. 1006=8 L.L.J. 67.

**JOINT STATEMENT—LEGALITY.**—There is nothing in law to support the view that when all the defendants confess judgment a joint statement of all of them cannot be recorded in a civil case. 152 I.C. 622=1934 L. 540.

**O. 10, Rr. 1 AND 2.**—In a suit against the mortgagor and the mortgagee for a declaration that the mortgagor had no interest in the mortgaged property and that the plaintiff was absolutely entitled to the same, the Court framed the issues and on the same date examined the mortgagee's counsel and recorded his statement to the effect that he did not know how the mortgagor acquired title to the mortgaged property. Held, that the statement by the counsel fell under O. 10, R. 1 and not under O. 10, R. 2 and that the same could not be recorded even under O. 10, R. 1. A.I.R. 1941 Sind 41.

**O. 10, R. 2.**—Object of examination is

not to take evidence, but to see what are matters in dispute. 15 I.A. 119. See 5 Bom.L.R. 687 and 1905 A.W.N. 170; 1926 A. 411=29 I.C. 1003. See also 1937 Nag. 268. The power given by O. 10, R. 2 to examine any party present in Court is to be used by the Judge only when he finds it necessary to obtain from such party information on any material questions relating to the suit. It ought not to be employed so as to supersede the ordinary procedure at a trial as prescribed in O. 18. 1941 Sind 41. The power under this rule is intended to be used by the Judge only when he finds it necessary to obtain from such party information on any material questions relating to the suit and ought not to be employed so as to supersede the ordinary procedure at trial as prescribed in O. 18. 35 C.W.N. 925=1931 P.C. 175 (P.C.). A statement made under R. 2 by a person who appears with a pleader merely to prosecute a case or to look after it would not necessarily bind the party on whose behalf he appears. 1926 A. 411=94 I.C. 1003. Statement under R. 2 is not evidence against the party who has had no opportunity to cross-examine the party making it. 1930 L. 947=129 I.C. 301. Court directing defendant to file written statement within specified time—Party failing to do so—Right of pleader to make oral statement. A.I.R. 1937 Nag. 268.

**O. 10, R. 4.**—The powers granted by this rule are discretionary, and its intention is to enable the Court not only to get obscure points cleared up by getting information, but also to get admission to narrow down



(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

## ORDER XI.

### *Discovery and Inspection.*

1. In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer : Provided

#### NOTES.

the issues. 5 Bom.L.R. 687. Power of the Court under R. 4 is not an unlimited one. It is only where the party's pleader or recognized agent refuses or is unable to answer to material questions that Court can direct the personal attendance of the party himself. In absence of such refusal or inability if the Court assumes that it has power to direct, without assigning any reason, the personal attendance of the parties, the order is irregular and can be rectified under S. 151 and O. 47, R. 1. 1933 A.L.J. 1318=1933 A. 517. Under the provisions of R. 4, Court cannot insist on personal attendance of a party who is a pardanashin lady. 55 A. 666=1933 A.L.J. 1384=1933 A. 551. R. 4 is a self-contained rule for cases where a party is ordered to attend because the Court desires to have his evidence. 63 I.C. 961=14 L.W. 15. See also 140 I.C. 716. The rule does not provide for cases where party appears and refuses to answer. For such cases, see O. 16, R. 20. Parties to suits should not be required to attend Court under R. 4 unless questions material to the case which are to be answered have first been put to their pleaders and they have been unable or have refused to answer them. 48 I.C. 269=21 O.C. 252. There are only two cases in which personal appearance of plaintiff can be required and these fall under O. 5, R. 3 and O. 10, R. 4. 140 I.C. 716=1932 N. 135. Court ordering plaintiff to appear on the challenge of the defendant—Validity of the order. 24 L.W. 757. The question required to be answered must be material. 2 Bom.H.C.R. 340; 21 W.R. 44. Pleader merely applying for adjournment is not putting an appearance. 99 I.C. 717=1927 R. 46=4 R. 408.

O. 10, R. 4 (2).—What is lawful excuse will depend upon the circumstances of each case. 18 W.R. 63. Before pronouncing judgment, Judge should hear what the defaulter has to say, and adjudicate on the sufficiency of the excuse. 24 W.R. 314. Several adjournments were given for appearance of a party, on the motion of pleader and agent of the party; and each time they were warned that in case the party failed to appear, action will be taken under R. 4. In spite of all this, neither the party appeared nor did the pleader or agent undertake to answer all the questions. Thereupon the Court disposed of the suit under

R. 4 (2) without putting any question to the pleader or the agent. *Held*, that even though it was incumbent on the Judge to put such questions before taking action under R. 4 (2), still under the circumstances the Judge's action was quite proper. 1933 L. 922. Order dismissing suit for default of appearance under R. 4 (2) can be restored under O. 9, R. 9, for good cause. 138 I.C. 613=1932 A.L.J. 726=1932 A. 595. An order under R. 4 (2) against one of the parties is not appealable under O. 43, R. 1, unless that order amounts to a judgment. 39 A. 450=39 I.C. 151.

O. 11: APPLICATION OF THE ORDER.—O. 11 applies to proceedings in probate. 49 C. 300=23 C.L.J. 480. Under the Code interrogatories can be administered in the same manner as is done in England for discovering the facts in issue. 24 I.C. 765=41 C. 6. (7 C. 840, Dist.)

O. 11, R. 1: WHAT INTERROGATORIES MAY BE DELIVERED.—Question to extract information as to material facts in issue or for the purpose of obtaining admissions about them may be asked. The mere fact that the questions would be admissible in cross-examination does not make them good as interrogatories. 17 I.C. 155=17 C.L.J. 66. Interrogatories must not be exhibited unreasonably or vexatiously or be prolix, unnecessary or scandalous, nor be obviously meant for the purpose of fishing information. (*Ibid.*) Thus defendant setting up the plea of wagering should not be allowed to interrogate his opponent generally as to his business transactions. (*Ibid.*) A party is not entitled to administer interrogatories for obtaining discovery of facts which constitute exclusively the evidence of his adversary's case. 56 C.L.J. 440=1933 C. 151. See also 10 P. 630=1931 P. 426; 17 C. 849. Interrogatories as to amount of damages are relevant, though they may not be allowed until the question in action has been tried. See 14 C. at 706. Interrogatories should be disallowed if aimed at discovering the nature of opponent's evidence. 69 I.C. 417=1923 L. 282 (2). Nor as to matters of opinion. 23 C. 117. A party may deliver interrogatories in order to ascertain the nature of the opponent's case or to support his own case in order to narrow the points in issue or to avoid proving facts which are admitted. Interrogatories as to contents of a document cannot be issued. 151 I.C. 104=1934 N. 181. Defendants on whom the



that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

2. On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.

3. In adjusting the cost of the suit inquiry shall be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

4. Interrogatories shall be in Form No. 2 in Appendix C, with such variations as circumstances may require.

5. Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly.

6. Any objection to answering any interrogatory on the ground that it is

#### NOTES.

onus lies cannot escape that onus by laying no evidentiary basis for their defence but seeking to get admissions from plaintiff by interrogatories. To allow the interrogatories at their instance would be to allow them to avoid opening their case and to cast the onus on the other party. 142 I.C. 17 (1)=1933 M. 298. O. 3, R. 1 governs O. 11, R. 1, C. P. Code. The former order is a general one and has general application. Therefore, unless there is something specific to show that its provisions are not intended to apply to some act or appearance in some particular case, it ought to be applied. If a party to a suit is ordered to answer interrogatories, he is not bound to answer personally in the absence of a special direction to that effect, and he can answer through some recognised agent, who knows the facts. In other words, an affidavit need not be sworn to by the party himself and this can be done by a recognised agent. 193 I.C. 707.

"OPPOSITE PARTY".—The party on the other side of the record to the applicant is an opposite party, and he may be ordered to give discovery if he is a necessary party to an action, although there may be no issue or matter in question at all between him and the applicant. *Spokes v. Grosvenor and*

*Co.*, (1897) 2 Q.B. 124. But see *contra* 58 C. 1091=134 I.C. 935. See also 17 B. 384. *Ex parte* defendant does not come within the words "opposite party". 63 I.C. 258. Plaintiff is not entitled to administer interrogatories to him; nor is he entitled to do so with defendants who have the same interests as he (the plaintiff) has in the suit. 63 I.C. 258. Objection to the relevancy of interrogatories must be adjudicated upon by the Court. 46 I.C. 660=16 A.L.J. 762. *Ex parte* order giving leave to interrogate can be set aside on application of the opposite party. 5 C. 707.

ORDER DECLINING TO RE-ISSUE INTERROGATORIES—REVISION.—Under S. 44, Punjab Court's Act, High Court has no jurisdiction to entertain an application for revision from an interlocutory order declining to re-issue interrogatories but as the High Court's powers under S. 107, Government of India Act, are not merely administrative but also judicial, it can interfere to prevent injustice where the lower Court in an interlocutory order wrongly declines to re-issue interrogatories. 39 P.L.R. 250=1937 L. 28.

O. 11, R. 6: NOT "BONA FIDE".—Fishing questions in order to try whether any flaw can be discovered in defendant's case cannot be allowed. 17 C. at 849. See also 10 P. 630=1931 P. 426. If defendant is out of



Objections to interrogatories by answer. scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

7. Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

Setting aside and striking out interrogatories. 8. Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as the Court may allow.

9. An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require.

10. No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court.

11. Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the Court may direct.

12. Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit. Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

#### NOTES.

the jurisdiction, a reasonable time will be given. 24 W.R. 587.

O. 11, R. 11.—When Court grants leave to interrogate, it does not make an order under this rule. 18 C. 420 (F.B.). Order directing party to file proper affidavit within 10 days—Direction that suit should stand dismissed in default—Party failing to comply with Court's order—Suit whether automatically dismissed—Legality of such order—Right of aggrieved party. 50 C.L.J. 397 = 78 I.C. 859 = 1925 C. 166.

O. 11, R. 12.—The words "opposite party" and "any other party" in R. 12 contemplate opposite parties within the meaning of O. 11, R. 1, i.e., they must be persons between whom issues are raised at the stage at which the order for discovery is demanded. 58 C. 1091 = 134 I.C. 935. R. 12 of O. 11 is considerably wider than O. 13, R. 1 of the Code. The right to obtain discovery of an adversary's documents is a very wide one and is not limited merely to those documents which may be held to be admissible in evidence when the suit is ultimately tried.

I.L.R. (1940) 1 Cal. 504 = A.I.R. 1940 Cal. 331. Where it is obvious not only to the parties concerned but also to the presiding Judge that the decision of the matter would depend to a very large extent upon documentary evidence, the case is essentially one in which recourse should be taken to the provisions of O. 11, and in the absence of any application to this effect by either of the parties, the Judge should himself record the requisite orders for this purpose under S. 30. I.L.R. (1940) 1 Cal. 504 = A.I.R. 1940 Cal. 331. Guardian *ad litem* if a party to the suit. See 22 C. 981. But see R. 23 and 19 B. 350. Where there are several plaintiffs all must join in making an affidavit. 15 B. 7. A defendant, if may obtain discovery against a co-defendant. 17 B. 384. But see also 134 I.C. 935 = 58 C. 1091. If one co-defendant is not entitled to an order for discovery against his co-defendant, he cannot obtain it indirectly by insisting on the performance of such an order already obtained by the plaintiff but not complied with. 58 C. 1091 = 134 I.C. 935 = 1932 C. 72. Affidavit, effect of. 5 Pat.



13. The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.

14. It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

#### NOTES.

L.J. 550=58 I.C. 281. A document directed to be produced under Rr. 12 and 14 does not *ipso facto* become evidence in the case. It must be proved by witnesses and then marked as an exhibit. 4 Lah. L. J. 385=1921 C. 328. On this section, *see also* 29 Bom.L.R. 414=1927 B. 367.

PRACTICE AND PROCEDURE.—Discovery of a party's title-deeds is not ordered upon what may be a mere fishing application without the materials necessary to support the claim or precision in description of documents. 10 P. 630=1931 P. 426. *See also* 17 C. at 849; 56 C.L.J. 440. It is true that in a suitable case a defendant may object to the production of a document on the ground that it relates solely to his title, but if, on the other hand, that document may have some bearing in support of the plaintiff's title, such objection cannot be validly raised. If an order for discovery is made under O. 11, R. 12 all the documents relating to the case should be embodied in the affidavit of documents by the person against whom the order for discovery is made. If however the defendant considers that he is entitled to protection in respect of the production of any particular documents which may be entered in the affidavit under O. 11, R. 13, he will be at liberty to raise such objection at the proper stage of the proceedings if and when he is ordered to produce such documents under O. 11, R. 14 or to give inspection of them under O. 11, R. 18. I.L.R. (1940) 1 Cal. 504=A.I.R. 1940 Cal. 331.

O. 11, Rr. 12 and 13: AFFIDAVIT OF DOCUMENTS BY PARTY'S AGENT.—DISCRETION OF COURT.—Although ordinarily affidavit of documents must be made by the party himself, yet Court may allow it to be made by an agent of the party in a particular case. Under R. 12, the matter has been left to the discretion of Court and that discretion is obviously to be exercised with special reference to the facts of each case. 1934 P. 693.

O. 11, R. 13.—Affidavit of document filed under R. 13 does not protect the party from obligation to give inspection of other documents that may be proved to be in his possession. 38 C. 428=16 C.W.N. 81.

STATE DOCUMENTS.—PRIVILEGE.—Court is entitled to prescribe in any particular case the manner in which the claim for privilege for State documents shall be made if the

claim is to be allowed. It may be content with unsworn statement of a responsible Minister or it may accept a formal affidavit from him, or, if necessary call for an affidavit sufficiently full and indicative of the fact that his mind has been brought to bear on the question of the expediency in the public interest of giving or refusing the information asked for. 35 C.W.N. 1121=1931 P. C. 254=61 M.L.J. 943 (P.C.). *See also* (1941) 1 M.L.J. 617 (Income-tax returns).

O. 11, R. 14: ORDER WHEN TO BE PASSED.—Court has no power to order production of documents which do not relate to any matter in question. 23 C. 125. Power under this rule must be exercised with great caution. 53 L.W. 543=(1941) 1 M.L.J. 617. An order for production of documents under R. 14 must follow an order as to affidavit of documents under R. 12. 1923 P. 337=76 I.C. 991. No order will be made under R. 14 against a party unless he has directly admitted the document to be in his possession or power. 5 Pat.L.J. 650=58 I. C. 281. *See also* (1941) 1 M.L.J. 617. Under R. 14, Court may order production of any documents in the possession of any party relating to any matter in question in such suit, but until it is known what the plea is and what the points at issue are it is impossible for the Court to say that plaintiff's accounts are relevant. In a suit on a promissory note to which the defendant has as yet not raised any defence there is no justification for the Court to make order directing plaintiff to produce his accounts. 1937 N. 136=I.L.R. (1937) Nag. 266. The Court can only order the production of documents under R. 14 and not the inspection. An order for inspection has to be made under R. 18. 14 I.C. 51. Suit against Secretary of State for India in Council represented by Collector—Petition directing Collector to produce paimash registers in his custody is not maintainable. *See* 48 L.W. 646=(1938) 2 M. L.J. 815. Suit by husband for restitution of conjugal rights relying upon correspondence between parties—Production of correspondence—Duty of plaintiff. *See* 1937 Sind 97=169 I.C. 588. As to what documents are privileged and what statements, *see* 29 Bom.L.R. 414=102 I.C. 425=1927 B. 367. *Income-tax return* cannot be ordered by Court to be produced. (*See* S. 54, Income-tax Act) 53 L.W. 543=(1941) 1 M.L.J. 617.



15. Every party to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

16. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form Nol. 7 in Appendix C, with such variations as circumstances may require.

17. The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.

#### NOTES.

EFFECT OF NON-COMPLIANCE.—The non-compliance with order under R. 14 for production of account-books does not warrant the striking off the defence of the party who is guilty of non-compliance with the order. 44 A. 565=20 A.L.J. 422. See also 38 L. W. 933=1933 M. 870; 46 M.L.J. 350. Grounds on which discretion is given to a Court for striking off the defence are given in O. 11, R. 21. (*Ibid.*).

REVISION.—Order under this rule cannot be revised, under S. 115. 9 M. 256. But see 53 L.W. 543=(1941) 1 M.L.J. 617.

O. 11, R. 15.—There is a distinction between documents sued upon and documents relied upon by plaintiffs and a defendant under R. 15 is not entitled as of right to have inspection of documents relied upon by plaintiff before he files written statement. 56 I. C. 457=24 C.W.N. 302. But see 34 L.W. 654=1931 M. 825=61 M.L.J. 704 (*contra*). See also 53 A. 442=1931 A.L.J. 94=1931 A. 221. See also notes under O. 11, R. 18. R. 15 refers not merely to documents which the plaintiff sues upon but also those which he relies upon as evidence in support of his claim. The "referred expression to" is equivalent to 'entered in the list' and the list must be deemed to be part of the plaint. So right of inspection extends to documents entered in a list attached to plaint. 1931 M. 825=61 M.L.J. 704 (24 C.W.N. 302, Diss.). It is a good cause for non-production of a document within R. 15 that the document is not in the possession or power of the person called upon to produce it. 5 Pat.L.J. 550=58 I.C. 281. It is not good case for non-production

that the account books called for inspection are necessary for every day transactions. 156 I.C. 246=1935 M. 234.

O. 11, Rr. 15 and 18: RULE 18 IS NOT PREREQUISITE TO R. 15.—It cannot be said that unless the party who has given notice of inspection which is not replied to, takes further action which is open to him under R. 18, the party who has omitted to reply or give inspection is absolved from the penalties of R. 15. There is absolutely nothing in R. 18 to suggest that it is a prerequisite to R. 15. It lays down an alternative procedure by which, if the notice is not replied to, the party who has asked for inspection can force the other party to give it. 1935 M. 234; 156 I.C. 246. See also 10 C. 59. Whether a party proceeds under O. 11, R. 15 or under O. 11, R. 18 (2) he must act promptly, and delay in itself may be a good ground for refusing to grant time for the filing of the written statement until after the inspection has been made. Where the documents of which inspection is sought have not been referred to in the pleadings or affidavits of the plaintiff and appear only in the list filed under O. 7, R. 14 (2), the defendant, unless he proceeds under O. 11, R. 18 (2), cannot insist that he has a right to inspect these documents before he can be called upon to file his written statement. 175 I.C. 40=A.I.R. 1938 Nag. 239.

O. 11, R. 17.—Where a contract is entered into at one place and has to be performed at another place, and the documents are at the place where contract has to be performed, the place of performance is proper place for



18. (1) Where the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit: Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

19. (1) Where inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations: Provided that, notwithstanding that such copy was been supplied, the Court may order inspection of the book from which the copy was made.

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3) The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specified documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and, if not then in his possession, when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some

#### NOTES.

inspecting the documents. 5 B. 467. See also 11 C. 655; 12 C. 265; 15 B. 7.

O. 11, R. 18.—[N.B. See also under O. 11, R. 15.] Strict compliance with provisions of the rule is necessary before order for inspection of documents is passed. 67 I.C. 73=44 A. 565. See also 20 S.L.R. 309. No order can be made under this rule until the questions raised under R. 17 have been determined. 14 C. 776. Before Court can make an order under this rule, if the preliminary steps mentioned in R. 15 must be taken, see 1935 M. 234 cited under R. 15, *supra*; 10 C. 59. Applicant must show that document is relevant to the matter in question. 23 C. 125. Party cannot be compelled to show the whole account-book to the opposite party, if his trade secrets are likely to be unnecessarily exposed to him. 14 I.C. 371. See also 1931 M. 825=61 M.L.J. 704. Under this rule, Court is not the proper place to offer inspection of documents. 1935 M. 234=156 I.C. 246. An order providing for inspection "*forthwith*" contemplates that

it would be given without unreasonable delay. The order takes effect although it is not drawn up. I.L.R. (1938) 2 Cal. 14=42 C. W.N. 457=A.I.R. 1938 Cal. 353.

O. 11, R. 18 (2).—Under R. 18 (2) order of inspection can be made not only in respect of document mentioned in the plaint and written statement and affidavit of discovery but also in respect of other documents. Where Judge is satisfied as to relevancy of the document it is not necessary that there should be an affidavit. At any rate, the want of affidavit cannot invalidate the order under R. 18 (2), requiring the defendant to produce a document and if defendant does not comply with the order, Court is justified in ordering that his written statements be struck off. 53 A. 442=1931 A.L.J. 94=1931 A. 221. (26 A.L.J. 1376; 1922 A. 235, Dist.).

O. 11, R. 19.—In a proper case, Court has power, notwithstanding a certificate from the Minister of State claiming protection, to inspect state documents and official communications, in respect of which privilege was



time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them.

20. Where the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

21. Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.

#### NOTES.

set up, in order to see whether the claim was justified, *see* 35 C.W.N. 1121=1931 P.C. 254=61 M.L.J. 943 (P.C.).

O. 11, R. 20.—Rule applies to mixed questions of law and fact. 27 W.R. 678. It is not intended to come into operation until after an application has been made under R. 18. 14 C. 776. *See also* 6 B. 578. Discovery may precede particulars if two conditions are satisfied: (1) where information sought is necessarily within opponent's knowledge; (2) where Court is satisfied that no unfair attempt to fish out a case is being made. In these two cases, discovery may precede particulars even where the object of the action is to re-open settled accounts. R. 20 does not operate as a bar to discovery, when for determining the very issue of a settled account, the discovery or production of documents is essential. 41 L.W. 275=68 M.L.J. 241=157 I.C. 599=1935 M. 288.

O. 11, R. 21: APPLICABILITY OF RULE.—*See* 1933 L. 248=143 I.C. 355.

WHEN AN ORDER UNDER THE RULE MAY BE PASSED.—Order can be passed only after Court has directed discovery under R. 12 or inspection of documents under R. 18. 44 A 565=20 A.L.J. 422=67 I.C. 73; 96 I.C. 1003=1926 S. 272. Thus a mere suspicion against plaintiff of suppressing documents relating to matters in issue, without order for discovery or inspection, is not a ground for dismissing the suit. 38 A. 5=13 A.L.J. 831. The principle governing the Court's exercise of its discretion under R. 21 is that it is only when the default is wilful and as a last resort that Court should dismiss the suit or strike out the defence. 158 I.C. 613=1935 R. 310. Suit can be dismissed for failure to comply with an order for discovery or inspection of documents only when the documents are referred to in the pleadings or affidavits. 28 I.C. 905. Order under R. 21, can be passed only when there is a previous

order under R. 11 requiring a party to answer interrogatories. 96 I.C. 16=24 A.L.J. 589=1926 A. 553. The terms of O. 11, R. 21, seem to contemplate that ordinarily there will be two orders; first an order for discovery, and second, on default, an order of dismissal of the suit for want of prosecution. But where there has been a previous order for discovery, it is proper and also according to the practice both in England and India, to make a subsequent conditional order, for example, an order for discovery within a prescribed time and upon default that the suit be dismissed or stand dismissed. I.L.R. (1938) 2 Cal. 14=42 C.W.N. 457=1938 Cal. 353. Court has no power to dismiss suit for disobedience of an order under O. 11, R. 14 for production of certain documents. (46 M.L.J. 350, Foll.) 38 L. W. 933=1933 M. 870. *See also* 1936 N. 130 (Insolvency petition by creditor—Non-production of account-books. Power to dismiss Petition.) Mere non-compliance with orders for discovery or inspection does not justify trial Court to strike off the defence of the party so ordered. 20 A.L.J. 422=44 A. 565. There is no difference in effect between the terms "stand dismissed" and "be dismissed". The order becomes on default a final order dismissing the suit. I.L.R. (1938) 2 Cal. 14=42 C.W.N. 457=A.I.R. 1938 Cal. 353. Penalty provided in R. 21 should only be imposed in extreme cases and as a last resort. (58 P.R. 1898; 59 P.R. 1892; 9 C. 923; 38 A. 5; 58 I.C. 281=5 Pat.L.J. 550; 14 C. 768, Ref.); 65 I.C. 661; 121 I. C. 421=1929 L. 750. Defendant should be called upon to show cause before an order striking off defence is passed. It must also be shown that the non-compliance was due to wilful default. 27 Bom.L.R. 694=89 I.C. 215. *See also* 1925 C. 166=50 C.L.J. 397; 20 S.L.R. 309. "Wilfully" means that the Act is done deliberately and intentionally not by accident or inadvertence but so that the



22. Any party may, at the trial of a suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answers: Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, it may direct them to be put in.

23. This order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons under disability.

Order to apply to minors.

## ORDER XII.

### ADMISSIONS.

1. Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

Notice of admission of case.

2. Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

Notice to admit documents.

3. A notice to admit documents shall be in Form No. 9 in Appendix C, with such variations as circumstances may require.

Form of notice.

### NOTES.

mind of the person who does the act goes with it. 1929 L. 750=121 I.C. 421. Where a party fails to comply with order for discovery, the proper remedy is for the party seeking the discovery to apply to have the proceedings stayed or the suit dismissed. 48 I.C. 711=4 Pat.L.J. 394. Where suit is dismissed for want of prosecution under the rule, the remedy of the aggrieved party is by appeal. Court cannot set it aside under O. 9, R. 9. 3 R. 63=1925 R. 218. See also 137 I.C. 842=1932 M. 316. Where plaintiff's suit has been dismissed under O. 11, R. 21, the Court has no power to review its order under S. 151, the order being appealable. 98 I.C. 70=1927 C. 158. Non-compliance with order under R. 14—Dismissal under R. 21 if justified—Appeal from—If lies. 115 I.C. 464=1929 A. 83. If defendant fails to comply with an order for discovery of documents, he is liable to have his defence struck out and to be placed in the same position as if he had not defended the suit. It does not justify Court in shutting out all his evidence, although he was allowed to defend the suit. 121 I.C. 337=1931 P. 114.

APPEAL—PRACTICE AND PROCEDURE.—Where order is made under the provisions of R. 21, dismissing suit and simultaneously with that order judgment and decree are passed, notwithstanding that an appeal lies against the decree itself, an appeal is competent against the order that the suit should be dismissed.

137 I.C. 842=1932 M. 316. [See also 143 I.C. 355=1933 L. 248.] Where the provision of law quoted in dismissing suit is R. 21 but everything points to the order itself in substance and intention having been under O. 6, R. 5, in judging of the appealability of order, Court has to look to the substance of it rather than the provisions of law under which it purports to have been made. (*Ibid.*).

O. 11, Rr. 21 and 23.—R. 21 is part of the rules of the High Court, unless High Court has made a rule of itself expressly or by application abrogating it; and when High Court Original Side Rules do not contain any such Rule, the provisions of R. 21, ought to be enforced even against a minor defendant, in view of R. 23, of O. 11; the enforcement cannot be refused on the ground that it is not the practice of the Court to do so. A practice of the Court cannot be allowed to abrogate the rules applicable to the Court. 39 C.W.N. 1029.

O. 12.—The U.P. Land Revenue Act being a self-contained enactment in respect of procedure, the provisions of the C.P. Code do not apply to proceedings under the Act unless they have been made specially applicable; and Orders 12 and 23 are not among those which have been made applicable to such proceedings. 1940 O.A. 860=1940 A. W.R. (B.R) 18=1940 R.D. 364.

O. 12, R. 1.—Admissions must be taken as a whole. 41 M.L.J. 525=71 I.C. 270.



4. Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other, party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs: Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

5. A notice to admit facts shall be in Form No. 10 in Appendix C, and admissions of facts shall be in Form No. 11 in Appendix C, with such variations as circumstances may require.

6. Any party may, at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment as the Court may think just.

LOC. AMS.—[MADRAS]. 1. *Re-number* the existing R. 6 of O. 12 as sub-R. 6 (1) and *insert* the following as sub-Rr. (2) and (3):—

“(2) The Court may also of its own motion make such order or give such judgment as it may consider just, having due regard to the admissions made by the parties.

(3) Whenever an order or judgment is pronounced under the provisions of this rule, a decree may be drawn up in accordance with such order or judgment and bearing the same date as the day on which the order or judgment was pronounced.”

[PATNA]. *Substitute* the following for R. 6 in O. 12.

“6. Where admissions of fact have been made, either on the pleadings or otherwise, the Court may, at any stage of a suit on the application of any party, or, of its own motion, without waiting for the determination of any other question between the parties, make such order or give such judgment, as it may think just.”

[RANGOON]. In O. 12, R. 6, *substitute* “judgment, decree or order” for the words “judgment or order” where they first occur and for the last part of the rule *substitute* the following:— “and the Court may, either upon such application or upon its own motion, give such judgment or make such decree or order as the Court may think just.”

*Add* the following as sub-R. (2):—

“(2) A decree or order passed under this rule may be executed at any time, notwithstanding that other questions between the parties still remain to be decided in the case.”

7. An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof is required.

#### NOTES.

O. 12, R. 6.—When judgment on admissions to be passed. 27 C.W.N. 783=1924 C. 190; 1929 L. 750=121 I.C. 421. *See also* 132 I.C. 796=1931 O. 321. Before Court can act under R. 6, admission must be clear and unambiguous and the amount due and recoverable, must be due and recoverable in action in which admission is made. (45 C. 138, Rel. on.) 145 I.C. 705=1933 L. 403; 1927 S. 25=97 I.C. 623. Judgment on con-

fessions, object and enforcement of. *See* 92 I.C. 562=1926 S. 119=20 S.L.R. 216. Admission of portion of claim—Judgment—Procedure. 45 C. 138=22 C.W.N. 204. Applicability to admission of law—Use of word “may”, significance of—Admission of plea as to *res judicata*—Court whether bound to pass decree on basis of admission. 116 I.C. 330=1929 L. 569. Court is not always bound to pass a decree on basis of an admission. It has a discretion to pass or refuse



8. Notice to produce documents shall be in Form No. 12 in Appendix C, with such variations as circumstances may require. An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.

9. If a notice to admit or produce specifies documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.

Costs.

### ORDER XIII.

#### *Production, Impounding and return of Documents.*

1. (1) The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

(2) The Court shall receive the documents so produced: Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

LOC. AMS.—[OUDH]. O. 13, R. 1 substituted by Oudh Chief Court.—(1) The parties or their pleaders shall produce or cause to be produced on the date fixed by the Court, under O. 7, R. 14 and O. 8, R. 1 (2), or on any subsequent date which may be fixed by the Court for the purpose, all the documentary evidence of every description in their possession or power on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has permitted or ordered to be produced.

#### NOTES.

to pass a decree on mere admission, which discretion, if properly exercised, will not be interfered with in appeal or revision. 132 I. C. 796=1931 O. 321.

O. 13, R. 1.—The words "when called for by the Court have been omitted to meet the ruling in 8 M. 373, 375.

SCOPE.—R. 1 is peremptory that documents on which a party intends to rely must be produced at the first hearing, and R. 62 of the Madras Civil Rules of Practice does not relieve the party of that obligation. 34 L. W. 528=133 I. C. 371=1931 M. 512.

"FIRST HEARING OF THE SUIT".—The words "first hearing" do not mean first hearing on the issue. 21 W. R. 42. First hearing means day of framing of issues and documents can only be produced after that date on good cause being shown under O. 13, R. 2. 23 L. W. 69=1926 M. 347=93 I. C. 16. First hearing of suit means not the day to which the case is adjourned but the day when the case is actually gone into. It is enough if documents are filed before the latter date. 50 I. C. 296. Documentary evidence which has not been produced at the first hearing of a suit under R. 1 may be admitted at a later stage at the discretion of Court. 45 C. 878=45 I. A. 73=35 M. L. J. 422 (P. C.), See also 42 C. L. J. 280=1926 C. 1; 106 I. C. 272=1928 P. 209=9 P. L. T. 317; 23 L. W. 69. Summary rejection of application to produce

documents after settlement of issues but at an early stage, not proper. 87 I. C. 351 (2)=1925 M. 744. Where certain registered documents were filed and admitted in evidence at a very late stage of the trial and the opposite side did not object to the same, *held*, that trial Judge had complete discretion to admit the documents and that no objection having been raised to their mode of proof, the question cannot be raised in appeal. 8 Pat. L. T. 255=98 I. C. 968=1927 P. 117. Mere receipt of a document by a Court does not imply that it is evidence, but merely declares that it may be used as evidence in the suit. 21 W. R. 76. The mere endorsement "Exhibit" does not amount to formal admission in evidence. 16 I. C. 834=169 P. L. R. 1912. See also 13 L. 126=1931 L. 546. Absence of endorsement makes the document inadmissible. 96 I. C. 998=8 L. L. J. 492. (38 A. 627, P. C.). Duty of counsel to tender documentary evidence and have the endorsement of the Judge. 9 L. 4=1928 L. 142.

REVISION.—See 133 I. C. 371=1931 M. 512.

O. 13, Rr. 1 and 2.—Filing of documents—Stage—The practice of giving a hearing known as "*wajeh-sabut*", i. e., a hearing specially fixed for presentation of documents that may be required, is nowhere warranted by any of the provisions of the C. P. Code. Rr. 1 and 2 of O. 13, clearly prescribe the procedure to be followed in the filing of the documents. 1938 A. M. L. J. 120.



(2) The parties or their pleaders may also file, with the permission of the Court, either on the date of hearing or any subsequent date to be fixed by the Court for the purpose, a supplementary list of further documents on which they intend to rely, and such documents shall be produced by them within the time fixed by the Court.

(3) The Court shall receive the documents so produced provided that (whenever the documents are produced at any stage of the case) they are accompanied by an accurate list thereof prepared in such form as the Chief Court may direct.

*Explanation.*—A Certified copy of a public document is a document “in the power” of a party, but where a document is in the possession of a person other than the plaintiff or defendant it will not be deemed to be “in the power” of the plaintiff or defendant.

[PATNA]. O. 13. In R. 1 after the words “at the first hearing of the suit” should be added “or, where issues are framed, on the day when issues are framed, or within such further time as the Court may permit.”

[RANGOON]. To O. 13, R. 1, the following shall be added as sub-rule (3):—

“(3) The High Court of Judicature at Rangoon directs that such lists shall be prepared in Judicial Form ————23 which will be given free of charge to the parties wishing to tender document in evidence.”

[N.-W.F.P.] Rule 1.

The following rule is substituted:—

“All documentary evidence shall be produced by the parties or their pleaders in the method and at the time prescribed in Orders 7 and 8: Provided that after the settlement of issues the Court may fix a date not being more than 30 days after such settlement within which the parties may present supplementary lists of documents on which they rely.”

2. No documentary evidence in the possession or power of any party which should have been, but has not been produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing.

#### NOTES.

O. 13, R. 2.—Rule was enacted to prevent fraud by the late production of suspicious documents, and not to shut out formal evidence beyond suspicion, such as certified copies of public document, like records of Government. 22 B. 173; 6 C.L.J. 521; 56 C. 1003 (P.C.); 1930 P. 603. But Court should be careful in allowing parties to make out at a late stage a new case different from that which was set up in their pleadings before the trial, and should not be too ready to receive documents produced very late with the allegation of their having been mislaid. 140 I.C. 104=1932 P. 332. Rule does not apply to documents handed to a witness to refresh his memory. 1 M.H.C.R. 168; or to documents filed for comparison of handwriting. 8 M. 373; to documents produced for the cross-examination of witness. 8 Mad. 373. Where, according to the evidence, at the date of the first hearing certain documents were not in the possession or power of the plaintiffs and the plaintiff and his advisers did not know of their existence so as to enable them to inspect them and form an opinion as to whether they would rely on them or not, *held*, that it cannot be said that they should have been produced at the first hearing and, therefore, the rule does not authorize the exclusion. 56 C. 1003=33 C.W. N. 463=56 M.L.J. 562 (P.C.). Discretion of Court—Time of exercise—Order directing documents to be kept on record—Effect. 8 P. 766=10 Pat.L.T. 183=1929 P. 254.

O. 13, R. 2 contemplates late production of documents in the possession of the party and has no reference to documents in possession of a witness. 1930 M.W.N. 511. Though O. 13, R. 2, C. P. Code, requires the parties to put in their documentary evidence at the first hearing of the suit, the Court has still a discretion under the rule to accept documents at a later stage; and when the trial Court has exercised its discretion by allowing documents to be put in, the appellate Court should not lightly interfere with it especially when the document is put in support of an amendment which the Court considered justifiable. 21 Pat.L.T. 440. A trial Court cannot base its decision on an allegation of fraud never set up by the defendants in their written statement, nor in issue, and based on documents put for the first time in cross-examination of the plaintiff's witnesses and can be disregarded by the appellate Court if so admitted by the trial Court without reasons. 1939 Rang.L.R. 18=A.I.R. 1939 Rang. 98. An appellate Court cannot refuse to admit evidence admitted by the trial Court on the ground that the evidence was produced late and was not admissible under O. 13, R. 2. 67 C.L.J. 133.

O. 13, Rr. 2 and 3.—A document which was neither a public document nor even a registered one was produced at a late stage in the suit and was refused to be admitted in evidence by trial Court. Lower appellate Court also refused to interfere with the discretion exercised by trial Court. *Held*, that



Rejection of irrelevant or inadmissible documents.

3. The Court may, at any stage of the suit, reject any document, which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

4. (1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence.

namely :—

- (a) the number and title of the suit,
- (b) the name of the person producing the document,
- (c) the date on which it was produced, and
- (d) a statement of its having been so admitted; and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge.

#### NOTES.

the lower Court did not err in law in refusing to admit it. 146 I.C. 445=1933 R. 174. Acceptance or rejection of a document tendered by a party at a late stage of the case is a matter entirely within the discretion of the Court which cannot be interfered with in second appeal unless that discretion has been exercised capriciously, in an arbitrary manner and contrary to well-recognised judicial principles. 146 I.C. 683=34 P.L.R. 736=1933 L. 892. The debtors in an insolvency petition against them are no doubt under an obligation to produce their books of account at the earliest opportunity. The Judge also should see that the books are produced at the first possible moment. But when the Judge waives such production, the Judge cannot refuse permission to produce the books at a later stage. Judge is not justified in stating that the books are fabricated merely relying on the unsupported allegation of a creditor. Whether the books are fabricated or not is a question to be determined by the Judge after the books are produced. 152 I.C. 655=15 P.L.T. 461=1934 P. 526.

O. 13, R. 3.—Appellate Court is bound to consider documents admitted by Lower Court. 8 M. 373; 6 C.L.J. 621. See also 12 M.L.J. 351. An insufficiently stamped document was filed and some evidence was taken on it and it was marked as an exhibit for reference, but the endorsement required by O. 13, R. 4 was not made. Next day the opposite party objected to the admissibility of the document and the objection was upheld. Held, that there was no judicial determination of the question of the admissibility of the document till the objection was raised, and the words "admitted in evidence" in S. 36, Stamp Act, must be taken to mean letting in as a part of the evidence as a result of judicial determination of the question whether it can be admitted in evidence or not for want of stamp. Hence the Court could reject the document under this rule. 142 I.C. 535=1933 L. 271 relying on 1929 M. 522. See also 46 L.W. 515=1937 Mad. 431.

O. 13, R. 4.—Provisions of rule are imperative. Judge should endorse with his own hand a statement, that a document is proved or admitted by the person, against whom it is used. 38 A. 627=31 M.L.J. 607=43 L.A. 212 (P.C.). See also 1933 L. 261, cited under O. 13, R. 3, *supra*. Strict compliance with section necessary. 8 L. 1=1927 L. 115. Documents produced behind back of a party and endorsed by Court—Party can call for the proof thereof. 104 I.C. 146=1927 L. 679. As to mofussil practice in Madras Presidency regarding admission of documents, see 37 M. 455=22 M.L.J. 217. (See also 1931 L. 546 as to procedure in exhibiting documents as evidence.) Documents tendered and marked as exhibit by Commissioner—Formal endorsement not made by trial Judge—Document not rendered inadmissible. 7 R. 164=1929 R. 211. When once a document is admitted under R. 4, its admission cannot be called in question at any stage of the same suit or proceeding on the ground that it has not been duly stamped. And the trial Court has no more authority to review its own order admitting the document in evidence than an appellate Court would have to reverse that order on appeal. 1933 A. 821. Document mechanically admitted in trial Court, but not considered—Appellate Court basing its decision on the document—Not valid. Proper course is to send back the whole case for re-trial *de novo*. 99 I.C. 920=1927 L. 45; 56 M.L.J. 633=1929 M. 522. Where certain documents are produced by a party, and are referred to in the argument and made use of in judgment also, the mere fact that they have not been marked as exhibits is a mere irregularity which is not incurable. 1933 S. 379. Documents sent for from another Court—No endorsement—Documents whether evidence. 31 P.L.R. 250.

EXHIBITING DOCUMENTS—PRACTICE.—The practice of putting seal on the documents immediately on their production and thereby exhibiting the document is not proper. There are two stages relating to the documents. One is the stage when all the documents on which the parties rely are filed by



LOC. AMS.—[OUDH]. In R. 4 (1) (d) add "in the Judge's own handwriting" after the word "statement."

[RANGOON]. To O. 13, R. 4, the following shall be added as sub-rules (3), (4) and (5):—

"(3) The Court shall mark the documents which are admitted on behalf of the plaintiff or plaintiffs with capital letters in the order in which they are admitted thus A, B, C, etc.; and the documents admitted on behalf of the defendant with figures thus 1, 2, 3; etc.

"(4) When a number of documents of the same nature are admitted, as for example, a series of receipts for rent; the whole series shall bear one number or capital letter, a small number or small letter being added to distinguish each paper of the series.

"(5) Every document on admission shall be entered in a list in Form 

Judicial
General

 25 prepared by the Bench Clerk and signed by the Judge."

5. (1) Save in so far as otherwise provided by the Bankers' Book's Evidence Act, 1891, where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of the entry.

(2) Where such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished—

(a) where the record, book or account is produced on behalf of a party, then by that party, or

(b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party.

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it.

LOC. AM.—[RANGOON]. To O. 13, R. 5, sub-R. (3), the following shall be added:—

"(3) A note of the return should be made in the list in Form 

Judicial
General

 25."

6. Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.

#### NOTES.

them in Court. The next stage is when the documents are proved and formally tendered in evidence. It is at this later stage that the Court has to decide whether they should be admitted or rejected. If they are admitted and proved, then the seal of the Court is put on them giving certain details laid down by law as to how they are to be exhibited; otherwise the documents are returned to the party who produced them with an endorsement thereon to that effect. 1931 L. 546=132 I.C. 481. Where a document is produced in Court and is initialled by the Judge, he should make it quite clear whether he is admitting it in evidence or only marking

it for identification. 1936 A.M.L.J. 22.

NON-COMPLIANCE WITH RULE—EFFECT OF.—The fact that the provisions of R. 4 have not been strictly complied with in regard to endorsement on an exhibit does not make it inadmissible in evidence. 161 I.C. 164=1937 P. 222.

O. 13, R. 5.—An extract from an entry in an account book does not require any stamp. 26 B. 522. Proceedings for return of documents are purely ministerial. No question can arise therein, which would make the taking of evidence on oath compulsory. 71 I.C. 666=26 C.W.N. 660. On this rule, see 8 L.L.J. 537=1927 L. 45 cited under R. 4.

O. 13, R. 6.—See 12 M.L.J. 351.



7. (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

Recording of admitted and return of rejected documents.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

LOC. AMS.—[MADRAS]. Add the following proviso to O. 13, R. 7 (2) :—

“Provided that no document shall be returned which by force of the decree has become wholly void or useless.”

[NAGPUR]. The following shall be added as sub-R. (3) :—

“(3) Every document produced in evidence, which is not written in the Court language or in English, shall be accompanied by a correct translation into English; and every document which is written in the Court language but in a script other than Devanagri shall be accompanied by a correct transliteration into Devanagri script. If the document is admitted in evidence the opposite party shall either admit the correctness of the translation or transliteration or submit his own translation or transliteration of the document.”

[RANGOON]. Add the following to sub-rule (2) to O. 13, R. 7 :—

“who shall give receipt for them in col. 6 of the list in Form 

Judicial	23.”
General	

”

8. Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit.

Court may order any document to be impounded.

9. (1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same,—

Return of admitted documents.

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of :

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so :

Provided also that no documents shall be returned which, by force of the decree, has become wholly void or useless.

#### NOTES.

O. 13, R. 7.—A document which is not admitted in evidence cannot be treated as forming part of the record, although it is found amongst the papers on record. 14 A. 356.

O. 13, R. 7 AND OUDH CIVIL RULES, RR. 38 AND 39—RECORDING OF ADMITTED AND RETURN OF REJECTED DOCUMENTS—PROCEDURE—The language of R. 7 and of Rr. 38 and 39 of the Oudh Civil Rules, shows that the document must be either placed on the record or returned to the person producing it. There is no alternative. It is highly desirable and even necessary for the ends of justice that a disputed document should be placed on the record and should not be returned to the

person producing it. Therefore, as soon as formal or *prima facie* evidence of its genuineness has been given, it should be endorsed as “admitted in evidence” and placed on the record. Subsequently the Judge might find, upon a consideration of the whole evidence, that the document was a forgery, or that its genuineness was not proved to his satisfaction. In that event the Judge should, in order to avoid any possible misunderstanding add a further endorsement “genuineness not established” or words to that effect, but he should not endorse it as “rejected” which implies that the document should not form part of the record and should be returned to the person producing it. 162 I.C. 527=1936 O.W.N. 619=1936 O. 298.



(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it.

LOC. AMS.—[BOMBAY]. Between the first and second proviso to sub-rule (1) of R. 9 of O. 13, the following proviso shall be *inserted*, namely :—

"Provided also that a copy of the decree and of the judgment filed with the memorandum of appeal under O. 41, R. 1, may be returned after the appeal has been disposed of by the Court."

[LAHORE]. Rule 9 (1).—*Add* the following proviso as the third proviso :—

"Provided further that the cost of such certified copy shall be recoverable as a fine from the party at whose instance the original document has been produced."

[MADRAS]. O. 13, R. 9.—*Substitute* the following for the existing sub-R. (3) and *re-number* the existing sub-R. (4) as sub-R. (5) :—

"(3) Every application for return of a document under the first proviso to sub-R. (1) shall be made by a verified petition and shall set forth facts justifying the immediate return of the original.

"(4) The Court may make such order as it thinks fit for the costs of any or all the parties to any application under sub-R. (1). The Court may further direct that any costs incurred in complying with or paid on application under sub-R. (1) or incurred in complying with the provisions of R. 5 of this order, shall be included as costs in the cause.

"(5) Subject to the provisions of R. 8 above, where a document is produced by a person who is not a party to the suit and such person applies for the return of the document as hereinbefore provided and undertakes to produce it whenever required to do so, the Court shall, except for reasons to be recorded by it in writing, require the party on whose behalf the document was produced, to substitute with the least possible delay, a certified copy for the original, and shall thereupon cause the original document to be returned to the applicant and may further make such order as to costs and charges in this behalf as it thinks fit. If the copy is not so provided within the time fixed by the Court, the original document shall be returned to the applicant without further delay."

[NAGPUR]. Rule 9.—*Insert* the following as sub-rule (2) of r. 9 and *re-number* the present sub-rule (2) as sub-rule (3) :—

"(2) Where the document has been produced by a person who is not a party to the suit, the Court may and, at the request of the person applying for the return of the document, shall order the party at whose instance the document was produced to pay the cost of preparing the certified copy."

[PATNA]. *Add* the following as sub-R. 1-A in R. 9, O. 13 :—

"(1-A) Where a document is produced by a person who is not a party in the proceeding, the Court may require the party on whose behalf the document is produced to substitute a certified copy for the original as hereinbefore provided."

10. (1) The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

Court may send for papers from its own records or from other Courts.

#### NOTES.

O. 13, R. 10.—Judge is not bound to send for the records of another suit. 7 W.R. 109; 18 W.R. 13. But should not refuse an application under this rule merely because in his opinion the document cannot be produced before trial. 7 C. 560. Party applying may be required to file copies of the documents on record. 2 Bom.H.C. 341. Mere summoning by Court of a record containing a document relied on by a party will not absolve the party from the duty of placing the document by formal admission or proof upon the record of the trial for which it is required as evidence; the correct procedure for the party relying on a document not in his possession but of which a copy can be got by him is to produce the copy. If the copy is admitted by the opposite party original need not be produced. If it is not admitted or if it is still necessary to produce the original for technical proof, then the party must make an application in strict accordance with R. 10 specifying the documents required. Application for summoning records of a case on the file of suit should be rejected unless the

affidavit satisfied the Court that copies of the specified documents cannot be produced without unreasonable delay or expense or that the production of the original is necessary. 131 I.C. 374=1931 L. 119. The record of a case does not become part of the evidence merely by being requisitioned in a subsequent case under O. 13, R. 10. Any original statement or other document on the record of the previous case which is relied upon in a subsequent case must be duly proved according to the provisions of the Evidence Act before it can be utilised as part of the evidence in the later case. 1941 O.A. (Supp.) 371=1941 R.D. 390=1941 A.W.R. (Rev.) 441. The power to send for the record of another case and to inspect the same does not carry with it the power to treat the whole of the record or a part thereof as evidence in the case. If upon inspection, the trial Court comes across an important document which, in its opinion, throws important light on the question at issue or is of material assistance in ascertaining the truth, it is open to it to bring it on record and prove it according to law,



(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof, as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit.

LOC. AM.—[RANGOON]. In O. 13, R. 10, sub-R. (3) shall be re-numbered as (5) and the following shall be inserted as sub-rules (3) and (4):—

“(3) If the Court thinks fit to send for the record, it shall do so by sending a formal proceeding to the Court whose record is required. No summons to produce any record shall be issued to any Record-keeper, Chief Clerk, or Official of any Court.

“(4) Whenever a Judge sends for the record of another suit or case or other official papers and uses any part of such record or papers as evidence in trial before him, he shall direct that an authenticated copy of the part so used shall be put up with the trial record, and shall further direct at the expense of which party such copy shall be made.”

In O. 13, the following shall be inserted as rules 10-A and 10-B:—

“10-A. Exhibits, with their accompanying lists, shall not be filed with the record until after the termination of the trial.

“10-B. If any exhibit included in the index of contents of the trial record is withdrawn after judgment, the fact should be noted in the column of remarks of the index, and it should be stated whether a copy has been substituted or not.”

Provisions as to documents applied to material objects.

11. The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence.

LOC. AM.—[ALLAHABAD]. Insert the following as rules 12 and 13 to O. 13:—

“12. Every document not written in the Court vernacular or in English, which is produced (a) with a plaint or (b) at the first hearing or (c) at any other time tendered in evidence in any suit, appeal, or proceeding, shall be accompanied by a correct translation of the document into the Court vernacular. If any such document is written in the Court vernacular but in characters other than the ordinary Persian or Nagri characters in use, it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character.

The person making the translation or transliteration shall give his name and address and verify that the translation or transliteration is correct. In case of a document written in a script or language not known to the translator or to the person making the transliteration, the person who reads out the original document for the benefit of the translator or the person making the transliteration shall also verify the translation and transliteration by giving his name and address and stating that he has correctly read out the original document.”

“13. When a document included in the list, prescribed by R. 1 has been admitted in evidence, the Court shall, in addition to making the endorsement prescribed in R. 4 (1), mark such document with serial figures in the case of documents admitted as evidence for a plaintiff and with serial letters in the case of documents admitted as evidence for a defendant, and shall initial every such serial number or letter. When there are two or more parties defendants, the documents of the first party defendant may be marked A-1, A-2, A-3, etc., and those of the second party B-1, B-2, B-3, etc. When a number of documents of the same nature is admitted, as for example, a series of receipts for rent, the whole series shall bear one figure or capital letter or letters and a small figure or small letter shall be added to distinguish each paper of the series.”

#### ORDER XIV.

*Settlement of Issues and Determination of Suit on Issues of Law or on Issues agreed upon.*

1. (1) Issues arise when a material proposition of fact or law is affirmed  
Framing of issues. by the one party and denied by the other.

#### NOTES.

before using it as evidence in the case. Mere summoning of the record does not, however, render the entire record *ipso facto* evidence in the case. 1941 O.W.N. 643=1941 O.A. 412=1941 Oudh 341.

O. 14, R. 1: OBJECT OF FRAMING OF ISSUES.—“We make it the occasion for insisting on the importance of defining with precision at

the outset the points on which a decision must turn. This no doubt requires thought and care, but the time is well spent; vague and general issues for the most part mean that the case is approached without a clear idea of its essentials.” 28 B. 424. See also 22 C. 324 (P.C.); 11 C. 111 (118) (P.C.). See also 1939 Pesh. 44. The duty of framing issues rests under the Code on the Court, and



(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds : (a) issues of fact, (b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

#### NOTES.

it would be unsafe to presume from the failure of the Court to raise the necessary issues, an intention of the defendant to admit the facts which the plaintiff was bound to prove. 26 B. 363. See also 47 I.C. 589 = 35 M.L.J. 372; 51 I.C. 1007. It is the duty of Court primarily to frame issues but the parties are entitled to be heard. 78 I.C. 1 = 1925 M. 169; 60 I.C. 751. The failure to frame an issue is not necessarily fatal to a suit, provided substantial justice has been done. Where the plea of the applicability of S. 41, T. P. Act, is raised in the defence, arguments are addressed to the Court and the matter has been before the parties during the case, the Court is justified in applying the principles of S. 41, T. P. Act, even though no issue was framed on that point. A.I.R. 1941 Pesh. 59. Court cannot raise points not raised by parties. 1923 A. 167; 21 M.L.J. 1008 = 12 I.C. 137. The issues should raise matters fairly in controversy between the parties, even though the pleadings may be defectively drawn. 8 M.H.C. 114. No issues arise where there is no averment or denial. 68 I.C. 106 = 2 Lah.L.J. 188. Every Court trying civil cases has inherent power to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties. 35 M. 607 = 39 I.A. 218 = 23 M.L.J. 321 (P.C.). This rule implies that issues may be settled whether there is a written statement or not, though it is not obligatory on Court to frame issues when the defendant makes no defence. 11 C.W.N. 870. See also 29 B. 234. Court is not bound to frame issues when defendant does not appear. 15 W.R. 145. Under R. 1 issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other. Such affirmation or denial must be contained in the pleadings as defined in O. 6, R. 1. Where there is no written statement the only issues would be those arising out of the plaint which allegations are put in issue when not admitted. 165 I.C. 29 = 1936 N. 177. Court is not justified in framing an issue on a question about which there is no dispute in the pleadings. 51 I.C. 981. But see 87 I.C. 575 = 1925 C. 1157 (an issue may be framed by reference to other matters besides pleadings); 5 R. 527 = 1927 R. 319 (Suit on pronote—

Defendant admitting signature but pleading fraud on the part of plaintiff—Burden of proof on plaintiff). As to the raising of issues between co-defendants, see 15 M. 264. For other illustrative cases, see 2 M.H.C. 470; 13 M.I.A. 573; 29 M. 72. See also 29 A. 184 (P.C.); 16 W.R. 235; 17 W.R. 359, 6 C. 815; 8 C. 975. Inconsistent issues should not be raised. 15 C. 684 (P.C.). See also 13 M. 549. Judge is not bound to raise an issue on a point of law which he considers to be perfectly clear. 2 Bom.H.C. 272. Court while striking issue regarding limitation should first ascertain what article the parties consider to be applicable to the suit as framed. If the application of a particular article raises a question of fact, an issue should be struck on those facts; and if the facts are not in dispute, it may be possible to decide the question on purely legal arguments in the initial stages of the case without putting the parties to the expense of a trial. 1935 L. 982. The Court should not decide a suit in a way which is not the case of either party and on matter on which no issue is raised. 15 I.C. 185 = 1912 M.W.N. 177. A specific finding must be given on every issue though two or more issues may be discussed jointly. 20 I.C. 792 = 25 M.L.J. 329. Evidence inadmissible on issues not raised. 53 I.C. 975.

**O. 14, R. 1 (3) and (5).**—The word “shall” in cls. (3) and (5) of O. 14, R. 1 does not leave any discretion to the Court and makes it mandatory that every proposition affirmed by one party and denied by the other, whether of fact or of law, should be made the subject-matter of an issue. Even if substantial justice is done, the failure to frame an issue should not be overlooked, because an act which is obligatory under the statute must be done and the omission to do it cannot be condoned by the fact that substantial justice has been done. 184 I.C. 433 = A.I.R. 1939 Pesh. 44. See also 1941 Pesh. 59.

**O. 14, R. 1 (5): ‘FIRST HEARING OF SUIT’—MEANING OF.**—The words ‘first hearing of the suit’ in O. 13, R. 1 are obviously different from the words ‘the first hearing of the suit’ under O. 14, R. 1, Cl. (5), because parties have not to produce their documents till issues are framed. First hearing would clearly extend at least up to period of the



2. Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

Issues of law and of fact.  
Materials from which issues may be framed.

3. The Court may frame the issues from all or any of the following materials:—

(a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;

#### NOTES.

'first hearing of the suit, referred to in O. 13, R. 1. Hence it cannot be said that the powers conferred by O. 14, R. 1 (5) only extend to the first discussion of issues and not to any subsequent ones which intervene between the 'first hearing of the suit' as meant by R. 1, Cl. (5) and the first hearing as meant by O. 13, R. 1. 1935 M. 261.

**O. 14, R. 2: SECTION MANDATORY.**—R. 2 is mandatory; the only thing left open to Court is to form and express an opinion of whether the case can be disposed of on the issue of law, but the opinion even if expressed must be expressed upon some reasonable materials. 17 Pat.L.T. 253=1936 P. 250.

**OBJECT OF RULE—DISCRETION OF COURT.**—In deciding the question as to whether Court should grant or refuse a prayer to try a preliminary issue on a point of law, some harmony is to be observed between the general principle that it is undesirable to try cases piecemeal and the specific and wholesome provision of R. 2 which is for the purpose of preventing the injustice of a party being able to force his opponent go at great length into evidence when the simple decision on a point of law might render the investigation of the facts unnecessary. 17 Pat.L.T. 253=1936 P. 250.

**APPLICATION OF THE RULE.**—Provisions of this rule, as to trying issues of law before those of fact only come into operation at the first hearing of the suit. 4 B. 578. This rule and O. 15, R. 3 have no application to a case where application is made after the date fixed for first hearing for the trial of some issues raised in a suit, as issues of law, without taking evidence. The question should be dealt with quite irrespective of the provisions of the Code. 57 C.L.J. 127=1933 C. 559. R. 2 does not apply to cases in which issues of fact have not been settled but applies to cases, where Court has not postponed the settlement of issues of fact. 28 I.C. 818=19 C.W.N. 1193. It applies when on settlement of issues Court thinks there are issues of law upon which the case or some part thereof may be disposed of; then those issues of fact may be postponed. 15 L.W. 667=68 I.C. 167. See also 57 C.L.J. 127=1933 C. 559. As to limitation on the power, see 89 I.C. 814=1925 P. 674. Court acts illegally, if it treats issues raising mixed questions of law and fact, as involving only questions of law and decides without taking evidence. 26 I.C. 954=20 C.L.J. 426. On this

section, see also 5 R. 527. Under R. 2 Court must decide whether the case can be disposed of on the issue or issues of law in the first place, and if it is of opinion that the case may be disposed of on those issues only, it has no option but must decide those issues first. Where the defendant applied to have the issue relating to the jurisdiction of the Court tried first, but the Court rejected the application on the ground that it was not desirable to decide the case piecemeal, held, that as the Court had failed to consider at all the question whether the case may be disposed of on the legal issue alone, it had acted irregularly and that the order of dismissal may be interfered with in revision. 146 I.C. 792=1933 A.L.J. 707=1933 A. 753. See also I.L.R. (1938) All. 198=1938 All. 113.

**PRELIMINARY ISSUE OF FACT.**—Under R. 2 Court has no power to frame a preliminary issue of fact, though, no doubt, when Court has framed issues which properly arise, Court may come to the conclusion that one or more of these issues should be tried first and independently, because the evidence on such issue or issues can be conveniently separated from the rest of the evidence and the finding on that issue or issues may render the trial of other issues unnecessary. 56 B. 224=137 I.C. 362=1932 B. 128. See also 1932 M.W.N. 331. Where, in a suit, there are several issues of fact and law, if there is a preliminary issue of law, the decision of which may obviate the examination of a large number of witnesses, it is desirable and proper that such issue should be determined before the witnesses are called. In such a case it is not the proper procedure to take the evidence on all the issues and then decide the case finally. The mere fact that findings on preliminary issues give rise to revision applications and cause delay is no ground for postponing the determination of such issues. 18 N.L.J. 339. The burden of proof is fixed when the issues are framed, and after that it is merely a case of considering the evidence. Once the pleadings are complete the burden of proof is not transferred from side to side in the course of the proceedings. 146 I.C. 445=1933 R. 174.

**REVISION.**—It is for trial Court to decide in what order it will decide the issues and High Court will not interfere in revision in order to make a direction on this point. 1933 A. 749. But see 146 I.C. 792.

**O. 14, R. 3.**—See 3 B. 210 (213); 11 C. 407 (410); 12 W.R. 512; 27 A. 266.



(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit ;

(c) the contents of documents produced by either party.

4. Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before

Court may examine witnesses or documents before framing issues.

the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

5. (1) The Court may at any time before passing a decree amend the issues

Power to amend, and strike out, issues.

or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

6. Where the parties to a suit are agreed as to the question of fact or of law

Questions of fact or law may by agreement be stated in form of issues.

to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,—

(a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement ;

(b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct ; or

(c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

7. Where the Court is satisfied, after making such inquiry as it deems proper,—

#### NOTES.

O. 14, R. 4.—Document produced at the instance of other party—Evidence. 1926 N. 60.

O. 14, R. 5.—It is duty of the Court to frame clear and distinct issues on points in dispute between the parties. 1931 A.L.J. 349 = 1931 A. 625. An issue cannot be amended or a fresh issue framed so as to convert a suit of one character into one of another and inconsistent character. 13 B. 664; 6 A. 456. See also 38 I.C. 191 = 2 Pat.L.J. 69. Under O. 14, R. 5, the Court has power to amend the issues or to frame additional issues on such terms as it thinks fit, but this power is controlled by R. 3 of the same order which provides that the issues are to be framed from the allegations by the parties or their counsel and the contents of documents. Hence it is not open to a Court to frame an issue on a point that does not arise out of such material. 1939 N.L.J. 591 = A.I.R. 1940 Nag. 94. A charge of unchastity disentitling a

Hindu widow to maintenance, must be specifically raised in the pleadings or issues. After plaintiff's case is closed, Court will not frame an issue to that effect. 27 B. 485 (P.C.). Judge is not bound to make any amendment in the issues of a case, except for the purpose of more effectually putting in issue and trying the real question or questions in controversy, or disclosed by the pleadings on either side. 5 C. 64. The application of this rule is not confined to the date of first hearing. 68 I.C. 167 = 1922 M. 321. Amendment of plaint—Late stage—Plea of fraud—Amendment ordered, on payment of costs. 57 C. 398.

O. 14, R. 6.—The principles laid down in this rule and in R. 7 apply when the question of fact is stated in the form of an issue and is referred to the finding, not of the Court, but of a Commissioner. 29 C. 306.

O. 14, R. 7.—The word "shall" has been substituted for the word "may" to give effect to the ruling in 16 B. 202 (216).



- (a) that the agreement was duly executed by the parties,  
 (b) that they have a substantial interest in the decision of such question as aforesaid, and  
 (c) that the same is fit to be tried and decided,  
 it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court ;  
 and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement ; and, upon the judgment so pronounced, a decree shall follow.

### ORDER XV.

#### *Disposal of the Suit at the first hearing.*

1. Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment.  
 Parties not at issue.
2. Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.  
 One of several defendants not at issue.

LOC. AM.—[MADRAS]. *Re-number* R. 2 of O. 15 as sub-R. 2 (1) and *insert* the following as sub-rule (2) :—

“(2) Whenever a judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such judgment bearing the same date as the day on which the judgment was pronounced.”

3. (1) Where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit :  
 Parties at issue.

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects.

(2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires.

4. Where the summons has been issued for the final disposal of the suit and

#### NOTES.

**O. 15, R. 2.**—The working of this rule will lead to anomalies. *See* 25 A. 42. In an action commenced against several joint debtors judgment recovered against one of them who admits the claim does not bar the further prosecution of the suit against the others. 25 B. 378.

**O. 15, R. 3: APPLICATION OF THE RULE.**—R. 3 (1) applies after issues have been framed and allows the Court to determine issues of law, if satisfied that no further argument or evidence than the parties can at once adduce, is required upon such of the issues as may be sufficient for the decision of the suit. 68 I.C. 167=1922 M. 321. *See also* 16 M.

198. O. 14, R. 2 and O. 15, R. 3 have no application to a case where the application is made after the date fixed for first hearing for the trial of some issues raised in a suit, as issues of law, without taking evidence. The question should be dealt with quite irrespective of the provisions of the Code. 145 I.C. 446=57 C.L.J. 127=1933 C. 559. In appealable cases Court should as far as possible pronounce its opinion on the other issues as well. 34 C.W.N. 1129=1930 C. 787.

**O. 15, R. 4.**—Judge cannot dispose of the case at the first hearing when the summons is issued for settlement of issues only. 25 I.C. 9=1914 M.W.N. 501.



Failure to produce evidence. either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues.

## ORDER XVI.

*Summoning and Attendance of Witnesses.*

1. At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

LOC. AMS.—[ALLAHABAD]. The following proviso is *added* by the Allahabad High Court :—  
“ Provided that no party who had begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witnesses against whom process has not previously issued, or to call any witness not named in a list, which must be filed in Court before the hearing of evidence on his behalf has commenced, without an order of the Judge made in writing and stating the reasons therefor.”

[BOMBAY]. The following shall be *added* as R. 1-A to O. 16 :—

“ 1-A. (1) The Court may, on the application of any party for a summons for the attendance of any person, permit that service of such summons shall be effected by such party.

## NOTES.

O. 16, R. 1.—Under R. 1, Court has no discretion in the matter of an application for summonses on witnesses if such application be made before the day of hearing. 68 I. C. 272. *See also* 132 I. C. 579=1931 L. 135; 27 Bom. L. R. 471=1925 B. 368; 15 B. 86; 16 A. 218; 57 C. 560 at 565=1929 C. 459=49 C. L. J. 546. The word ‘may’ in O. 1, means “it shall be lawful” unless an application, on the face of it, is frivolous and vexatious, the Court has no discretion except to summon the witnesses. If an application is made too late and the service on the witness cannot be effected in time, it is no doubt within the discretion of the Court to adjourn the date of the hearing or not, but that is no reason whatsoever why a party should not be given an opportunity, if he is prepared to take the chance of having the presence of the witness secured by serving a notice upon him. 17 L. 775. *See also* 1938 Rang. 360. Even where application is too late Court has no power to refuse to summon witnesses; it may refuse to adjourn the case. 87 I. C. 355=1925 L. 67. *See also* 1938 Rang. 360; 101 I. C. 541=1927 L. 281; *see also* 96 I. C. 448=1926 P. 545; 1926 C. 364; 1929 P. 622. Where one party desires the presence of the opposite party in Court for purpose of examining him as a witness the proper procedure to adopt is the one under O. 16 and not under the proviso to O. 3, R. 1. 146 I. C. 536=1933 M. 821=65 M. L. J. 734. The legitimate privilege of taking out summons to witnesses is subject to the control of the tribunal which is called upon to enforce their attendance though such control will be sparingly exercised, and only in exceptional cases. When a person’s attendance is required from ulterior motives, a commission may be issued.

28 M. 28. Judge’s discretion in not compelling the attendance of witnesses must be exercised on reasonable grounds distinctly stated in the judgment. 7 W. R. 147. Detailed reasons, for refusal, need not be given. 6 W. R. 65. Direction to witnesses to appear—Adjournment of hearing by Court if can be made. 15 I. C. 367=22 M. L. J. 409. The fact that a party has undertaken to bring his witnesses is no ground for refusing to summon them. 6 B. 472. Where witnesses summoned are absent, further opportunity should be allowed. 4 Pat. L. T. 545=1924 P. 36. And the case cannot be decided on the ground that the witnesses, if produced, would not have supported the case of the party producing them. 86 I. C. 1012=1925 L. 572. The witness can produce documents not referred to in the summons. 88 I. C. 498=1925 C. 1149.

O. 16, R. 1: Proviso (Lahore)—APPLICABILITY.—Court cannot refuse to examine the witnesses whose names were included in the original list and who were present on the date of hearing. R. 1, Proviso (local amendment) does not apply. 1934 L. 317. The proviso to R. 1 added by the Lahore High Court, does not say that all the witnesses have to be named in the list filed. The party can file his list up till the moment when he actually commences to lead evidence. 157 I. C. 431=1935 L. 488. R. 1 is a technical one and in the absence of any prejudice to either party, Court is not justified in refusing to examine the witnesses on the ground that they were not mentioned in the list. The rule gives the Court discretion to allow witnesses to be examined even if they are not mentioned in the list if it is satisfied that there are sufficient reasons for doing so. The rule should not be applied mechanically. 1941 Lah. 38.



(2) When the Court has directed service of the summons by the party applying for the same and such service is not effected, the Court may, if it is satisfied that reasonable diligence has been used by such party to effect such service, permit service to be effected by an officer of the Court."

[LAHORE]. Add the following proviso :—

" Provided that no party who has begun to call his witness shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to produce any witness not named in a list, which must be filed in Court on or before the date on which the hearing of evidence on his behalf commences and before the actual commencement of the hearing of such evidence, without an order of the Court made in writing and stating the reasons therefor."

[N.-W.F.P]. Substitute the following for R. 1 :—

" 1. (1) On such date as the Court may appoint and not later than 30 days after the settlement of issues, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents.

(2) They shall not be permitted to call witnesses other than those contained in the said list, except with the permission of the Court and after showing good cause for the omission of the said witnesses from the list ; the Court granting such permission shall record reasons for so doing.

(3) On the application to Court or such officer as it appoints in this behalf, the parties may obtain summonses for persons whose attendance is required in Court."

[OUDH]. Substitute for R. 1 the following :—

" (1) 1. The Court may, in any suit or class of suits, require any party to file by a date to be fixed by the Court, a list of witnesses whom he proposes to produce ; and may, if necessary, direct that such list be kept in a sealed envelope for such time as the Court considers desirable.

Where such a list has been called for from any party, the latter shall not, except for special reasons, be permitted to summon or produce as witness, any person whose name has not been entered in the list.

(2) Subject to the provisions of sub-r. (1) the parties may, after the suit is instituted, obtain on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents."

[SINDH]. Add the following as R. 1-A after R. 1 :—

" 1-A. The Court may, on the application of any party for a summons for the attendance of any person as a witness, permit that service of such summons shall be effected by such party."

2. (1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

(2) In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

(3) Where the Court is subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf.

LOC. AMS.—[ALLAHABAD]. To O. 16, R. 2, add :—

" (4) This rule shall not apply, in cases to which Government is a party, in the case of witnesses who are Government servants whose salary exceeds Rs. 10 per mensem and who are summoned to give evidence in their public capacity at a Court situated more than five miles from their headquarters."

[BOMBAY]. Insert as proviso to sub-rule (1) of R. 2 of O. 16 :—

" Provided that where Government or a public officer being a party to a suit or proceeding, as such public officer supported by Government in the litigation, applies for a summons to any public officer to whom the Civil Service Regulations apply, to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal as a public officer, or to produce any documents from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness."

#### NOTES.

O. 16, R. 2.—After the list of witnesses has been filed and batta paid, Court's Officers and not the applicant are responsible for their service. 15 W.R. 88. Dismissal of suit is proper where plaintiff fails to pay

process fees. 89 I.C. 955. No action will lie for the expenses of a witness. 5 W.R.S.C.C. Refce. 6. A witness is entitled to be paid his expenses although he has not applied for them before giving his evidence. 4 B. 619.



[CALCUTTA]. R. 2. *Cancel* clauses (1) and (2) and *substitute* therefor the following :—

"(1) The Court shall fix in respect of each summons such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

(2) In fixing such an amount the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case."

[LAHORE]. *Add* the following as an *Exception* to R. 2 (1) :—

"*Exception*.—When applying for a summons for any of its own officers, Government will be exempt from the operation of clause (1)."

[NAGPUR]. *Add* the following as an exception to r. 2 (1) :—

"*Exception*.—When applying for a summons for any of its own officers, Government will be exempt from the operation of sub-R. (1)."

[PATNA]. *Add* the following proviso to O. 16, R. 2 (1) :—

"Provided that the Secretary of State shall not be required to pay any expenses into Court under this rule when he is the party applying for the summons, and the person to be summoned is an officer serving under Government, who is summoned to give evidence of facts which have come to his knowledge, or as matters with which he has had to deal in his public capacity."

[RANGOON]. *Add* the following to R. 2 (1) :—

"Provided that in cases to which Government or a local authority is a party :—

(a) No payment into Court will be required for the travelling and other expenses of a servant of Government or of local authority who may be required to be summoned at the instance of Government or the local authority prospectively to give evidence in his official capacity ;

(b) The amount to be paid into Court for the travelling and other expenses of a servant of a Government or of a local authority whose salary exceeds Rs. 10 and who may be required to be summoned at the instance of a party other than the Government or the local authority respectively to give evidence in his official capacity in a Court situated at a distance of more than five miles from his headquarters shall be equivalent to the travelling and halting allowances admissible under the rules applicable to him in his official capacity."

The following shall be *substituted* for sub-R. (3) :—

"(3) Subject to the provisions of sub-R. (2), travelling and other expenses of witnesses, in Courts subordinate to the High Court other than the Court of Small Causes of Rangoon, shall be payable on the following scale :—

(1) *Ordinary labouring classes*.—The actual railway or steamboat fare to and from the Court by the lowest class ; or where the journey could not have been performed by rail or steam-boat, actual travelling expenses up to a limit of Rs. 2 a day by boat and of 4 annas a mile by road ; and an allowance for each day's absence from home of ten annas to those who are residents of places other than the place where the Court is held and of eight annas to those who are residents of the place where the Court is held.

(2) *Petty Village officers*.—The same rates as above for railway or steam-boat fare, or actual travelling expenses by boat or road up to the limit of Rs. 2 a day by boat and of four annas a mile by road ; and an allowance for each day's absence from home of fourteen annas to those who are residents of places other than the place where the Court is held, and of twelve annas to those who are residents of the place where the Court is held.

(3) *Persons of higher ranks of life such as clerks, tradespeople, village headman and headman of circles and members of Circle Boards*.—Second class railway or steam-boat fare to and from the Court ; or where the journey could not have been performed by rail or steam-boat, actual travelling expenses up to a limit of Rs. 4 a day by boat and annas six a mile by road and an allowance not to exceed except in special cases Rs. 1-8-0 per each day's absence from home.

(4) *Persons of superior rank*.—The actual sum spent in travelling to and from the Court with an allowance according to circumstances, not to exceed except in special cases Rs. 5 for each day's absence from home.

(5) *Witnesses following any profession, such as medicine or law*.—A special allowance according to circumstances.

(6) *Lodging allowance*.—In addition to the above, a lodging allowance not exceeding except in special cases rupee one for persons in class (3) and rupees two for persons in classes (4) and (5) may be allowed for each night necessarily spent away from home if the Court is satisfied that the witness has to pay for his night's lodging. When an amount exceeding this scale is sanctioned as a special case, it shall not exceed the actual amount spent :

Provided that—

(1) A servant of Government or of a local authority whose salary exceeds Rs. 10 per mensem giving evidence in his official capacity in a suit to which Government or the local authority respectively is a party—

(a) When giving evidence at a place more than five miles from his headquarters, shall not receive anything under these rules, but shall be given a certificate of attendance ;



(b) When giving evidence at a place not more than five miles from his headquarters, shall in cases where the Court consider it necessary, receive under these rules actual travelling expenses, but shall not receive subsistence, special or expert allowances.

(2) A servant of Government or of local authority whose salary does not exceed Rs. 10 per mensem, giving evidence in his official capacity, shall receive his expenses from the Court.

*Note.*—When the journey has to be performed partly by rail or steam-boat and partly by road or boat, the fare shall be paid in respect of the former and the mileage or boat allowance in respect of the latter part of the journey.

Railway servants summoned by a Civil Court as witnesses, and travelling by rail to attend the Court should be paid the railway fare to which they are entitled under the rules for the payment of witnesses without regard to the fact that they may have travelled under a pass and not on actual payment of the fares."

[SIND]. *Insert* the following as proviso to sub-R. (1) :—

"Provided that where Government or a public officer being a party to a suit or proceeding as such public officer supported by Government in the litigation applies for a summons to any public officer to whom the Civil Service Regulations apply to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal as a public officer, or to produce any document from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling expenses of such witness."

Tender of expenses to witness. 3. The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

LOC. AMS.—[BOMBAY]. *Insert* as proviso to R. 3 of O. 16 :—

"Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice or of facts with which he has to deal in his official capacity, or to produce a document from public record, the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him."

[CALCUTTA]. *Cancel* r. 3 and *substitute* therefor the following :—

"The sum so fixed shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally."

[LAHORE]. For R. 3, *substitute* the following :—

"3. (1) The sum so paid into Court shall, except in the case of a Government servant, be tendered to the person summoned at the time of serving the summons, if it can be served personally.

(2) When the person summoned is a Government servant the sum so paid into Court shall be credited to Government.

*Exception* (1).—In cases in which Government servants have to give evidence at a Court situate not more than five miles from their headquarters, actual travelling expenses incurred by them may, when the Court considers it necessary, be paid to them.

*Exception* (2).—A Government servant, whose salary does not exceed Rs. 10 per mensem, may receive his expenses from the Court."

[NAGPUR]. For R. 3, *substitute* the following :—

"3. (1) The sum so paid into Court shall, except in the case of a Government servant, be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

(2) When the person summoned is a Government servant the sum so paid into Court shall be credited to Government.

*Exception* (1).—In cases in which Government servants have to give evidence at a Court situate not more than 5 miles from their headquarters, the actual travelling expenses incurred by them, may, when the Court considers it necessary, be paid to them.

*Exception* (2).—A Government servant, whose salary does not exceed Rs. 10 per mensem may receive his expenses from the Court."

[PATNA]. *Add* the following as proviso to R. 3 of O. 16 :—

"Provided that when the person summoned is an officer of Government who has been summoned to give evidence in a case to which Government is a party, of facts which have come to his knowledge, or of matters which he has had to deal, in his official capacity ; then—

(i) if the officer's salary does not exceed Rs. 10 a month, the Court shall at the time of the service of the summons make payment to him of his expenses as determined by R. 2 and recover the amount from the treasury ;

(ii) if the officer's salary exceeds Rs. 10 a month and the Court is situated not more than five miles from his headquarters, the Court may, at its discretion, on his appearance, pay him the actual travelling expenses incurred ;

#### NOTES.

O. 16, R. 3.—A witness who attends on *subpoena* is entitled to demand his *batta* at any time, from the party summoning him although he gives evidence as witness for a

party other than the party summoning him. 28 B. 647. If he does not attend, he can be sued for the recovery of the sum tendered. 17 M.L.J. 143.



(iii) if the officer's salary exceeds Rs. 10 a month and the Court is situated more than five miles from his headquarters, no payment shall be made to him by the Court. In such cases any expenses paid into Court under R. 2 shall be credited to Government."

[RANGOON]. To R. 3 of O. 16, add the following :—

"This rule does not apply, where the person summoned is a servant of Government or of a Local Authority summoned to give evidence in his official capacity in a case to which the Government or the Local Authority respectively is a party."

[SIND]. Insert the following as proviso :—

"Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice, or of facts with which he has had to deal in his official capacity, or to produce a document from the public record, the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him."

4. (1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the movable property of the party obtaining the summons ; or the Court may discharge the person summoned, without requiring him to give evidence ; or may both order such levy and discharge such person as aforesaid.

(2) Where it is necessary to detain the person summoned for a longer period than one day, the Court may, from time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the movable property of such party ; or the Court may discharge the person summoned without requiring him to give evidence ; or may both order such levy and discharge such person as aforesaid.

LOC. AMS.—[CALCUTTA]. Cancel clause (i) and substitute therefor the following :—

"(1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum so fixed is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and in case of default in payment, may order such sum to be levied by attachment and sale of the movable property of the party obtaining the summons ; or the Court may discharge the person summoned without requiring him to give evidence ; or may both order such levy and discharge such person as aforesaid."

[LAHORE]. Rule 4. After the word "summoned," where it first occurs in R. 4 (1) insert—  
"or, when such person is a Government servant, to be paid into Court."

[MADRAS]. Insert the following as R. 4-A in O. 16 :—

"4-A. (1) Notwithstanding anything contained in the foregoing rules, in any suit by or against the Secretary of State for India in Council no payment in accordance with R.2 or R.4 shall be required when an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs. 10 per mensem and whose attendance is required in a Court situate more than five miles from his headquarters, and the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit.

(2) When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer according to the scale prescribed by the Government under whom the officer is serving and shall also pay any further sum that may be required, under r. 4 according to the same scale and the money so deposited or paid shall be credited to the Government.

(3) In all cases where a Government servant appears in accordance with this rule, the Court shall grant him a certificate of attendance."

[NAGPUR]. Rule 4. After the word "summoned," where it first occurs in R. 4 (1) insert—  
"or, when such person is a Government servant, to be paid into Court."

5. Every summons for the attendance of a person to give evidence or to

#### NOTES.

O. 16, R. 4.—Default of payment. Only movable property can be attached. 70 I.C. 123=26 C.W.N. 877.

O. 16, R. 5.—A summons should state the place of attendance. 7 M.H.C.Ap. XIV & XLIII. A summons should clearly specify the title of the Court and the place, day



Time, place and purpose of attendance to be specified in summons.

any particular document, which the person summoned is called on to produce shall be described in the summons with reasonable accuracy.

produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes ; and

6. Any person may be summoned to produce a document, without being summoned to give evidence ; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

Power to require persons present in Court to give evidence or produce document.

7. Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

LOC. AM.—[CALCUTTA]. Insert the following :—

" 7-A. (i) Except where it appears to the Court that a summons under this Order should be served by the Court in the same manner as a summons to a defendant, the Court shall make over for service all summons under this Order to the party applying therefor. The service shall be effected by or on behalf of such party by delivering or tendering to the witness in person a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court.

(ii) Rules 16 and 18 of O. 5, shall apply to summons personally served under this rule, as though the person effecting service were a serving officer.

(iii) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or if for any reason such summons cannot be served personally, the Court shall, on the application of the party, re-issue such summons to be served by the Court in like manner as a summons to a defendant."

8. Every summons under this Order shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule.

LOC. AMS.—[ALLAHABAD]. For the words in line 1 " under this order shall be served" read " under this order may by leave of the Court be served by the party or his agent, applying for the same, by personal service and failing such service shall be served."

[CALCUTTA]. Rule 8. Cancel R. 8 and substitute therefor the following :—

" 8. (1) Every summons under this Order not being a summons made over to a party for service under r. 7-A (1) of this Order, shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in O. 5, as to proof of service shall apply thereto.

(2) The party applying for a summons to be served under this rule shall, before the summons is granted and within a period to be fixed, pay into Court the sum fixed by the Court under R. 2 of this Order."

[OUDH]. In Oudh add the following provisos :—

" Provided that any party may, with the sanction of the Court, himself or by his agent effect service on his own witness, as if he were an officer of the Court ; but in this case no diet money paid to a witness by a party or by his agent shall be included in the costs of the suit unless the witness verifies such payment before an officer of the Court :

Provided also that the special procedure for the service of summons upon defendant under O 5, R. 20-A (1) shall not apply to service of summons under this order."

[PATNA]. Add the following proviso to R. 8 :—

" Provided that a summons under this Order may by leave of the Court be served by the party or his agent, applying for the same, by personal service. If such service is not effected and the Court is satisfied that reasonable diligence has been used by the party or his agent to effect such service, then the summons shall be served by the Court in the usual manner."

[RANGOON]. The following proviso shall be added :—

" Provided that, at the request of a party or his pleader, a summons for service on a witness or witnesses, whose attendance is required by such party may be delivered to such party or his pleader for service by a person employed by such party or his pleader, and the rules in O. 5, as to service and proof of service shall apply in such case as if the person employed by such party or his pleader to effect service were the officer of the Court whose duty it is to effect service of summons."

#### NOTES.

and time of the day when attendance is required. 5 A, 7.

O. 16, R. 8.—The rule is one in favour of the witness, and for enforcing diligence on the party. 9 B. 308 (310).



9. Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

LOC. AM.—[RANGOON]. The following shall be added :—

“Where the person summoned is a public officer or servant of the Railway Company, sufficient time shall also be allowed in order to give the witness an opportunity of communicating with his departmental superior, so as to arrange for the discharge of his duties during his temporary absence from his post.”

10. (1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons, the Court shall, if the certificate of the serving officer has not been verified by affidavit, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching the service or non-service of the summons.

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12 :

Provided that no Court of Small Causes shall make an order for the attachment of immovable property.

11. Where, at any time after the attachment of his property, such person appears and satisfies the Court,—

(a) that he did not, without lawful excuse, fail to comply with the summons or intentionally avoid service, and

(b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend, the Court shall direct that the property be released from attachment, and shall make such order as to costs, of the attachment as it thinks fit.

#### NOTES.

O. 16, R. 10.—The main purpose of proceedings taken under O. 16, R. 10, is to indicate the authority of the Court, though incidentally a party who secures the presence of a witness may also benefit, if, as a result of the proceedings, the witness should ultimately appear. A person who asks the Court to attach certain property as the property of a witness under O. 16, R. 10 cannot be placed on the same footing as a decree-holder who moves the Court to attach certain properties as the properties of his judgment-debtor, because the proceedings to enforce the attendance of a witness are the act of the Court. The same legal consequences cannot therefore follow if the property attached happens to be not of the witness but of another. A party therefore

who moves the Court under O. 16, R. 10 and gets attached wrongly and carelessly properties of some other person as properties of the witness, cannot be held liable for damages for trespass in a suit by the owner of the properties, especially when the party is not shown to have acted maliciously. 1937 M. 811=46 L.W. 966. Where an application is made at a very late stage of the case, to enforce the provisions of this rule, Court is justified in not adjourning the case. 15 W.R. 176. Non-appearance of witness—Court should not insist on party taking out warrant if the party offers to produce the witness himself. 101 I.C. 257 (2)=1927 L. 424 (1).

O. 16, R. 10 (3).—See 7 P. 312; 1928 L. 979.



12. The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any :

Procedure if witness fails to appear. Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

13. The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment-debtor.

14. Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

15. Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place.

16. (1) A person so summoned and attending shall, unless the Court otherwise directs, attend at each hearing until the suit has been disposed of.

(2) On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned

#### NOTES.

O. 16, R. 12.—No order under R. 12 can be made until the procedure laid down in R. 10 had been followed, where that rule applies. 33 I.C. 968=20 C.W.N. 511; 57 I.C. 302; 1929 A. 850. But see 48 M. 941=49 M.L.J. 438, where it has been held that there need not be any issue of proclamation or attachment of property before the fine is imposed. If an order for attachment of property is made, and the person concerned fails to attend in obedience to a warrant, Court may impose upon him a fine under R. 12. 55 I.C. 425=31 C.L.J. 363. When witness or party is present, and Court directs him by word of mouth to produce a document, and there cannot be the slightest mistake as to the witness or the party having received information of such direction, it will be merely making a travesty of procedure to insist upon the Court issuing a summons to a witness who is present. On failure by a witness to produce the document he can be fined without going through the cumbrous procedure. 116 I.C. 483=1929 A.

99. Both arrest and attachment cannot be ordered. 51 I. C. 967=27 M. L. T. 95. Court is not bound to compel attendance of a witness in absence of an application by a party to that effect. 57 I.C. 311. Where witness appears, but is unable to produce the document, it is illegal to impose a fine upon him. 61 I.C. 967.

O. 16, R. 14: EXAMINATION OF PLEADER AS COURT WITNESS.—Court may refuse to examine the lawyer of one party as a *Court witness* when in dealing with his client's case he is aware of every detail which was expected to be elicited from him. Thus it will not be fair to examine him after the details had been discussed in two Courts. 12 P. 359=1933 P. 306. A witness called by the Court is liable to be cross-examined by any of the parties. 11 W.R. 468.

O. 16, R. 16.—The rule has been amended so as to meet the ruling in 5 M.H.C.R. 132. These rules have no application to a case where a party to a suit desires to give evidence of his own motion in his own favour. 35 C.L.J. 7=68 I.C. 9.



and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the Civil prison.

LOC. AM.—[LAHORE]. Add the following :—

(3) In the absence of the presiding officer the powers conferred by sub-rule (2) may be exercised by the Senior Subordinate Judge of the First Class exercising jurisdiction at the headquarters of the District, or by any judge or Court-official nominated by him for the purpose:

Provided that a Court Official nominated for the purpose, shall not, order a person, who fails to furnish such security as may be required by sub-rule (2) to be detained in prison but shall refer the case immediately to the Presiding Officer on his return.

17. The provisions of rules 10 to 13, shall, so far as they are applicable, be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse, in contravention of rule 16.

18. Where any person arrested under a warrant is brought before the Court in custody and cannot, owing to the absence of the parties, or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him, and in default of his giving such bail or security, may order him to be detained in the civil prison.

Procedure where witness apprehended cannot give evidence or produce document.

19. No one shall be ordered to attend in person to give evidence unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house.

20. Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

Consequence of refusal of party to give evidence when called on by Court.

#### NOTES.

O. 16, R. 17.—Unless it can be clearly held that a witness was expressly directed to re-attend the Court on a particular date, and that he understood that he was so required by the Court, and that he in spite of it failed to re-attend as required, he cannot be liable to be dealt with under O. 16, R. 17. In the absence of any definite order of the Court borne out by the record pointing to the existence of any such direction requiring him to attend, a mere impression on the part of the Judge that the witness had so been ordered to attend, does not justify the Court in proceeding under O. 16, R. 17, for his failure to attend. 180 I.C. 102=A.I. R. 1939 Pat. 285.

O. 16, Rr. 19 and 21.—Scope of. 35 C.L.J. 78=68 I.C. 9. O. 16, R. 19 if controls O. 26, R. 1. See 63 C. 914. A plaintiff who does not reside within limits of the jurisdiction of trial Court nor within

200 miles of the place where the Court sits cannot be compelled to appear in person as a witness for the defendant; but the defendant has to get him examined on commission at the place where the plaintiff resides. 140 I.C. 716=1932 N. 135. See also 68 M.L. J. 203=1935 M. 244.

O. 16, R. 20.—What is or what is not a lawful excuse, must depend on the circumstances of each case. 18 W.R. 63. The stringent provisions of this rule ought to be applied only in case of contumacious litigants. 15 W.R. 253. The requirement of the law under R. 20 is fulfilled, if the document is produced, and where a document is produced but refused to be exhibited, the Court cannot dismiss the suit. 46 I.C. 879=28 C.L.J. 24. A decision against a party for failure to give evidence does not operate as *res judicata*. 2 C. 222. An appeal will lie from a decree passed under this rule. See also O. 43, R. 1.



Rules as to witnesses to apply to parties summoned. 21. Where any party to a suit is required to give evidence or to produce a document the provisions as to witnesses shall apply to him so far as they are applicable.

LOC. AMS.—[CALCUTTA]. *Substitute* the following :—

21. (1) When any party to a suit is required by any other party thereto to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as applicable.

(2) When any party to a suit gives evidence on his own behalf, the Court may, in its discretion, permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing.

[MADRAS]. O. XVI, R. 21. *Substitute* the following for R. 21 :—

Rules in case of parties appearing as witnesses. (1) When a party to a suit is required by any other party thereto to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as applicable.

(2) When a party to a suit gives evidence on his own behalf, the Court may, in its discretion, permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing.

[ALLAHABAD]. *Add* the following to O. 16 as Rules. 22 and 23 :—

“22. (1) Save as provided in this rule and in R. 2, the Court shall allow travelling and other expenses on the following scale :—(a) In the case of witnesses of the class of cultivators, labourers and menials, six annas a day ; (b) in the case of witnesses of a better class such as zemindars, traders, pleaders, and persons of corresponding rank, from eight annas to two rupees a day, as the Court may direct ; and (c) in the case of witnesses of superior rank, including officers of Government in receipt of salary of not less than Rs. 200 a month, from three to five rupees a day.

(2) If a witness demands any sum in excess of what has been paid to him, such sum shall be allowed if he satisfies the Court that he has actually necessarily incurred the additional expense.

#### *Illustration.*

A post office or railway employee summoned to give evidence is entitled to demand from the party on whose behalf or at whose instance he is summoned the travelling and other expenses allowed to witnesses of the class or rank to which he belongs, and in addition the sum for which he is liable as payment to the substitute officiating during his absence from duty. The sum so payable in respect of the substitute will be certified by the official superior of that witness on a slip which the witness will present to the Court from which the summons was issued.

(3) If a witness be detained for a longer period than one day the expenses of his detention shall be allowed at such rate not usually exceeding that payable under cl. (i) of this rule as may seem to the Court to be reasonable and proper :

Provided that the Court may, for reasons stated in writing, allow expenses on a higher scale than that hereinbefore prescribed.”

“23. In cases to which Government is a party, Government servants, whose salary exceeds Rs. 10 per mensem and all police constables whatever their salary may be who are summoned to give evidence in their official capacity at a Court situated more than five miles from their headquarters shall be given a certificate of attendance by the Court in lieu of travelling and other expenses.”

## ORDER XVII.

### ADJOURNMENTS.

1. (1) The Court may, if sufficient cause is shown, at any stage of the suit Court may grant time and grant time to the parties or to any of them, and may adjourn hearing. from time to time adjourn the hearing of the suit.

#### NOTES.

O. 16, R. 21.—*See* 140 I.C. 716=1932 N. 135, cited under O. 16, R. 19. Court has no power under R. 21 or any other provision of the Code to order travelling expenses of a party to the suit who has given evidence in support of his own case, by way of costs to him. 41 L.W. 186=68 M.L.J. 203=159 I.C. 319=1935 M. 244.

O. 17, R. 1: APPLICABILITY OF O. 17 TO AN APPLICATION UNDER O. 34, R. 5.—*See* 31 S.L.R. 180.

APPLICATION OF THE RULE.—The rule does not apply to an adjournment not made at the instance of the parties. 2 C.W.N. 490.

Application for adjournments should not be belated. 83 I.C. 257=1925 N. 536 (2). Non-compliance with a provision of law does not give a party an absolute right to insist on an adjournment. 5 Pat.L.J. 390. Adjournment is in the discretion of Court. 24 I.C. 206; 37 I.C. 266=1 Pat.L.J. 173; 27 I.C. 942. *See also* 17 Pat.L.T. 329=15 P. 561 (S.R.). Court can no doubt refuse to grant an adjournment for good reasons, but if an adjournment be given, the Court cannot refuse to summon witnesses for the adjourned hearing if the process-fees are paid, unless the Court is satisfied that the application for the summons is not made bona



(2) In every such case the Court shall fix a day for the further hearing of the suit and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:

Costs of adjournment. Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

LOC. AMS.—[ALLAHABAD]. The following proviso is added by the Allahabad High Court:—

Provided further that no such adjournment shall be granted for the purpose of calling a witness not previously summoned or named, nor shall any adjournment be utilised by any party for such purpose, unless the Judge has made an order in writing under the proviso to O. 16, R. 1.

[LAHORE]. (i) To R. 1 add the following as sub-R. (3):—

(3) Where sufficient cause is not shown for the grant of an adjournment under sub-R. (1) the Court shall proceed with the suit forthwith.

(ii) To R. 1 (1) before the word "the Court" add the words subject to the provisions of O. XXIII, r. 3"—(H.C. Notification No. 211—dated 21—7—37).

#### NOTES.

*fide* or, is an abuse of the power of the Court to summon witnesses. Where, on the other hand, the non-attendance of the witnesses was due to the mistake of the process writer, who had given a wrong date of hearing, Court should adjourn the case to enable the party to summon his witnesses afresh. 146 I.C. 334=16 Nag.L.J. 208=1933 N. 336. Where a person applied to the Court without delay for the issue of summons and paid in the necessary fees and on the date fixed for the recording of evidence, some of the witnesses although duly served refused to come to Court until they had been served through their superior officers and he asked for adjournment but the Court refused it on the ground that sufficient cause had not been made out, High Court can examine the correctness of the order and it was the duty of the Court to see that service was effected. 117 I.C. 891=1929 L. 620. Case transferred without notice to defendant an adjournment should be given if he pleads unpreparedness to go on. 91 I.C. 167=7 P.L.T. 381=1925 P. 534. O. 17, R. 1 draws a distinction between the hearing of a suit and the hearing of evidence. 46 I.C. 246=27 C.L.J. 119. When the defence set up is of such a nature as to take plaintiff by surprise, time should be granted. 7 W.R. 84. Trial Court alone has power to grant adjournment. 26 I.C. 261=16 M. L.T. 504. Signature of parties or their pleaders to be taken when adjournments are granted. 4 P. 440=1925 P. 807. Court can grant adjournment on the understanding that plaintiff should bear the whole costs of the hearing. 7 C. 177. See also (1941) 1 M.L.J. 305 (Pauper suit); (1938) 1 M.L.J. 793. O. 17, R. 1 gives the Court power to make an order as to costs only in respect of the costs occasioned by the adjournment and not the costs of the suit generally. The rule does not entitle the Court to demand payment of the entire costs of the suit incurred up to the date on which the adjournment is asked for. What can be allowed is only the costs of the day including a reasonable fee to the legal practitioner

engaged by the opposite party. 47 L. W. 780=A.I.R. 1938 Mad. 711=(1938 1 M.L.J. 793. If costs are not paid, the suit is liable to be dismissed. 35 I.C. 534. Where such a condition is imposed on the defendant and he fails so to pay, Court can strike off the defence and proceed *ex parte*. 47 A. 538=23 A.L.J. 312. But payment on the same day should not be insisted on. 1925 C. 570=78 I.C. 125. When a pleader is asked to admit the genuineness of certain documents there and then, he is entitled to consult his client; and the Court, simply because the pleader wants a short adjournment to receive proper instructions, should not burden him with costs. 38 P.L.R. 896=1936 Lah. 705. Illness of counsel is good ground to grant adjournment. 1939 A.M. L.J. 118. Where the defendant who was present in Court summoned no evidence and applied for adjournment on the pretext of being ill and the Court rejected the application on the ground that the defendant was shaming. Held, that the discretion in refusing adjournment was properly exercised and could not be interfered with. A. I. R. 1941 Sind 41. Where a Court deposits a case *sine die* at the request of plaintiff for an adjournment, it does not amount to dismissal of the case and it can be revived on the application of the plaintiff. 1941 R.D. 176=1941 A.W.R. (Rev.) 230.

O. 17, Rr. 1 and 3.—The words 'may make such orders as it thinks fit' occurring in Sub-R. (2) of R. 1 of O. 17, are sufficiently wide to cover a condition to be imposed as a penalty if the costs of an adjournment are not paid. An order of dismissal can be made under R. 1 and R. 1 cannot be restricted by R. 3 of the same order. 186 I. C. 473=1940 N. L. J. 104=A.I.R. 1940 Nag. 158.

O. 17, R. 1 and O. 33, R. 8.—In a suit filed in *forma pauperis*, the plaintiff was not ready at the date of the hearing and on his application the Court adjourned the case directing as a condition precedent that the plaintiff should pay day costs to the defendants within the next hearing date. By the adjourned date, the plaintiff had not paid



2. Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by O. IX or make such other order as it thinks fit.
- Procedure if parties fail to appear on day fixed.

## NOTES.

the costs. On a contention as to the propriety of attaching such a condition and the procedure to be adopted on breach thereof. *Held*, the Court has jurisdiction under O. 17, R. 1, to pass an order of adjournment conditional on payment of costs by the plaintiff on failure of which the suit should straightaway be dismissed. (8 M.L.J. 189 = 21 Mad. 403; A.I.R. 1928 Mad. 786, Foll.). *Held, further*, that under O. 33, R. 8, a pauper plaintiff is not exempted from the payment of costs of adjournment; the Court has therefore power to direct him to pay the costs of an adjournment granted at his instance. (6 Rang. 561, Foll. 47 Bom. 104, Not Foll.). A.I.R. 1941 Mad. 437 = 53 L.W. 206 = (1941) 1 M.L.J. 305.

O. 17, R. 2: APPLICATION OF RULE.—This rule does not apply to a case where no day has been fixed for the hearing of the suit. 18 W.R. 325. It applies to the case where the hearing of a suit has been adjourned and on adjourned date, the parties or any of them fail to appear. 45 A. 618 = 21 A.L.J. 495; 1 P. 188 = 69 I.C. 837; 102 I.C. 273 (2) = 1927 A. 507; 125 I.C. 358 = 8 R. 168 = 1930 R. 270. Court cannot hear case on the merits. 20 A.L.J. 123 = 1922 A. 68; 27 Bom.L.R. 477 = 87 I.C. 710 = 1925 B. 328; 24 Bom.L.R. 775 = 46 B. 1026; 22 A.L.J. 1041 = 47 A. 181; 85 I.C. 528 = 1925 O. 360 (1). The words "or make such other order as it thinks fit" do not include a decision on the merits. 89 I.C. 418 = 1925 O. 433; 56 C.L.J. 12 = 1933 C. 73. *See also* 138 I.C. 200 = 1932 L. 477. (These words do not include an order under R. 3.) Where defendant is absent on the adjourned hearing and judgment is pronounced on the same day, the order should be presumed to be under R. 2 in absence of mention otherwise in the judgment and an application to have the decree set aside as being *ex parte* one would lie. 47 A. 140 = 85 I.C. 470. No appeal will lie from an order under this rule. 19 A. 355. *See also* 10 M. 270. Where, however, Court purports to decide the case on the merits, the remedy of the aggrieved party is by appeal. 84 I.C. 521 (1) = 1925 A. 252. *See* 96 I.C. 564 = 1926 A. 720; 4 R. 408 = 1927 R. 46. An order dismissing the suit, when both the pleader and the client, who was present retired from the case, is one under R. 2 though the decree was wrongly drawn up and it is not appealable. 32 I.C. 766 (C.); 4 R. 408 = 1927 R. 46. *See also* 1937 All. 347. Where on the date fixed for hearing of the suit, defendant's pleader appeared and applied for an adjournment, adjournment was refused and the suit was decreed, *held*, that the decree was not an *ex parte* decree. 1934 A. 107. A dis-

inction should be drawn between the case of a pleader who states that he has no instructions and the case of a pleader who states that he has instructions for a limited purpose of making an application for adjournment. The former case does not come under the Explanation to R. 2. 1933 A.L.J. 1298 = 1933 A. 652. *See also* 1934 M. 199 = 39 L.W. 353. Dismissal is not proper where the pleader is present but is unprepared to argue. Court is bound to proceed and decide on the merits. 83 I.C. 257 = 1925 N. 236 (2). But *see* 133 I.C. 622 = 1931 A.L.J. 646 = 1931 A. 703. *Revision* lies against such dismissal on the ground of material irregularity. (*Ibid.*) Instructions only to ask for adjournment—Dismissal is one under R. 2. 74 I.C. 693; 4 R. 408. But *see also* 133 I.C. 622 = 1931 A.L.J. 646 = 1931 A. 703. Pleader reporting no instructions after refusal of adjournment—Party present in Court—Order passed, if *ex parte*. *See* 1926 M. 971 = 1926 M.W. N. 616; 27 L.W. 347 = 1928 M.W.N. 162; 124 I.C. 402. *See* 1926 L. 27; 1931 A.L.J. 646. In a case where the plaintiff is absent and his pleader is present but has no instructions to appear for the day, it is, in the eye of law, no appearance at all on behalf of the plaintiff and the Court must dispose of the case under the provisions of R. 2 and not R. 3. 117 I.C. 73. Order dismissing suit after preliminary decree is without jurisdiction. 51 I.A. 321 = 4 P. 61 (P.C.). *See also* 6 P.L.T. 152 = 86 I.C. 785. Under R. 2 it is discretionary and not obligatory on the Court to proceed in each case in the manner directed by O. 9. The discretion is exercised improperly if the suit is dismissed for default when the plaintiff has at an earlier hearing made a definite case, which if uncontradicted would entitle him to a decree. In such instances the case should be adjourned to another date. 1929 P. 248. Where there is a default and there is not enough material on record to enable the Court to pronounce judgment, Court should proceed under O. 17, R. 2. 41 C. 956 = 18 C.W.N. 775. A party had summoned witnesses who did not appear in spite of the summons. *Held*, that this did not amount to default in appearance of the party within R. 2. 33 A. 690. Rr. 2 and 3 are independent and mutually exclusive. 41 M. 286 = 34 M.L.J. 24 = 43 I.C. 566 (F.B.); 1930 N. 152. Under R. 3 Court must have material to decide the case on the merits. 1925 O. 278 = 78 I.C. 240. Where a Court wrongly holds that no application under O. 9, R. 13 lies to set aside an order under the rule, it amounts to refusal to exercise jurisdiction and revision is competent. 47 A. 140 = 85 I.C. 470. Withdrawal of suit



LOC. AMS.—[ALLAHABAD]. *Add to R. 2 :—*

Where on any such day the evidence, or a substantial portion of the evidence, of any party has been recorded and such party fails to appear, the Court may, in its discretion, proceed with the case as if such party were present, and may dispose of it on the merits.

*Explanation.*—No party shall be deemed to have failed to appear if he is either present or is represented in Court by an agent or pleader, though engaged only for the purpose of making an application.

[OUDH]. To R. 2 *add* the following as sub-R. (2) and *read* the existing R. 2 as sub-R. 2 (1):—

(2) Where, before any such day, the evidence of a substantial portion of the evidence of any party has been recorded, and such party fails to appear on such day the Court may, in its discretion proceed with the case as if such party were present and may dispose of it on the merits.

*Explanation.*—No party shall be deemed to have failed to appear if he is either present in person, or is represented in Court by his agent or pleader, though engaged only for the purpose of making an application.

#### NOTES.

by plaintiff—Right of defendants whose interests were similar to plaintiffs to have the suit restored to file. 98 I.C. 501=25 L.W. 57=1927 M. 227. *See also* 137 I.C. 792=1932 M. 414; 138 I.C. 200=1932 L. 477.

PRACTICE AND PROCEDURE.—Where a party seeks to set aside an order under this rule the proper course is to apply under O. 9, R. 13 and not under O. 47, R. 1. 37 C. W.N. 1045. In a case falling under this rule when both parties failed to appear on the date of the adjourned hearing, the Court should usually proceed under O. 9, R. 3 and should only use its discretion in granting an adjournment when there is some good reason for the default. 29 N.L.R. 326. *See also* 148 I.C. 521=34 P.L.R. 1027=1934 L. 56; 1933 N. 234=29 N.L.R. 326.

APPEAL.—If an order is made under O. 17, R. 2 read with O. 9, R. 8, then it is as though it were an order under O. 9, R. 8 and is not appealable at all. I.L.R. (1939) Nag. 574=A.I.R. 1939 Nag. 213.

O. 17, R. 2, Expl. (ALLAHABAD) [See NOTES UNDER O. 9, Rr. 8 TO 13.]—Defendants failing to appear on date of final hearing—Pleader asking for adjournment and on refusal by Court reporting no instructions—Decree *ex parte*—Setting aside of—Jurisdiction. *See* 1935 A.L.J. 377=1935 A. 565; 1937 A.L.J. 239=1937 A. 347; 1937 Rang. 437; 1937 Mad. 674; 1940 A.W.R. (H.C.) 161. Plaintiff's counsel applying for adjournment during plaintiff's absence—Court refusing adjournment and dismissing suit for default—Plaintiff's remedy. *See* 1936 A.L.J. 635=1936 A. 659. The mere filing of the list of witnesses before the case has been called on for hearing does not amount to an appearance within the meaning of the explanation to R. 2. The failure to appear takes place only when the suit is called on for hearing even though it be an adjourned hearing. If at the time the case is called on for hearing either party is present or is represented in Court by an agent or pleader then he has not failed to appear, but if at that time he is neither present nor represented by an agent or pleader, he has failed to appear. The mere fact that at an earlier stage, something almost mechanical as the filing of a list of witnesses, is done by a pleader on his behalf before the case is called

on for hearing, cannot amount either to appearance or being represented in Court by an agent or pleader at the time when the case is called on for hearing. A decree passed against a defendant in a suit under such circumstances in the absence of the defendant and his pleader, is therefore *ex parte* although passed under O. 17, R. 3 and he is entitled as of right to show cause for his non-appearance under O. 9, R. 13. The Court holding that it has no jurisdiction to consider the matter errs in the exercise of its jurisdiction. 1936 A.L.J. 1274=1936 A. 619. *See also* 1939 Mad. 974=(1939) 2 M. L.J. 611.

O. 17, Rr. 2 and 3: SCOPE AND CONSTRUCTION.—Rules 2 and 3 are mutually exclusive and where the vakil pleads no instructions and the party is not prepared to go on R. 2 applies. 148 I.C. 177 (1)=39 L.W. 353=1934 M. 199 (1). *See also* 1934 A. 107; 1934 A. 652; 30 N.L.R. 94=1933 N. 370=149 I.C. 512. *See also* 18 R.D. 421. Where the right course for a Judge in the circumstances of a case was to decide the case under O. 17, R. 2, but the judgment mentioned O. 17, R. 3, it must be presumed that the Judge intended to act under R. 2 and that the entry of R. 3 was an accidental slip for R. 2. The fact that the Judge also mentioned O. 9, R. 6 in his order bears out the same conclusion. 169 I.C. 226=1937 O.L.R. 360=1937 O. W.N. 620. The last words of R. 2 of O. 17, confer on the Court a discretion, but it is a discretion which must be exercised judicially. A Judge, in exercising such discretion may grant a further adjournment, or, if the circumstances justify such a course, he can pass an order on the merits; but he must have material before him to justify that course. If there is no evidence before him, he cannot in the exercise of judicial discretion proceed to deal with the case on merits; he must either dispose of the matter under O. 9, or else grant an adjournment. R. 3 of O. 17 is not in terms confined to default of appearance as is R. 2, though it may be brought into operation by default of appearance. It deals with the failure by a party to do an act for which he has been allowed time; and even under R. 3, the Court must have materials to enable it to exercise its proper discretion by decid-



3. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

Court may proceed notwithstanding either party fails to produce evidence, etc.

#### NOTES.

ing the case on merits. Where the hearing of a suit has been adjourned under O. 15, R. 3 for the production of evidence by the parties and the plaintiff fails to appear on the adjourned date, it cannot be said that O. 17, R. 3, applies. The case falls under O. 17, R. 2, and if there is no material before the Court, the Court can only dismiss the case for want of appearance if it does not grant an adjournment. I.L.R. (1941) Bom. 150=42 Bom.L.R. 1111=1941 Bom. 83. R. 3 cannot apply where the adjournment is not at the instance of a party but under the ordinary procedure of the Court, as the witnesses present could not be examined on the date fixed for hearing. 1933 N. 234=29 N.L.R. 326. Even when an adjournment has been granted at the instance of one party, who fails to appear at the adjourned hearing, an order should be passed under R. 2 and not under R. 3. (*Ibid.*). In order to attract the provisions of R. 3, two conditions must co-exist; (i) the application for adjournment must be at the instance of the party to suit applying for the production of evidence; (ii) there must be some materials on which the Court can proceed to judgment; unless these two conditions are present, the Court should only pass an order under R. 2. If a Court erroneously passes an order which may be of the nature of a decree, an appeal would lie from that order; and the appellate Court which can exercise the same power as a Court of first instance is competent to restore the suit under O. 9, if it comes to the conclusion that there is sufficient cause for doing so. 39 C.W.N. 859. See also 37 C.W.N. 666=1933 C. 412. Where the plaintiff had taken various steps in order to bring the suit to a hearing, had filed documents, cited witnesses and paid a large sum as costs of the local investigation and further the Commissioner's report was already on the record and time had been granted to him to produce his witnesses, the Court should not dispose of the suit under R. 2 of O. 17, but might proceed to decide the suit under R. 3 of O. 17 on the plaintiff failing to produce his witnesses on the date of hearing. 67 C.L.J. 516=A.I.R. 1938 Cal. 789. The proper way of construing R. 3 would be that where no default occurring under R. 2, default occurs under R. 3, the Court should proceed under the latter rule and dispose of the case on the merits; but if the default consists in non-appearance, R. 2, which specifically deals with such a case, must in terms apply. Where a suit is adjourned to a date for production of evidence by the defendant, and the latter and his vakil are

absent on that date, but another vakil applies for an adjournment on behalf of the vakil on record, and that being refused, reports that he has no further instructions, the decree passed by the Court must be deemed to be an *ex parte* decree and not a decree on the merits. When the vakil who appears states that he has no instructions beyond applying for an adjournment, it is a contradiction in terms to hold that he does in fact appear, though he says he does not appear. 1936 M. 625=70 M.L.J. 688. In a case where there are no materials on the record the proper procedure to be followed would be that laid down in R. 2, but if there are materials on the record the Court ought to proceed under R. 3. 37 C.W.N. 666=1933 C. 412. See also 1933 A. 907. As to *inherent powers* of Court to correct errors, see 152 I.C. 211=1934 N. 234. Where plaintiff's pleader appears on the day of adjourned hearing and makes an application for an adjournment which is disallowed, the plaintiff cannot in view of the explanation to the Allahabad and Oudh Rules be deemed to have failed to appear on that occasion. There is accordingly no default of appearance on behalf of the plaintiff and there being no evidence before the Court, the suit is dismissed for want of prosecution. Such an order amounts to a decree dismissing the suit for want of evidence on the merits and not one dismissing it for default of appearance. The plaintiff's remedy is either by way of review or an appeal and not for restoration of suit after setting aside the decree. 1933 A.L.J. 4=1933 A. 41. (34 A. 426, Expl.) See also 1933 A. 539=146 I.C. 750; 1933 L. 248=143 I.C. 355.

**O. 17, R. 3: APPLICATION OF THE RULE.** [See also NOTES UNDER O. 9, RR. 9 AND 13 *supra*.]—This rule applies to those cases where time has been given to adduce evidence, and the parties appear, but fail to produce the necessary evidence. 95 I.C. 798 (1). See also 1938 A.M.L.J. 86; 10 M. 270. Where the parties do not appear, R. 2 applies. 10 M. 270; 20 B. 736; 6 M. H.C.R. 262 and 1 M. 287. But see 25 A. 194. R. 3 does not apply where the adjournment was not at the instance of a party but under the ordinary procedure of the Court and there are not materials on record for the Court to proceed to decide the suit. 29 N.L.R. 326. R. 3 gives an option to the Court to decide the suit on the merits. Where time is given to the plaintiff to produce his evidence on the adjourned date, the Court is entitled to decide the suit on the merits. If no evidence is produced by the plaintiff, the Court has no option but



LOC. AMS.—[ALLAHABAD]. *Substitute* the following for R. 3 :—

“(3) Where any party to a suit, to whom time has been granted fails, without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, whether such party is present or not, proceed to decide the suit on the merits.”

[OUDH]. *Substituted* by Oudh Chief Court:—(3) Where any party to a suit to whom time has been granted, fails, without reasonable excuse, to produce his evidence or to cause the attendance of his witnesses or to comply with any previous order or to perform any other act necessary to the further progress of the suit for which time has been allowed, the Court may, notwithstanding such default, and whether such party is present or not, proceed to decide the suit on the merits.

#### NOTES.

to dismiss the suit, if it wants to decide it on the merits. In R. 3 of O. 17, there is no provision that a suit can be decided on the merits only if the evidence or a substantial portion of the evidence of the party failing to appear has been recorded. 1935 A.L.J. 209=1935 A. 210. Plaintiff who was represented by a lawyer asked for adjournment of the case on the date when it was posted for peremptory hearing, on the ground that her lawyer was not present and further it was found that she was not ready with her witnesses. She refused to get into the witness-box whereupon the Court dismissed the suit under R. 3. *Held*, the order was quite proper. 1935 R. 123. *See also* 1936 A.L.J. 902=1936 A. 67. R. 3 is made specially applicable in a case where any party to whom time has been granted fails to perform any act necessary for the further progress of the suit. On the date fixed for final disposal, a party did not appear and the Court gave an *ex parte* decree against him. An application to set aside the *ex parte* decree was dismissed; and in revision it was contended that the Court ought to have proceeded under R. 3. *Held*, that R. 3 was not applicable to the case as time was not granted to the applicant, that even if there was an adjournment and O. 17 applicable to the case, the Court had under R. 2 jurisdiction to dispose of the suit in one of the modes directed in O. 9 and that the order passed by the Court was proper. (1933 A. 41, Ref.) 1933 A. 907. *See also* 1933 C. 412=37 C.W.N. 666. R. 3 only applies where the hearing of the suit had commenced and an application for an adjournment is then made by one of the parties. 1928 P. 167=7 P. 236. Where there is no institution of the suit and the plaint has been returned for amendment, the rule does not apply. 86 I.C. 491=1925 M. 1045. Where there are materials on record on which the Court can decide the case it should proceed under R. 3 and not under R. 2, 3 Pat.L.T. 64=6 Pat.L.J. 313=61 I.C. 897. *See also* 1925 O. 278=78 I.C. 240. R. 3 applies only where on the application of one of the parties the Judge directs a particular act to be done on the adjourned hearing and the party is unable to perform that act. 27 I.C. 882=2 L.W. 105. *See also* 1933 N. 234; 176 I.C. 503=1938 Sind 142. Case adjourned by consent of parties—Party not ready on adjourned date—Dismissal of suit under R. 3 is not valid and an appeal lies. 5 R. 838=1927 R. 148. R. 3

applies only to cases where the parties are present and have not satisfied the Court as to the existence of any adequate reason for their not having done what they were directed to do. 41 M. 286=34 M.L.J. 24 (F. B.). The words “notwithstanding such default in R. 3 clearly imply that Court is to proceed with the disposal of suit in spite of default upon such materials as are before it. 51 M.L.J. 684=1927 M. 109.

SCOPE AND OPERATION OF THE RULE.—R. 3 merely authorises Court to proceed to decide the suit forthwith and it does not authorise its dismissal summarily. 71 I.C. 862=1924 L. 404. R. 3 is an enabling and not a mandatory rule. 52 I.C. 292=150 P.R. 1919. Where plaintiff who takes time to produce evidence fails to appear on date fixed for hearing, proper course is to pass an order of dismissal for default of appearance. In such a case even if Court purports to deliver judgment on the merits the order should be treated as an *ex parte* decree for the setting aside of which the procedure mentioned in O. 9, R. 13, will apply. 138 I.C. 200=1932 L. 477. R. 3 of O. 17 means that the Court has discretion either to decide the case that day or not, but if it does decide the suit, it will be a decision on the merits and appearance on behalf of the defendant would be assumed, whether he was in fact present or not and the decree passed cannot be regarded as *ex parte* decree so as to entitle the defendant to apply for restoration under O. 9, R. 13. 1939 A.L.J. 627=A.I.R. 1939 All. 642. Where there is no default by party, Court cannot proceed under this rule. 69 I.C. 665=1924 L. 272. Party's failure to request the Court to pass orders under O. 16, R. 10 (2) and (3) for getting the attendance of material witnesses, does not enable the Court to proceed under R. 3. 33 A. 690=8 A.L.J. 839=10 I.C. 903. A dismissal of suit for failure to amend plaint and pay costs of adjournment cannot fall under R. 3, 96 I.C. 312=1926 L. 571. Plaintiff present on date of hearing but not present on date fixed for return of summons—R. 3 is not applicable—Dismissal of suit is illegal. 102 I.C. 289=1927 L. 484. Absence of the defendant on date of hearing—Court should proceed under R. 3. 9 O.L.J. 543=72 I.C. 394. Default in appearance is not covered by this rule. 1 P. 188=69 I.C. 837. Date fixed for final disposal of suit and for appointment of guardian. No steps taken by plaintiff for latter—Suit cannot be dismissed. 63 I.C. 570=6 P.L.J. 650. Party not aware that



## ORDER XVIII.

## HEARING OF THE SUIT AND EXAMINATION OF WITNESSES.

1. The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks in which case the defendant has the right to begin.  
 Right to begin.
2. (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.  
 Statement and production of evidence.

## NOTES.

he was to pay adjournment costs—Further hearing not conditional upon payment of costs—Time should be allowed. 1926 C. 1221=97 I.C. 172 (2). Plaintiff ordered to appear as a witness—Failure to appear—Dismissal of suit is improper. 100 I.C. 788 (1)=1927 L. 388 (1). Production of stay order is not an act within the rule. 105 I.C. 30. Order apparently passed under—Plaintiff persistently absent—No adjournment specifically granted—Suit decreed on the merits—Order really one under O. 9, R. 8—Appeal—Maintainability. 116 I.C. 752=27 A.L.J. 391. A suit for profits against the lambardar was adjourned on several occasions. On one of such adjourned hearings the Assistant Collector dismissed the suit for "want of prosecution". The Assistant Collector did not make any reference in that order to the evidence that had already been produced in the case, nor did he deal with the validity or otherwise of the defence raised by the contesting defendants. *Held*, that such a decision could not be characterised as a decision on the merits. The order dismissing the suit, therefore, did not come within the purview of R. 3, but was one under O. 9, R. 8 of the Code, and could be set aside by the Assistant Collector under O. 9, R. 9 or under the inherent jurisdiction vested in Courts by S. 151. In either case the order was not appealable. 1932 A.L.J. 1100=1933 A. 118. Where a counsel appears on behalf of a person and makes an application or prayer for an adjournment, but the same is refused and the counsel then refuses to proceed on ground of no instructions and the case is decided and decree passed against them in their absence, it cannot be said that the case was decided *ex parte* as to attract the consequences of O. 9, R. 13. The case is decided under O. 17, R. 3. [53 A. 612 (F.B.); 1933 A. 41, Rel. on.] 148 I.C. 456=11 O.W.N. 393=1934 O. 171. *See also* 1940 A.L.J. 200=1940 All. 217; 186 I.C. 102.

APPEAL.—Only an appeal and no revision lies against an order under O. 17, R. 3. 34 A. 123=8 A.L.J. 1265. But *see also* 1933 A. 118. This is so even if the Court wrongly acts under R. 3 instead of under R. 2. 84 I.C. 521 (1)=1925 A. 252. A mistake in judgment stating the disposal was under R. 2

does not affect the right of appeal. 86 I.C. 356=1925 O. 495; 1929 A. 432=1929 A.L.J. 507. A decision passed "forthwith" under R. 3 is one on the merits as gathered from available facts. 31 I.C. 307=2 L.W. 1067. Decree passed on merits—Party cannot appeal against order setting it aside but must appeal against the decree. 103 I.C. 192=1927 L. 562 (1). *See also* 143 I.C. 307=1933 A. 118; 1938 A.W.R. (B.R.) 115.

REVISION.—Where a suit is dismissed by the Small Cause Court on the merits on the plaintiff's failure to be present on an adjourned date, the only remedy available to the plaintiff is to apply in revision to the High Court and not to the trial Court for restoration. 1935 A. 210=1935 A.L.J. 209. *See also* 1936 A.L.J. 902=1936 A. 670.

RESTORATION.—Suit adjourned for final hearing—Application by plaintiff's Counsel for further postponement rejected—Counsel reporting no instructions—Suit dismissed—Restoration—Jurisdiction. *See* 1935 A.W.R. 318=1935 A. 398. *See also* 1936 A.L.J. 902=1936 A. 670.

O. 17, R. 3: (Allahabad amendment).—Time granted at the instance of both parties—Failure to appear—Court, can decide suit on merits. 1939 A.L.J. 371=1939 All. 524.

O. 18, R. 1.—Right to begin—Preference is generally given to plaintiff. 3 Beng.L.R. 70 (A.C.). Restitution of conjugal rights, suit for Marriage admitted but coercion and non-consent pleaded—Defendant should begin. 23 I.C. 242. Applicant for mesne profits of property taken in execution of a decree reversed on appeal, must begin. 47 M. 800=48 M.L.J. 89. Where a defendant pleads minority he must prove his plea. 8 W.R. 371. Right of objector under Income-Tax Act to begin. *See* 48 C. 161. Where a claim is preferred in execution the claimant must begin as the onus is on him. 11 W.R. 8 (F.B.). Where a preliminary objection is raised by the defendant that the suit is barred, he has the right to begin. 12 B. 454. If on the issue or issues of facts, the burden of proof is on the defendant, he has the right to begin. 40 C.W.N. 865.

O. 18, R. 2.—"The day fixed for the hearing of the suit," *see* 82 I.C. 73=1925 A. 98. New pleadings cannot be introduced without leave of the Court. 103 I.C. 501=



(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

LOC. AMS.—\*[ALLAHABAD]. For the present Rules 2 and 3 substitute the following :—

"2. (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case, indicating the relevancy of each of the documents produced by him, and the nature of the oral evidence which he proposes to adduce and shall then call his witnesses in support of the issues which he is bound to prove.

(2) The other party shall then state his case in the manner aforesaid and produce his evidence (if any)."

\*[See Notification No. 3837-35 (a) — 2 (1), dated 9th June 1936.]

[CALCUTTA]. Insert the following as R. 2-A :—

"2-A. Notwithstanding anything contained in cls. (1) and (2) of R. 2 the Court may for sufficient reason go on with the hearing, although the evidence of the party having the right to begin has not been concluded, and may also allow either party to produce any witness at any stage of the suit."

[MADRAS]. Add the following :—

*Explanation.*—Nothing in this rule shall affect the jurisdiction of the Court, for reasons, to be recorded in writing, to direct any party to examine any witness at any stage.

[NAGPUR]. Rule 2.—Add the following as sub-rule (4) to R. 2 :—

"(4) Notwithstanding anything contained in this rule the Court may order that the production of evidence or the address to the Court may be in any order which it may deem fit."

[OUDH]. Substitute the following :—

"2. (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case, indicating the relevancy of each of the documents produced by him and the nature of the evidence, which each of his witnesses is expected to give and shall then produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case in the manner aforesaid and produce his evidence (if any).

[RANGOON]. Add the following as a proviso to sub-R. (2) of R. 2 :—

"Provided that the Court may, in its discretion, call upon the other party to proceed under this sub-rule before the evidence of the party having the right to begin is complete if it considers that the other party will not be prejudiced by so proceeding and that unnecessary inconvenience and delay will thereby be avoided.

3. Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party ; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning ; but the party beginning will then be entitled to reply generally on the whole case.

LOC. AM.—[ALLAHABAD]. For the present rule substitute the following :—

"3. (1) Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either state his case in the manner aforesaid and produce his evidence on those issues or reserve the statement of his case and the production of his evidence on those issues by way of answer to the evidence produced by the other party, and, in the

#### NOTES.

1927 L. 615 (1). Every party is entitled to have all the witnesses whom he desires to call, and is ready at the trial to produce, heard by the Court. 17 W.R. 172; 6 C. 608; 9 B. 146; 2 M.I.A. 424. But see 6 Beng.L.R. App. 10. Omission of counsel to argue a question of law or his abandonment of it, is not sufficient to disentitle the Court to go into the question. The case is different, when a question of fact is concerned. 11 C.W.N. 340 (342). Plaintiff

accepting *onus*—Court not bound to hear defendant's case if plaintiff fails. 25 M.L.J. 281=21 I.C. 96. Where there are several defendants and some support plaintiff's case, see 32 B. 599.

O. 18, R. 3.—Suit for declaration and recovery of possession—Plea of *benami* in defence—Plaintiff has right to adduce evidence of rebuttal after the close of evidence of *benami* by the defendant. 93 I.C. 273=7 Pat.L.T. 445.



latter case the party beginning may state his case in the manner aforesaid and produce his evidence on those issues after the other party has produced all his evidence.

(2) After both parties have produced their evidence, the party beginning may address the Court on the whole case; the other party may then address the Court on the whole case; and the party beginning may reply generally on the whole case, provided that in doing so he shall not without the leave of the Court, raise questions which should be raised in the opening address."

[OUDH]. *Substitute the following :—*

3. (1) Where there are several issues the burden of proving some of which lies on the other party, the party beginning may, at his option, either state his case in the manner aforesaid and produce his evidence on those issues or reserve the statement of his case and the production of his evidence on those issues by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may state his case in the manner aforesaid and produce evidence on those issues after the other party has produced all his evidence.

(2) The substance of the statement of the case provided for by Rules 2 and 3 (1) above shall be taken down by or under the personal direction and superintendence of the Judge and shall form part of the proceedings.

(3) After both the parties have produced their evidence, the party beginning may address the Court on the whole case, the other party may then address the Court on the whole case; and the party beginning may reply generally on the whole case, provided that in doing so he shall not, without the leave of the Court, raise questions which should have been raised in the opening address."

4. The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

5. In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed,

#### NOTES.

**O. 18, R. 4.**—Courts should in all cases exercise the powers entrusted by law in the examination of witnesses, if they see that they are not properly examined. 10 W.R. 280. A *pardanashin* lady should be admitted into Court in her palanquin, and her evidence taken after her being properly identified. 1 Beng.L.R. 5. Omission to administer oath to a witness, or any irregularity in the form in which it is administered does not invalidate the proceedings. 24 W.R. 61. See S. 13 of the Oaths Act (X of 1873).

**O. 18, R. 5: SCOPE AND OBJECT OF.**—Failure to comply with the provisions of this rule and R. 6 is an informality which renders the deposition inadmissible in evidence on a charge of giving false evidence based on such deposition. 6 C. 762. O. 18, Rr. 5 to 12, have no application to Small Cause Courts and the depositions need not be read over to the witnesses and they would be admissible in evidence in a prosecution for perjury. 89 I.C. 390 (2)=1925 N. 412. The object of R. 5 is to ensure accuracy; non-compliance with it does not affect the admissibility but the weight to be attached to the evidence. (18 N. 308; 42 C. 240, Diss.) 27 C.L.J. 377=22 C.W.N. 646. See also 51 C. 236; 45 C. 825. Reading out the deposition to a witness in a room adjoining the Court-hall and at a distance of 30 feet from the Judge's seat is a sufficient compliance with R. 5. 1918 M.W.N. 239=7 L.W. 435. Reading over of the

deposition by the witness himself is a sufficient compliance with the rule. 46 C. 895=23 C.W.N. 661. S. 91, Evidence Act, bars the admission of secondary evidence in proving a witness's statement, where it was not read over to him according to requirements of R. 5. 1 L. 361=58 I.C. 830. Witnesses in civil cases are not legally bound to sign or thumb mark their depositions. Courts cannot order them to do so, nor could they be compelled to sign under S. 151. 8 P.R. 1912 (Cr.)=16 I.C. 521. When parties agree that evidence is to be taken in a particular way, and that evidence in one suit shall be treated as evidence in another suit, this is not a matter which affects the jurisdiction of the Court. 30 B. 109.

The *Special Referee* who has been appointed *Commissioner of Partition* in the Original Side and authorised by the order of his appointment to examine witnesses upon oath or solemn affirmation and to take their depositions in writing is, in respect of procedure for the taking of evidence, governed by Rr. 5 and 6 by virtue of the concluding provisions of O. 26, though, were the enquiry to be held by the Court itself, those provisions will not apply because of O. 49, r. 3. 61 C. 488=38 C.W.N. 624=1934 C. 737.

**O. 18, Rr. 5, 8 and 14.**—Where evidence is dictated to a typist by a Judge and no memorandum is kept by him, the provision of Rr. 5, 8 and 14 will not be complied with. 55 C. 1084.



shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it.

LOC. AM.—[RANGOON]. The following shall be *substituted* for r. 5 of O. 18 :—

5. In cases in which an appeal is allowed, the evidence of each witness shall be taken down in writing in the language of the Court or in English by or in the presence and under the direction and supervision of the Judge, not ordinarily in the form of question and answer, but in that of a narrative and when completed shall be read over or translated to the witness by such person as the Judge may direct, provided that the Judge may, if he thinks fit, require the evidence to be read over in his own presence.

Such a person shall, after reading over the deposition to the witness, append a certificate at the foot of the deposition form as follows :—

Read over		
Interpreted	by me in Burmese or	(as the case may be) and acknow-
ledged correct.		

(Signature).  
Interpreter or Clerk.

The Judge shall, if necessary, correct the deposition and shall sign it.

6. Where the evidence is taken down in a language different from that in which it is given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given.

LOC. AM.—[RANGOON]. The following shall be *inserted* as r. 6-A : —

“6-A. Where there are no interpreters paid by Government and it is found necessary to employ an interpreter in a civil case, he shall be paid such fee, ordinarily not exceeding Rs. 2 per diem ; as the Court may fix. The fee shall be advanced by the party at whose instance the interpreter is required and shall be treated as costs in the case. All payments of interpreter's fees shall be made through the Court and duly entered in Bailiff's Register II.”

7. Evidence taken down under section 138 shall be in the form prescribed by rule 5 and shall be read over and signed, and, as occasion may require, interpreted and corrected as if it were evidence taken down under that rule.

8. Where the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

LOC. AMS.—[OUDH]. To R. 8, O. XVIII, *add* the following proviso :—

“Provided that such memorandum shall not be necessary in the case of a Judge who has obtained the previous sanction of the Chief Court to dictate evidence in open Court.”

[RANGOON]. Rule 8 shall be *deleted*.

9. Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down.

10. The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing.

#### NOTES.

O. 18, R. 6.—As to applicability of rule, see 132 I.C. 270=1931 O. 385.

O. 18, R. 8.—Where there is a conflict between the Judge's memoranda and the recorded deposition, the Court must be guided

C. C. M.—115

by the latter. 9 Beng.L.R. 274. Objections to non-compliance by Judge with provisions of this rule cannot be allowed to be taken for the first time in second appeal. 15 R. D. 600=12 L.R. 298 (Rev.).



11. Where any question put to a witness is objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it together with the decision of the Court thereon.

12. The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

13. In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

14. (1) Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

(2) Every memorandum so made shall form part of the record.

LOC. AMS.—[OUDH]. O. XVIII, r. 14 (1):—

In line 1 of r. 14 (1), O. XVIII between the words "is" and "unable" insert "not authorised by the Chief Court to dictate and is."

[RANGOON]. In the 2nd line of sub-rule (1) for the words "this order" the word and figure "Rule 13" shall be substituted.

15. (1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24.

16. (1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination shall be given to the parties.

#### NOTES.

**O. 18, R. 11.**—If no objection is taken in Court of first instance to the reception of a document in evidence, appellate Court cannot raise or recognise it in appeal. 11 B. 320. The objection cannot be taken in special appeal. 24 W.R. 296.

**O. 18, R. 13.**—It is not enough that the Judge should refer to the evidence in his judgment. It is mandatory that he should make a separate memorandum of the evidence given by each witness and shall sign it. 177 I.C. 157=A.I.R. 1938 Pesh. 46. Abstract of evidence incomplete—Judgment based on it is illegal. 2 L.W. 803=30 I.C. 634. O. 18, R. 15 applies only when the previous Judge has not concluded the trial of the case. 21 M.L.J. 808=9 I.C. 254. It is not necessary for the succeeding Judge to re-hear the case after arguments had been heard by the predecessor. 17 I.C. 278=1912 M.W.N. 999.

**O. 18, R. 16.**—The evidence must be taken by the Court unless the parties consent to the evidence being taken on commission. 5 Beng.L.R. 252.



(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit.

17. The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.

Court may recall and examine witness.

18. The Court may at any stage of a suit inspect any property or thing concerning which any question may arise.

Power of Court to inspect.

LOC. AM.—[ALLAHABAD]. Add the following as r. 19 :—

19. (1) The Judge shall record in his own hand in English all orders passed on applications, other than orders of a purely routine character.

#### NOTES.

**O. 18, R. 18.**—Local inspection—Result of investigation to be recorded. 65 I.C. 601. No decision should be based solely on local inspection of the Judge. 73 I.C. 616=1923 L. 546; 39 M. 501=28 M.L.J. 598; 131 I.C. 139=1931 M. 531. It is improper and objectionable for a judge to base his judgment solely on the impressions formed by him at the time of his local inspection and to come to a conclusion quite contrary to the evidence in the case. Where the judge does not make any notes of inspection and has not placed on record what he found on inspection, his decision, arrived at without putting the points observed by him at the inspection to the parties and eliciting their answers, cannot be upheld by the appellate Court. 50 L.W. 148=(1939) 2 M.L.J. 284. It is a quite unobjectionable procedure for a Judge to make a local inspection; in fact O. 18, R. 18, expressly provides for it. But it is not a justifiable procedure for a Judge at such local inspection to welcome the presence of crowds of anonymous villagers and indulge in formal inquiries amongst the people in those crowds for the purpose of obtaining guidance in deciding the rights of the parties. If a Judge does so and treats the result of these enquiries as evidence in the case, there is an end of all judicial procedure. A judgment must be based on evidence which is admissible in law. There is no objection to a Judge viewing the locality in dispute in order to enable him to visualise the same and to appreciate the evidence before him. But there is no warrant for the procedure whereby the Judge converts himself into an unofficial investigator and inquires of all and sundry regarding their views on the rights of the parties with the object of founding a judgment on what he has heard. No finding of fact based on such materials and achieved by such procedure can be supported or be held to be binding in second appeal. 1938 M. 61=48 L.W. 595=(1938) 2 M.L.J. 894. The function of a Judge in exercising his right of local inspection granted by the statute, i.e., under the Code, is for the purpose of understanding the evidence and for no other purpose. By "understanding the evi-

dence" is not meant "contradicting a witness". A witness may make a statement which from the local inspection may appear to be untrue, but a Judge is not entitled to say that it is untrue from what he himself observes. 1937 P.W.N. 261=A.I.R. 1937 Pat. 333. See also 1938 Pat. 288. Judges, both of Courts of first instance and Courts of appeal, who have to appreciate evidence and understand its bearing properly, are entitled, in proper cases, to make local inspection with a view not only to save time with reference to the arguments in the case but also to enable them to follow intelligently, and understand the evidence in the case. But it is not open to either Court to base its findings of fact solely on the result of its local inspection, nor without giving opportunities to the parties to let in counter-evidence and explain what is recorded as the result of the inspection. 131 I.C. 139=1931 M. 531; 1930 L. 152=129 I.C. 346. It cannot be said that in an ordinary case the opinion of the Judge formed on a local inspection under O. 18, R. 18 could take the place of evidence. But where the parties agree to accept the opinion of the Judge on that point, and for that reason lead no evidence, in such special circumstances, the opinion of the Judge could be accepted in place of evidence. 1941 N.L.J. 403=1941 Nag. 292. Observations by a Judge in the course of his local inspection cannot be substituted for the evidence of witnesses examined on the subject. It is obvious that in the case of a Judge's observations, the parties never get a chance of either cross-examining him on the various points raised or setting right his views if they are found to be erroneous. 175 I.C. 698=A.I.R. 1938 Pat. 288. Where parties agreed to shut out oral evidence and to substitute for it the inspection that the Judge might make of the locality, appeal from the decision of the Court is competent, because the Judge was not constituted an arbitrator. 113 I.C. 762=1929 A. 116. It should be used to test the accuracy of other evidence. It need not be recorded. 1925 C. 170. R. 18 authorises every Court to inspect any property or thing without the sanction of its superior Court. 28 M.L.J. 9=23 I.C. 297.



(2) The Judge shall record in his own hand in English all admissions and denials of documents, and the English proceedings shall show how all documents tendered in evidence have been dealt with from the date of presentation down to the final order admitting them in evidence or rejecting them.

(3) The Judge shall record the issues in his own hand in English, and the issues shall be signed by the Judge and shall form part of the English proceedings.

## ORDER XIX.

### AFFIDAVITS.

1. Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable :

Power to order any point to be proved by affidavit.

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

2. (1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.

Power to order attendance of deponent for cross-examination.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.

3. (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted : provided that the grounds thereof are stated.

Matters to which affidavits shall be confined.

### NOTES.

O. 19, R. 1.—An affidavit is ordinarily not evidence unless the person seeking to use it complies with the requirements of O. 19. 63 I.C. 258. Affidavits should not properly be acted upon, unless both parties agree to have them treated as evidence. Where one of the parties requests the Court to summon the witnesses for cross-examining them on their affidavits, the Court should summon them and not merely act on the affidavits. 1939 Mad. 927=(1939) 2 M.L.J. 399. Court is authorised under O. 19 to receive an affidavit from the identifier as evidence of the fact of the service of summons. 106 I.C. 703=6 P. 760. There is nothing illegal in a Court admitting proof of execution of a pro-note by the affidavit of plaintiff's next friend instead of calling him as a witness into the witness-box and taking his deposition in open Court when there is no contention as to the facts. 142 I.C. 386 (1)=1933 M. 164. R. 11, which is made applicable to proceedings for divorce by S. 45 of Indian Divorce Act, empowers Court to allow the petitioner and her witness in divorce proceedings to give evidence by affidavit, subject to what the law provides, namely, that the petitioner and her witness will have to be present for cross-examination, if so directed by the Court. 38 C.W.N. 969. District Judge can act upon affidavits in support of an appli-

cation to declare certain persons law-touts. 13 M.L.J. 272. It is altogether undesirable and indeed contrary to established practice to accept evidence on affidavit in matrimonial suits—especially evidence of the petitioner—except as regards evidence other than that of the petitioner in some very exceptional circumstances. 62 C. 541=62 C.L.J. 264. There is nothing in R. 1 to exclude from its operation a foreign company incorporated in a foreign country. 8 P.R. 1912=10 I.C. 141.

O. 19, R. 2.—Applicability—Appeal in proceeding in Revenue Court under S. 201, C.P. Land Revenue Act. 155 I.C. 557=1935 N. 125 (1).

O. 19, R. 3.—Contents and essentials of a valid affidavit. See 36 A. 18=22 I.C. 740. Affidavits should clearly specify what statements are made on knowledge and what on belief. 1924 P. 312=73 I.C. 721. An affidavit stating certain facts upon information and belief without stating the source thereof is sufficient evidence upon which to grant an injunction. 46 I.C. 335=22 C.W.N. 700; 1 L.W. 394=23 I.C. 377; 90 I.C. 703=1926 P. 54. An affidavit, in which it is stated that the allegations are based partly on information believed to be true and partly on belief, but which contains neither a specification as to which part is based on information and which on belief, nor the grounds of belief, is contrary to the provisions of and offends against R. 3, 61 C. 814=38 C.W.N.



(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.

LOC. AMS.—[ALLAHABAD]. Add the following rules 4 to 15 to O. 19 :—

4. Affidavits shall be entitled in the Court of . . . at (naming such Court). If the affidavit be in support of, or in opposition to, an application respecting any case in the Court, it shall also be entitled in such case. If there be no such case it shall be entitled: *In the matter of the petition of*

5. Affidavits shall be divided into paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

6. Every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly; and where necessary for this purpose, it shall contain the full name, the name of his father, of his caste or religious persuasion, his rank or degree in life, his profession, calling, occupation or trade; and the true place of his residence.

7. Unless it be otherwise provided, an affidavit may be made by any person having cognizance of the facts deposed to. Two or more persons may join in an affidavit; each shall depose separately to those facts which are within his knowledge and such facts shall be stated in separate paragraphs.

8. When the declarant in any affidavit speaks to any fact within his own knowledge, he must do so directly and positively, using the words "I affirm" or "I make oath and say."

9. Except in interlocutory proceedings, affidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove. In interlocutory proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression "I am informed" and, if such be the case, "and verily believe it to be true;" and shall state the name and address of, and sufficiently describe for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of documents produced from any Court of Justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such documents.

10. When any place is referred to in an affidavit, it shall be correctly described. When in an affidavit any person is referred to, such person, the correct name and address of such person, and such further description as may be sufficient for the purpose of the identification of such person, shall be given in the affidavit.

11. Every person making an affidavit for use in a Civil Court, shall, if not personally known to the person before whom the affidavit is made, be identified to that person by some one known to him, and the person before whom the affidavit is made shall state at the foot of the affidavit the name, address and description of him by whom the identification was made as well as the time and place of such identification.

11-A. Such identification may be made by a person

(a) personally acquainted with the person to be identified, or

(b) satisfied from papers in that person's possession or otherwise, of his identity:

Provided that in case (b) the person so identifying shall sign on the petition or affidavit a declaration in the following form, after there has been affixed to such declaration in his presence the thumb impression of the person so identified.

#### FORM.

I (name, address and description) declare that the persons verifying this petition (or making this affidavit) and alleging himself to be A. B. has satisfied me (here state by what means, e.g., from papers in his possession or otherwise) that he is A. B.

12. No verification of a petition and no affidavit purporting to have been made by a *parda-nashin* woman who has not appeared unveiled before the person before whom the verification or affidavit was made, shall be used unless she has been identified in manner already specified and unless such petition or affidavit be accompanied by an affidavit of identification of such woman made at the time by the person who identified her.

13. The person before whom any affidavit is about to be made shall, before the same is made, ask the person proposing to make such affidavit if he has read the affidavit and understands the contents thereof, and if the person proposing to make such affidavit state that he has not read the affidavit or appears not to understand the contents thereof, or appears to be illiterate, the person before whom the affidavit is about to be made shall read and explain or cause some other competent person to read and explain in his presence, the affidavit to the person proposing to make the same, and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make such affidavit understands the contents thereof, the affidavit may be made.

#### NOTES.

771=1934 C. 694. An affidavit as to the points argued in a case and sworn to by a

person, who cannot understand the language in which the argument was made has no value. 41 I.C. 1.



14. The person before whom an affidavit is made, shall certify at the foot of the affidavit the fact of the making of the affidavit before him and the time and place when and where it was made, and shall for the purpose of identification mark and initial any exhibits referred to in the affidavit.

15. If it be found necessary to correct any clerical error in any affidavit such correction may be made in the presence of the person before whom the affidavit is about to be made, and before ; but not after the affidavit is made. Every correction so made shall be initialled by the person before whom the affidavit is made, and shall be made in such manner as not to render it impossible or difficult to read the original word or words, figure or figures, in respect of which the correction may have been made.

[RANGOON]. To O. 19, the following shall be added as rr. 4 to 12 :—

4. The officer administering the oath to the declaration of an affidavit should first make the declarant take the oath or affirmation. Then he should make the declarant repeat the whole of the statement written in the affidavit as coming from him. Then the declarant should sign the affidavit, and lastly the officer administering the oath should sign and date it.

5. Every affidavit to be used in a Court of Justice should be entitled "In the Court of at naming the Court. If there is a case in Court, the affidavit in support of or in opposition to an application respecting it, must also be entitled "In the case of ."

If there is no case in Court, the affidavit should be entitled "*In the matter of the petition of.*"

6. Every affidavit containing any statement of facts shall be divided into paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

7. Every person, other than a plaintiff or defendant in a suit in which the application is made, making an affidavit shall be described in such a manner as will serve to identify him clearly, that is to say, by the statement of his full name, the name of his father, his profession or trade, and the place of his residence.

8. When the declarant in any affidavit speaks to any fact within his own knowledge, he must do so directly and positively, using the words "I affirm" (or make oath) and "and say."

9. When the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant must use the expression "I am informed" (and, if such be the case, should add) "and verily believe it to be true" or he may state the source from which he received such information. When the statement rests on facts disclosed in documents or copies of documents procured from any Court of Justice or other source, the deponent shall state what is the source from which they were procured and his information or belief as to the truth of the facts disclosed in such documents.

10. Every person making an affidavit, if not personally known to the Commissioner, shall be identified to the Commissioner by some person known to him, and the Commissioner shall specify at the foot of the petition, or of the affidavit (as the case may be), the name and description of him, by whom the identification is made, as well as the time and place of the identification and of the making of the affidavit.

11. If any person making an affidavit is ignorant of the language in which it is written, or appears to the Commissioner to be illiterate or not fully to understand the contents of the affidavit the Commissioner shall cause the affidavit to be read and explained to him in a language which he understands. If it is necessary to employ an interpreter for this purpose, the interpreter shall be sworn to interpret truly. When an affidavit is read and explained as herein provided, the Commissioner shall certify in writing at the foot of the affidavit that it has been so read and explained and that the declarant seemed perfectly to understand the same at the time of making the affidavit. When an interpreter is employed the Commissioner shall state in his certificate the name of the interpreter, and the fact that he was sworn to interpret truly.

12. In administering oaths and affirmations to declarants the Commissioner shall be guided by the provisions of the Indian Oaths Act, 1873.

## ORDER XX.

### *Judgment and Decree.*

1. The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders.

## NOTES.

O. 20. —There is no provision in O. 20, for the passing of a preliminary decree in a suit for damages in respect of personal injuries or in respect of breach of contract. If the principle of granting a preliminary decree is to be extended beyond the list mentioned in O. 20, that extension must be governed by the principle of *ejusdem generis*. I.L.R.

(1938) All. 658=1938 A.L.J. 571=A.I.R. 1938 All. 445.

O. 20, R. 1.—A judgment signed, dated and delivered in the absence of the parties or their pleaders and without previous notice to them is not validly pronounced. 47 A. 332=23 A.L.J. 145; 100 I.C. 909=28 P.L. R. 132. Pronouncing a judgment within the meaning of O. 20 does not require a reading



LOC. AM.—[MADRAS]. *Re-number* r. 1 as sub-r. (1) and *add* the following as sub-r. (2) :—

“(2) The Judgment may be pronounced by dictation to a short-hand-writer in open Court, where the presiding Judge has been specially empowered in that behalf by the High Court.”

Power to pronounce judgment written by Judge's predecessor.

2. A Judge may pronounce a judgment written but not pronounced by his predecessor.

3. The judgment shall be dated and signed by the Judge in open Court at

#### NOTES.

out of the whole judgment by the Court. 94 I.C. 121 (1). But the decree which has followed such a judgment cannot be violated so long as it stands. 94 I.C. 121. Judge may, at the close of the hearing, state at once orally the judgment which he intends to record and deliver. 5 M.H.C.R. at 8. Where Judge commences to write a judgment before the finishing of the entire evidence and hearing the arguments of the counsel, there is a gross irregularity in the trial of the case. 1933 A. 196. The omission in judgment to make special mention of oral evidence is not in itself sufficient to show that, as a matter of fact, Judge did not consider the evidence. 59 I.C. 963. It is not legal for Judge trying a civil suit to ask two members of the bar to act as assessors presumably to appraise the value of the evidence and to base his judgment on that opinion. 21 I.C. 427. A mere order in the order-sheet recording “that the case and suit be dismissed in terms of compromise” is not the disposal of a suit under the Code, which can only terminate in accordance with the rules set forth in R. 1. 1933 P. 135. Contravention of Rr. 1 to 3—Judgment pronounced by another Judge—Effect. 46 C. 979=29 C.L.J. 438. Posting of result of appeal on notice-board is not a pronouncement in open Court. 41 M.L.J. 385=65 I.C. 42. Omission to give notice of the date on which judgment is to be pronounced is a serious irregularity if not an illegality. 12 M.L.T. 332=1912 M.W.N. 999; 38 I.C. 575; 7 A. 857. Where a Court delivers a judgment without having previously fixed a date for pronouncing the judgment, and the defendant being absent on that date, the judgment is informed to his counsel on some later day, this later day must be regarded as the date for pronouncing judgment and period of limitation for appeal must be deemed to run from that date and not from the date on which the judgment is actually pronounced. (1925 A. 293, Rel. on.). A. I. R. 1938 Lah. 707. Where judgment was pronounced in open Court, but not in presence of the parties or after notice to them, *held*, that the judgment was not invalidated on that ground. 28 N.L.R. 308. Where judgment written and signed by the Judge at home was delivered to the clerk for communication to the parties as Judge did not attend Court on account of illness, *held*, per *Ghose, J.*, that no competent officer had pronounced judgment and that the appeal should be remanded for fresh disposal on that ground. Per *Guha, J.*—The failure to com-

ply with Rr. 1, 2 and 3 of O. 20 constitutes an irregularity. Appeal remanded for fresh disposal on merits. 130 I.C. 573=52 C.L.J. 566=1931 C. 164. When either party dies before judgment is pronounced, *see* O. 22, R. 6. *See also* 12 M.L.J. 435. O. 20, R. 1, C.P. Code, does not apply to proceedings of revenue officers under the Punjab Land Revenue Act, and there is no provision of law which requires orders of Revenue officers under that Act to be pronounced formally in open Court on a specified day. 20 Lah.L.T. 115.

O. 20, Rr. 1, 2 and 3: FAILURE TO SIGN ORDER—IRREGULARITY.—Infringement of the procedure prescribed by Rr. 1, 2 and 3 merely constitutes an irregularity curable by consent or waiver and it affords no ground for reversal of the decree based on the judgment irregularly pronounced. Where the irregularity is waived by the parties and does not affect the merits of the case where the omission to sign an order in execution was shown to be merely accidental, *held*, that the order was none the less binding. 149 I.C. 430=1934 L. 763.

O. 20, R. 2.—Rule 2 does not apply to the original side of the High Court. 51 B. 267=29 Bom.L.R. 126. Judgment—Pronouncement of, can be made by successor. 42 A. 362=61 I.C. 932; 50 I.C. 641; 46 I.C. 618=29 C.L.J. 568. *See also* 49 I.C. 724; 14 I.C. 371; 5 Pat.L.J. 147=58 I.C. 437. Judge may write a judgment after he ceases to be a Judge in the district. It may be pronounced by his successor. 35 A. 368. *See also* 1930 A.L.J. 1566=53 A. 133=1931 A. 90. Under R. 2, it is not necessarily incumbent upon the successor of the Judge, who wrote the judgment after he had ceased to be a Judge of the Court in which the trial was held to pronounce the judgment that had been written by his predecessor. He has a discretion in the matter, and if he is in doubt as to the correctness of the judgment that has been written by his predecessor he ought either to act in accordance with the provisions of O. 18, R. 15, or to hear the case *de novo*. 14 R. 136=1936 R. 147 (F.B.). In the absence of an order of transfer of the case by a competent authority a Judge who is transferred has no power to deal with it. 80 P.R. 1919=49 I.C. 724; 80 P.R. 1916=35 I.C. 938. *See also* 5 Pat.L.J. 147=58 I.C. 437.

O. 20, R. 3.—R. 3 is a distinct prohibition against any alteration of a signed judgment except as provided by S. 152 or on review. 254 P.L.R. 1913=20 I.C. 3. *See also* 31 A. 153; 1938 A.L.J. 673; 43 C.W.



Judgment to be signed. the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review.

LOC. AM.—[MADRAS]. R. 3. *Substitute* the following :—

3. The judgment shall bear the date on which it is pronounced and shall be signed by the Judges and, when once signed, shall not afterwards be altered or added to save as provided by S. 152 or on review provided also that, where the presiding Judge is specifically empowered by the High Court to pronounce his judgment by dictation to a short-hand writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge.

Judgments of Small Causes Courts.

4. (1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

#### NOTES.

N. 1148=1939 Cal. 732. It shows that after the judgment has been signed by the Judge he becomes *functus officio* and has no authority to alter it except as provided by S. 152 where the order provided for automatic dismissal of a suit on non-payment of Court-fee within a certain date. *Held*, that Court had no power to extend the time after that period. 8 Luck. 502=10 O.W.N. 387=1933 O. 241. Judgment dictated to shorthand writer—Transcript cannot be amended. 18 L.W. 105=1923 M. 663. As to the power of Court to rectify an order which it finds is wrong or has been made in an improper form, *see* 16 B. 404. S. 151 was never meant to enable Court to contravene a distinct provision of law. When there is no clerical error or arithmetical error in the judgment or decree Court cannot amend the decree. 8 O.W.N. 1238=12 L.R. 383 (Rev.). Where Court gives a judgment but refuses to pass a decree till the successful party complies with a certain condition, the judgment is only a provisional judgment which does not become operative until the decree is passed. 34 I.C. 867=9 S. L. R. 193.

INHERENT POWER TO CORRECT ERRORS.—R. 3 is not exhaustive and it is the duty of Court to invoke its inherent powers to correct errors that have led to injustice through no default of a party and to do real and substantial justice for the administration of which alone it exists. 152 I.C. 211=1934 N. 234. Where Court passed an order under a misapprehension of facts, it is open to it under its inherent power to set aside such order when true facts are brought to light. R. 3 has no application to such cases. 148 I.C. 614=1934 A.L.J. 862=1934 A. 287. A suit for rent had been brought against the proper person who was misdescribed owing to his own action in giving his son's name instead of his own when he rented the premises and who had since been refusing to receive the summons on the ground that he was not the proper person. He was the proper person against whom the decree had been rightly made. On an application in execution proceedings to bring on record the real judgment-debtor's name, *held*, that the record could be corrected by virtue of the

powers under S. 151 if not under O. 1, R. 10. 144 I.C. 901=35 Bom.L.R. 365=1933 B. 200.

O. 20, R. 4.—Judges, whatever reasons they may give in judgments, must make specific and precise statements of their findings. 37 I.C. 304. But R. 4 does not require the evidence to be discussed. It merely lays down that the judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. Hence merely because the judgment does not mention some particular item of evidence it does not follow that the Judges had not considered it. 146 I.C. 445=1933 R. 174. *See also* 1938 Pat. 69. The fact that the Judge has set out a point for determination after the pleadings on the record is not sufficient. The points must be included in judgment. The use of a *rubber stamp* in a contested suit is most reprehensible. 146 I.C. 16=1933 N. 272 (1). Personal inspection by Judge alone is not sufficient material for judgment. 67 I. C. 302=1923 C. 311. Court invested with Small Cause powers is governed by sub-R. (1). 31 B. 314=4 Bom.L.R. 327. Judgment of Small Cause Court not containing the points for determination and the decision thereon is liable to be set aside. 6 M. L.J. 50; 1925 O. 283. Court of Small Causes need not give reasons for its decision nor even a concise statement of the case. 88 I.C. 376=1925 O. 648. *See also* 146 I.C. 1056=1934 P. 243. Need not state more than the points for decision and the decision thereon *seriatim*. 67 I.C. 851 (C.); 42 M. L.J. 583=1922 M. 360; 4 Lah.L.J. 55=1922 L. 122 (1); 48 I.C. 752; 40 I.C. 890. *See also* 12 I.C. 740=7 N.L.R. 146; 59 I.C. 906=12 L.W. 285; 1937 Sind 243. But *see* 15 L.W. 642; 109 P.L.R. 1913=18 I.C. 216; 1 R. 274; 97 I.C. 538; 95 I.C. 584. Small Cause Judge can reduce his remarks to intelligible minimum containing points of determination. 1921 298=64 I.C. 266; 1933 S. 62; 7 Luck. 526=136 I.C. 701=1932 O. 143. Where judgment in a small cause suit shows that the Judge has applied his mind to the points for determination and he has also recorded his decisions thereon, there is sufficient compliance with the law. 43 L.W. 514=1936 M. 486=70 M.L.J. 433.



(2) Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

Judgments of other Courts.

### NOTES

O. 20, r. 4 (1) does not require that either the reasons for arriving at a conclusion or discussion of the evidence should be given by the Small Cause Court. The points for determination in order to arrive at the result and the resulting decision thereon alone need be stated. If all that is set out is the ultimate result without an indication of the points for determination, there is no compliance with the rule. A statement of issues only does not necessarily indicate the points to be determined although in some cases it may well do so. Each case must be judged by itself. 1936 Mad. 913. No doubt a judgment of the Court of Small Causes need not contain more than the points for determination and the decision thereon. It is however highly desirable that the judgment should also contain some indication that the Judge has actually applied his mind to the evidence on the record in order to facilitate the High Court to find out whether the decision under revision was rightly arrived at after weighing the pros and cons or whether there was merely a mistake or an inadvertent omission in recording a particular finding. 142 I.C. 844=1933 S. 62. See also 1933 A.L.J. 316=1933 A. 339; 1937 Sind 243; 1938 O.W.N. 805=1938 Oudh 225. The test whether R. 4 (1) of O. 20 has been used or abused by a Small Cause Court lies in the answer to the question whether the judgment has been made intelligible. When the Judge has to deal with a question of fact he need not give anything more than his actual decision on the question, namely his answer to it. But in cases involving difficult questions of law or mixed questions of fact and law the Judge should set out so much of his reasoning as will make clear the road by which he has reached his conclusion. 55 M. 671=1932 M. 336=62 M.L.J. 439. Judgment should contain reasons for decision. 1 R. 274; 15 B. 11. The words "need not" in O. 20, R. 4 were not meant to be read as "shall not". (*Ibid.*) A Small Cause Court is of course not bound to record the evidence *in extenso*, but it is incumbent upon that Court to record such statements of the witnesses, or to make a summary of those statements, in the deposition, as recorded, on which the Court relies in its judgment. Where the judgment in a Small cause suit is not supported by the evidence as recorded and the evidence has not been recorded in such a way as to enable the High Court to form any opinion as to the respective cases of the parties before the Court, and on what material circumstances the Court has relied upon in support of the judgment, the judgment is liable to be set aside in revision. It is not enough for the Judge trying a small cause suit to say that he finds for or

against a party from the facts and circumstances; he must take care to note those facts and circumstances when recording the evidence of the witnesses who come and depose before him. 64 C.L.J. 456=169 I. C. 512; 1937 Sind 243. There must be a distinct finding one way or the other, on all the material issues in the case. 8 W.R. 481. A judgment jumbling up all points together and containing a statement that all issues are found in plaintiff's favour does not comply with the rule. 1925 M. 1229=49 M.L.J. 354; 7 Luck. 526=136 I.C. 701=1930 O. 143.

PRACTICE OF "STRIKING OFF" PETITIONS DEPRECATED.—When a matter is contested and when the Court has heard pleaders for both sides, simply to say the petition is "struck off", is entirely unwarranted and extremely undesirable. To say that the "petition is struck off" is surely not a proper and legal mode of disposal of an important contested application; there must be judicial determination on the merits of the controversy. [10 C. 416 and 6 A. 269 (P.C.), Rel. on.] 144 I.C. 503=38 L.W. 280=1933 M. 510.

O. 20, R. 4 (2).—Conjecture is not a sound basis for judicial decision. 21 I.C. 413=18 C.L.J. 220. Judgment based on a question neither raised in written statement nor included in any issue is bad. 15 I.C. 159. Judgments—Contents of—Following prior judgment. 15 I.C. 434=1912 M.W. N. 900. Where the trial Judge did not give a reasoned finding on the main issue in the case but simply stated his conclusion, it was held to be a violation of the provisions of R. 4. 102 I.C. 280=1927 L. 418. Where a Judge mentions specifically certain points which were argued before him and the judgment is silent on other points taken in the memorandum of appeal, it may be presumed that such points have been abandoned; but where the Judge, after mentioning the points specifically argued before him, states that on merits too there is no force in the objections taken, it cannot be held that the other points have been abandoned. (1933 L. 124 and 1924 L. 107. Dist.) 145 I.C. 113=1933 L. 570. It cannot be assumed from the mere fact that the Court below has not referred in detail to all the items of the documentary evidence produced by the parties, that the said evidence has been ignored or discarded. If a party did not, during the progress of the suit, bring certain documents to the notice of the Court, the blame rests with him. If any document is referred to the Court, it can be said that the Court must have considered the nature and scope of the document before forming a conclusion on the questions in issue. A Judge is not however bound to refer in his judgment to each and every item of evidence which is relied on by the parties. 130 I.C. 289=



5. In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit.

Court to state its decision on each issue.

6. (1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

Contents of decree.

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid.

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

#### NOTES

1931 A. 210. See also 1936 M. 913; 1936 M. 486=70 M.L.J. 433; 64 C.L.J. 456. The Judge is not obliged to refer the evidence under O. 20, R. 4 but if he does so and his reference indicates that he did not consider a material portion of the evidence, High Court is entitled to interfere in revision. 35 C.W.N. 1242. In trying a question of fact a Judge should not act on his knowledge or public rumour. 11 M.I.A. 213.

COMMISSIONER'S REPORT.—Commissioner's report and the opinion he expressed on the evidence is merely a piece of evidence to be considered by the Judge. It is the duty of the Judge to consider every objection of fact or of law made by the parties to the report, to show the nature of the objection in his judgment and his grounds for allowing or dismissing it. 27 S.L.R. 194=1933 S. 327.

O. 20, R. 5.—Although a suit is decided upon a preliminary point, Court can record findings on all the issues. 9 C.W.N. 60. But see 11 C. 544 and 17 M.L.J. 626 (P.C.) =35 C. 189=35 I.A. 38; 20 C.L.J. 426 (431). Courts deciding a suit have no right to impose a condition as to the mode of execution of the decree. 45 I.C. 250. High Court set aside the judgment of first Court for uncertainty in the judgment as it could not know what the judgment meant. 25 I.C. 576=19 C.L.J. 545. In appealable cases lower Court should as far as possible pronounce its opinion on all the issues raised. 24 I.C. 87=1 L.W. 416 [5 W.R. 53 (P.C.), Foll.]. On this Section see also 1935 A. L.J. 309=1935 A. 519.

O. 20, R. 6.—Court will not be deterred from making a decree by the difficulties to be expected in carrying it out. 1 M.H.C. R. 415. Decree should not be vague, but explicit in its terms. 7 W.R. 232. When a decree or any part of a decree is passed by consent of parties, it should always so appear on the face of the decree when drawn up. 35 C.W.N. 612=1931 P.C. 107=60 M.L.J. 648 (P.C.). A decree ought to be drawn by the Court deciding a case, showing all the costs incurred by both the parties. 10 I.C. 858=38 C. 125. When there are several parties in a suit, the judgment and decree should make it clear which

parties are to receive costs and how many sets are allowed. 1936 A.M.L.J. 117. In the case of an original suit decree must be quite distinct from the judgment. 54 I.C. 913=1 L. 223. When a plaintiff sues by a recognised agent and obtains a decree, the decree should stand in the name of the agent as agent and on behalf of the plaintiff. 11 W.R. 503. Decree in a suit for contribution should specify the particular sum payable by each defendant. 24 W.R. 252. See also 3 M.H.C.R. 187. Decrees declaring a right to maintenance should contain an order directing future maintenance. 9 B. 108. See also 7 C. 394. Findings upon issues other than those upon which the suit is determined should not be inserted in decree. 26 A. 234. Where there is delay on the part of applicant for *correction of decree*, which is not capable of satisfactory explanation, the Court may reject the application. 139 I.C. 528=36 C.W.N. 97=1932 C. 563.

POWER OF COURT SUBSEQUENT TO JUDGMENT.—After judgment has been pronounced, decree must automatically follow and Court has no power to direct that the preparation of decree be stopped until payment of deficit Court-fee. 11 P. 532=1932 P. 228. See also 1938 A.L.J. 673=1938 All. 497.

O. 20, R. 6 (2).—The sub-rule does not authorize the Court to order payment of costs by a person who is not a party to the suit. Costs cannot be decreed against the guardian of a defendant except in the case referred to in O. 32, R. 2. 3 M. 263. A set-off cannot be allowed for costs not actually awarded. 16 W.R. 308. Costs awarded on the disposal of a preliminary point may be set off against cost awarded at the final disposal of the suit. 9 C. 797. Although it is within Court's discretion to allow or not to allow costs, still Court is bound to pass order with regard to it. Even where suit is dismissed decree ought to be prepared showing the amount of costs and giving direction in respect thereto even where each party has to bear its own costs. 1933 P. 135.

MISCELLANEOUS.—The word "decree" is often misunderstood. The order in the decree might give some relief to the plaintiff or might disallow the relief claimed altogether, but the Court has to prepare a decree



LOC. AMS.—[MADRAS]. For sub-rule (1) the following shall be substituted :—

"The decree shall agree with the judgment ; it shall contain the number of the suit, the names and descriptions of the parties, *their address for service* and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit."

In O. 20, R. 6, after sub-rule (2) the following be inserted as sub-rule (2-A) :—

"(2-A) In all cases in which an element of champerty or maintenance is proved, the Court may provide the final decree for costs on a special scale approximating to the actual expenses reasonably incurred by the defendant."

[LAHORE]. Substitute the following :—

6. (1) The decree shall agree with the judgment ; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

(1-A) In addition to particulars mentioned in clause (1) the decree shall contain the addresses of the plaintiff and the defendant as given in O. VII, rule 19 ; and Order VIII, rule 11, or as subsequently altered under Order VII, rule 24, and Order VIII, rule 12 respectively.

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid.

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

7. The decree shall bear date the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

LOC. AM.—[ALLAHABAD]. Add—

"7-A. A Court, other than a Court subordinate to the District Court exercising insolvency jurisdiction, passing an order under S. 47 or 144 of the Code of Civil Procedure or one against which an appeal is allowed by S. 104 or R. 1 of O. 43, or an order in any case, against which an appeal is allowed by law, shall draw up a formal order embodying its adjudication and the memorandum of costs incurred by the parties.

8. Where a Judge has vacated office after pronouncing judgment but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.

9. Where the subject-matter of the suit is immovable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries or by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers.

### NOTES

whether the claim is allowed or dismissed, except in cases excepted under General Rules and Circular Orders Civil Vol. V, Ch. 5, R. 11, 1933 P. 135.

O. 20, R. 7.—Where a person has the judgment of Court that he shall have a decree, he then obtains his decree. The decree, when drawn up afterwards, relates back to that time. 65 I.C. 650=34 C.L.J. 494. (17 C. 347, Ref.). See also 13 C. 104; 11 P. 532=1932 P. 228. A decree must follow the judgment and failure to prepare a decree cannot deprive the parties of their right to appeal. 52 I.C. 479=66 P.R. 1919. Date of decree is date of delivery of judgment. 1 P. 771=75 I.C. 879; 66 I.C. 7=1922 N. 113; 21 I.C. 545=25 M.L.J. 560; 25 I.C. 67; 32 I.C. 744; 42 B. 309. Difference in date between judgment and decree—The decree should bear the date of judgment. 101 I.C. 319. In the case of a decree not drawn up on a non-judicial stamped paper, although it is invalid on that account,

the subsequent affixing of the proper stamp, by the order of Court to the original decree, the stamp being defaced by the names of the parties and the cause title of the case being put upon it, makes the decree valid retrospectively from the date when it was drawn up. But if the Judge, when affixing the non-judicial stamp to the decree as originally drawn up, puts down his initials and the date of such affixing on the original decree, the decree has to be taken to be a decree passed on such date. 38 C.W.N. 1118.

O. 20, R. 8.—The Judge deciding a case on the conclusion of all the evidence is not bound by the previous decision on certain issues of a Judge who has tried a part of the case. 47 I.C. 555.

O. 20, R. 9.—A decree which does not specify the lands decreed, but directs them to be determined in execution, is bad in law. 4 C. 69. Such a decree cannot be executed. 25 W.R. 39. Evidence cannot be given in the execution department to amend any un-



10. Where the suit is for movable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had.

Decree for delivery of movable property.

11. (1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

Decree may direct payment by instalments.

### NOTES

certainty in the decree. 12 W.R. 99. But evidence could be taken to ascertain the boundaries, and the subject on which the decree operates. 16 W.R. 171; 22 W.R. 330. If the boundaries given are no longer in existence, evidence may be taken to ascertain the former position of the lands. 16 W.R. 191.

O. 20, R. 10.—In the case of a decree which follows R. 10, execution cannot be taken out by the decree-holder so far as the money portion of it is concerned without adopting the procedure prescribed by O. 21, R. 31, C.P. Code. 31 C.W.N. 850=1927 C. 652=55 C. 26. (13 M.L.J. 444, Foll.).

FORM OF DECREE.—R. 10, does not say that a person who is entitled to delivery of specific movables must in all cases sue for such delivery and not for their value or for damages; for in many cases the movables themselves would be of no use to him after conversion or detention. Nor does the rule say that the Court must invariably decree the articles claimed and not their value only. Court is not bound to pass a decree for the articles in the first instance and in the alternative only for their value in a case where the defendant asserts that the articles are not in his possession, or not in existence, and it is not possible for the plaintiff to prove that the defendant's assertion is untrue. 61 C. 711. In an action for specific restitution of chattels, it is for the defendant, and not the plaintiff, to determine the manner in which the alternative judgment of the articles or their value is to take effect, and it is in his election whether he would deliver the chattels or pay the assessed value on them. And the plaintiff has no right or power to obtain their specific restitution. But when a decree is in the form contemplated by R. 10, and there is no question of deterioration in value of the articles decreed to be recovered, the decree-holder is not entitled to execute the money part of the decree before applying for delivery of the articles. 61 C. 711. As a mere piece of movable property, and irrespective of its character as representing an actionable claim the value of a bond is only nominal, but the measure of the damages for its non-delivery would be upon the basis of its character as representing an actionable claim. But if the

bond is void at the time of conversion, and not by any act of the defendant, only nominal damages can be recovered. 61 C. 711. Where a decree is passed for *delivery of bonds*, an enquiry as to damages for their non-delivery may more profitably be started by the Court in execution. 61 C. 711. In a suit for recovery of specific movable properties, the decree ought to be a decree for the delivery of the movables enforceable under Order 21, Rule 31, but in accordance with Order 20, Rule 10; the decree has to state the amount of money to be paid by the defendant as an alternative if delivery cannot be had. S. 75, C.P. Code, does not authorise the Court to issue a commission to ascertain the value of the movables. I.L.R. (1940) 1 Cal. 372=44 C.W.N. 304=A.I.R. 1940 Cal. 337.

O. 20, R. 11: SCOPE AND APPLICATION OF RULE.—The fact that a Court passes an instalment decree under O. 20, R. 11 (1) does not make it *functus officio* or ousts its jurisdiction to pass a further and a different kind of instalment decree coupled with a hypothecation of immovable property. O. 20, R. 11 (2) is wide enough to include and to apply to the fixing of instalments and the taking of security after the passing any decree for the payment of money, whether the form of the original decree was for instalments or for a lump sum, when the new direction is made by consent of both parties. The judgment-debtor cannot in execution contend that such a decree is without jurisdiction or that the contract of security was without consideration and therefore unenforceable. The Executing Court is precluded from going behind the decree. 18 Pat. 719=20 Pat.L.T. 924. R. 11 is not in any way controlled by the provisions of the Imperial Bank of India Act, (1920), which limit the power of the Bank in the matter of advancing loans for a period exceeding six months. The Courts are not therefore precluded from granting instalments in proper cases simply because such a course would postpone realisation of the dues by the plaintiff (Imperial Bank) for over six months. 146 I.C. 1046=16 N.L.J. 78=1933 N. 330. After a portion of the amount due under a money decree had been paid, execution had been started for the balance, the decree-holder and judgment-debtor entered into a compromise, whereby, some of the properties which had been attached were released



## NOTES

and judgment-debtor was given time to pay the balance due in four instalments. This was presented to Court, and Court granted permission for the compromise, directing a decree to be passed in its terms. *Held*, the order of the Court must be taken to have been passed under R. 11 (2). 40 L.W. 883=67 M.L.J. 801. *See also* 144 I.C. 158=1933 L. 758. The word "postponed" has been added to meet the ruling in 2 A. 649. *See* 7 M. at 154 and 2 A. at 132. Applicability of rule to decree against tenants under Agra Tenancy Act. *See* 54 A. 521=138 I.C. 254=1932 A. 436. No doubt instalments and interest are discretionary matters, but that discretion must be exercised on judicial principles, and where there is no reason proved that the debtor should be granted an unusual concession, the normal course should be followed. 148 I.C. 349=1934 Pesh. 2. The discretion to order payment of a decretal amount by instalments must never be exercised so as to constitute a virtual denial of the decree-holder's rights. (54 A. 539, Rel. on.) A.L.R. 1935 R. 495. In making orders for instalments under R. 11, not only the condition of the debtor and his ability to pay must be considered but also all other circumstances, namely, the date and the amount of the loan, the amount of instalments, etc. The Court should be careful to guard also the interest of the creditor. Too much pity for the debtor is not the consideration. Simply because instalments are prayed for and the claim is not contested, that does not entitle a debtor to get an instalment decree as a matter of course. In granting instalments even a Small Cause Court is required under R. 11, to state its reasons therefor. 157 I.C. 1038=61 C.L.J. 93=A.I.R. 1935 C. 559. The mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason for granting instalments. The debtor may be required to show his *bona fides* by arranging prompt payment of a fair proportion of the debt. But that is only one way of proving *bona fides* and the prompt payment of a fair proportion of the debt cannot be made in all cases a condition precedent for granting instalments. 146 I.C. 1046=16 N.L.J. 78=1933 N. 330. It is not open to the executing Court to go behind an adjustment or agreement between the judgment-debtor and decree-holder for the payment of an amount smaller than the decretal amount payable by instalments, an agreement attested by the Court. Under R. 11, it is open to the Court, with the consent of the parties, to vary the terms of a decree. The order attesting the terms of the compromise having been passed by the Court in the presence of the parties and with their consent it is not open to either of them to contend that the Court was not competent to attest it. 144 I.C. 158=1933 L. 758. *See also* 67 M.L.J. 801. A decree for the enforcement of a mortgage or charge is not

a decree for the payment of money. 7 B. 332. *See also* 1933 R. 323. An order under this rule can only be made by the Court which passed the decree. 12 A. 571; 54 A. 573=1932 A.L.J. 365=1932 A. 273 (F.B.). The Court referred in sub-section (1) of R. 11 is clearly a Court which passed the decree. The executing Court must take the decree sent to it for execution as it stands and is not entitled to vary the decree by making it payable by instalments. 149 I.C. 763=1934 R. 197. S. 42 does not empower the Court to which a decree is sent for execution to pass an order which has the effect of amending, altering, or varying the decree itself. An order for payment of a decree by instalments which is made after the decree has been passed, undoubtedly has the effect of altering or varying the terms of the original decree and consequently it is not within the competence of the transferee Court to make such an order. 12 R. 320=151 I.C. 937 (2)=1934 R. 165. *See also* 7 B. 332. In the case of instalment decrees, the amount of the instalments and the periods for their payment is a matter of discretion for the Court. But the discretion is one which is to be exercised within reasonable bounds. 54 A. 539=1933 A. 90. The Court is not bound to direct that the instalments shall carry the stipulated rate of interest. 3 B. 202. Supplemental decree for balance of mortgage amount—Power of Court to order instalment payment. 11 I.C. 736=15 C.W.N. 1083. The fact that the estate of the defendants has been brought under the management of the Court of Wards is not a reason for allowing instalments. 1923 L. 266. Court which passed the decree is the Court which can postpone the execution of decree under R. 11. 32 M.L.J. 13=40 M. 233 (F.B.). An order postponing execution of a decree or ordering payment by instalments is virtually an order amending the decree. 34 I.C. 393. Rule refers to order passed by the Court which passed the decree and not executing Court. 2 Pat.L.T. 80=58 I.C. 893. The trial Court has the power under R. 11, to postpone payment of the amount decreed but it must be exercised judicially. 7 L. 393=97 I.C. 769=1926 L. 604. Burden of proving that the defendant is entitled to indulgence of a decree in instalments rests upon him. 71 I.C. 303. Under the Agriculturists' Relief Act, It is imperative on the Court to pass an instalment decree in certain circumstances. The Act, however, does not derogate from the provisions of O. 20, R. 11, C.P. Code, under which the Court is entitled to pass an instalment decree. 1937 A.W.R. 1074=1937 A.L.J. 1247=A.I.R. 1938 All. 52.

**LIMITATION.**—When order under this rule is made on an application held after the expiry of the period of limitation, it is invalid. 14 C. 348 (350). But *see* 54 A. 573 *contra*; 1938 A.M.L.J. 86. Limitation is a matter of procedure and an order passed



(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit.

Order, after decree, for payment by instalments.

decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit.

LOC. AMS.—[MADRAS]. *Substitute for R. 11 :—*

11. (1) Where and in so far as a decree is for the payment of money the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

Decree may direct payment by instalment.

(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and after notice to the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise as, it thinks fit.

[NAGPUR]. R. 11.—In sub-R. (2) of R. 11 in O. 20 for the words "and with the consent of the decree-holder" the words "and after notice to the decree-holder" shall be *substituted*.

[RANGOON]. O. 20, R. 11, sub-R. (2). For the words "and with the consent of the decree-holder" *substitute* the words "and after notice to the decree-holder."

[SIND]. O. 20, R. 11 (2). In sub-rule (2) of R. 11 of O. 20 :—

for the words "and with the consent of the decree-holder" *substitute* the words "and after notice to the decree-holder."

Decree for possession and mesne profits.

12. (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree—

## NOTES

on a time barred application is not one without jurisdiction. 1938 A.M.L.J. 86. Although Court should not entertain an application for payment of the decretal money by instalment under R. 11, if made after expiry of six months from date of decree, the order if actually passed on such a time-barred application is not a nullity. Limitation is a question of procedure and not one of jurisdiction. (26 A. 522, Rel. on; 1924 L. 342, Not foll.) 54 A. 573=1932 A.L.J. 356=1932 A. 273 (F.B.). The time for an application subsequent to decree for payment by instalments runs only from the date of the decree of the appellate Court even though the latter only confirmed the judgment of the lower Court and dismissed the appeal. 135 I.C. 858=1932 R. 54.

APPEAL.—An order postponing the time for the payment of the decretal amount passed under R. 11 is not by itself appealable, but when such an order is passed at the time of giving judgment and is incorporated in the decree, it is clearly a part of the decree and as such is appealable. 133 I.C. 233=1931 R. 152. (7 L.B.R. 71, Dist.; 1928 L. 931; 1926 L. 604, Ref.) See also 1933 Pesh. 31. An order under this rule is not a nullity because it postpones the period of limitation. 7 M. 152 (154). See also 12 B. 65.

O. 20, R. 11 (2).—An order in the terms "Let the petition be filed" passed on a petition presented by a judgment-debtor after he is arrested, asking for 15 days' time, the

decree-holder consenting, does not amount to an order directing payment to be postponed. 16 C. 16. See also 14 C. 348; 11 C. 143; 4 Bom.H.C.A.C. 77 and 5 B. 604. Order under R. 11 (2) directing judgment-debtor to execute mortgage—Subsequent insolvency does not affect decree-holder's rights. 2 R. 673=4 Bur.L.J. 32. Compromise between parties that decretal amount should be paid by instalments—Court accepting compromise and dismissing execution case—Terms of compromise—Can be enforced in execution. 41 C.W.N. 480=1937 C. 236. Execution of decree—Postponement of, on furnishing security—Validity of order. See 52 M.L.J. 182=1927 M. 416=100 I.C. 841. Order under R. 11 (2) is *appealable* being one under C.P. Code, S. 47. 119 I.C. 751 (1)=1929 R. 191; 135 I.C. 858=1932 R. 54. Even though the petition on which an order for payment of the decretal amount by instalments is made, is not made within six months of the decree, the order is not a nullity. The proper remedy of the person who objects to the order is to take appropriate steps for getting that order set aside and so long as that order is not set aside, it is binding on him. 41 C.W.N. 480=1937 C. 236.

O. 20, R. 12.—Difference between the old section (S. 211) and this rule. See 26 I.C. 622=2 L.W. 8. As to the effect of the rule, see 37 M. 186. It is the Court which passed the decree and not the executing Court which is to ascertain the mesne profits under the new Code. 130 I.C. 785=1931 P. 1.



(a) for the possession of the property ;

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits ;

#### NOTES

See also 1931 M. 650=61 M.L.J. 596 (F. B.). Mesne profits must be determinable in the suit itself and not by way of execution. 16 C.W.N. 109. See also 1938 M.W.N. 286; 42 C.W.N. 748. An application under O. 20, R. 11 (2), must be made to the Court which passed the decree and S. 42 does not confer concurrent powers on the Court executing the decree. 1939 A.M.L.J. 104. If the executing Court passes an order under O. 20, R. 11 (2), altering the terms of the decree to be executed, it usurps the jurisdiction of the trying Court. The acquiescence of the judgment-debtor will not avail the decree-holder and he cannot execute the altered or amended decree. 1939 A.M.L.J. 104; 37 I.C. 997; 32 I.C. 862; 2 Pat. L.J. 394=41 I.C. 231. An application for assessment of mesne profits is an application in the suit. 25 A. 385; 90 I.C. 811=1926 C. 175; so where such an application is dismissed for default a fresh application is not maintainable. 16 C.L.J. 3. See also 29 I.C. 997. The remedy of the aggrieved party is under O. 9, R. 4. 1921 P. 25=62 I.C. 747. Where in a suit for damages and arrears of rent, the plaintiff makes it clear that he would not press his claim for damages and confines his relief to the recovery of the fixed rents which had been agreed upon between the parties, the amount becomes definitely ascertained, and the Court is, therefore, not bound to pass a preliminary decree in the first instance. 166 I.C. 897=1936 A.W.R. 1212=1937 A. 36. See also 1938 M.W.N. 286.

SCOPE OF RULE.—The rule does not apply to a suit for partition, but to suits for possession of immovable property in which plaintiff has a specific share. 14 C. 493 (P. C.). See also 1938 O.W.N. 348=1938 Oudh 103; (1938) 2 M.L.J. 704. If a Court passing a decree for delivery of possession of immovable property directs that an enquiry should be made in *execution* as to the amount of mesne profits from the institution of the suit till delivery of possession to the plaintiff, the executing Court has no jurisdiction to question the propriety of the direction. It should enquire into the amount of mesne profits and forward its report to the Court which passed the decree and it would then be the duty of that Court to pass a final decree in conformity with the provisions of O. 20, R. 12 (2). 67 C.L.J. 473=42 C.W.N. 748. Per *Derbyshire, C.J.*: *Mukherjea, J.* (*contra*).—There is nothing improper or wrong in law in the suit Court directing that such an inquiry shall be made by the executing Court, and there is much to be said in favour of it from the point of view of convenience. 67 C.L.J. 473=42 C.W.N. 748. Mesne profits may be allow-

ed, however, when one member has been entirely excluded from enjoyment. 19 B. 532. See also 16 C. 397 (P.C.); 14 W.R. 397. Mere excess of enjoyment is not ouster. 23 I.C. 122. Although the preliminary decree passed on a compromise in a partition suit makes no provision for payment or ascertainment of any mesne profits, the Court would be justified in appointing a commissioner to determine the amount of mesne profits, when the applications and the proceedings of the Court clearly show that the intention of both the parties was that mesne profits should be paid to each other. 1938 O.W.N. 348=1938 Oudh 103; see also 1938 M.W.N. 1214=(1938) 2 M.L.J. 704. A suit for mesne profits does not fall within this rule. 9 Bom.H.C.R. 7. See also 1 N. W.H.C.R. 22; 9 M.L.J. 163; 9 C.L.R. 1; 21 A. at 432 (F.B.); 5 C. 563; 24 B. 345; 19 A. 296; 30 C. at 664 (F.B.). Mesne profits may be awarded during the whole period a suit is pending, however long that period may be. 8 Bom.H.C.R. (A.C.) 205. In absence of mention of period in the decree, plaintiff is entitled to mesne profits up to the date of delivery of possession. 13 C.W.N. 430. See also 8 C. 178 (P.C.); 16 I.C. 866; 12 W.R. 75; 17 W.R. 209. Amount larger than what is claimed may be awarded as mesne profits. 8 C. 295; 9 C. 474. But see 6 C. 474; 5 W.R. 127 (P.C.) *contra*. The provision of R. 12 (c), suggest, that when a person obtains a decree for possession of immovable property, the defendant would be answerable to the plaintiff for mesne profits either until he delivers up possession or relinquishes possession with notice to the decree-holder through Court. It is immaterial that the decree itself contains no direction as to future mesne profits. 43 L.W. 221=1936 M. 137=70 M.L.J. 87. Where the appellate Court finds that a person is entitled to possession, the proper course is not to remand the whole suit, but to pass a preliminary decree so far as possession is concerned and direct an enquiry as to mesne profits. 45 M. 449=42 M.L.J. 372. Where possession is decreed to a plaintiff, he is entitled to a further decree for mesne profits from the date of the suit up to the date of taking possession. 42 A. 497=18 A.L.J. 613.

COURT FEE.—A person applying under R. 12 for ascertainment of mesne profits prior to suit need not pay any Court-fee which should be paid only after the amount of mesne profits has been ascertained. 1935 A. L.J. 254=1935 A. 206. See also 49 L.W. 652.

"DELIVERY OF POSSESSION."—Mere filing of a petition stating that the plaintiff might take possession, of which no notice went to



(c) directing an inquiry as to rent or mesne profits from the institution of the suit until—

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

#### NOTES.

the plaintiff would not amount to delivery of possession. 12 I.C. 272=(1911) 2 M.W.N. 258. 'Relinquishment of possession'—Notice of relinquishment if given at a time when it is too late to cultivate, if of no avail. 2 L.W. 1129=31 I.C. 387.

"THREE YEARS FROM DECREE".—Mesne profits for more than three years from the date of the decree should not be awarded, even though possession was not delivered during that period. 24 B. 345; 24 B. 149; 35 C. 1017; 27 C. 951 (P.C.). Claim for mesne profits up to date of suit—Decree silent as to period for which mesne profits is to be given—Court whether can award such profits till date of delivery of possession. 53 C. 992=31 C.W.N. 112=99 I.C. 428=1927 C. 182. Where preliminary decrees gave the plaintiff mesne profits before suit but did not specify the exact date from which mesne profits were to be assessed, the decrees entitle the plaintiff to mesne profits before suit for such period as the law entitles him to, that is to say, from three years anterior to the suit if profits had been received or might have been received by the defendant within that period. 68 C.L.J. 152=A.I.R. 1938 Cal. 563. The period should be calculated from the date of the ultimate decree. 34 C.L.J. 415. In cases of appeals it is the appellate decree. 30 C. 660. *See also* 23 A. 152; 70 I.C. 6=34 C. L.J. 415; 3 Pat.L.J. 116=43 I.C. 855.

O. 20, R. 12 (c) (Mad.).—Mesne profits—Application for ascertainment—Necessity Limitation. 71 M.L.J. 388.

O. 20, R. 12 (1).—The word "may" in R. 12 (1) indicates that Court's power is discretionary though in R. 12 (1) (a) "may" means "shall." 41 M. 188=33 M.L.J. 699 (F.B.). Preliminary decree—What amounts to—Objection to jurisdiction—Where to be taken. 36 I.C. 431=9 Bur.L.T. 119.

Mesne profits—Liability for period between date of judgment-debtor's relinquishment of possession with private notice to decree-holder and date of formal delivery through Court. 66 I.C. 49=25 C.W.N. 369. Exclusive possession of one co-sharer as lessee of others—Jurisdiction of Court to award compensation to co-sharers out of possession subsequent to institution of suit. 35 C.W.N. 949=1931 P.C. 209=61 M.L.J. 186 (P.C.).

MODE OF AWARDED ASSESSMENT AND CALCULATION OF MESNE PROFITS.—*See* notice under S. 2, cl. (12). *See also* 15 I.C. 1; 3 C. W.N. 748; 18 C. 99 (P.C.); 4 C. 882; 9 A.L.

J. 774=16 I.C. 126; 2 A. 651. The correct procedure under O. 20, R. 12, is for the Court to direct an inquiry as to the mesne profits, and then pass a final decree for the amount found due on inquiry. The Court which is directed to make the inquiry in execution ought merely to determine the amount and not pass an order for its recovery. It is for the trial Court to pass a final decree for recovery of the amount due. 176 I.C. 254=40 Bom.L.R. 416=A.I.R. 1938 Bom. 320. The only relevant consideration for Court is whether defendant's possession was wrongful or not. If it was wrongful, Court is not justified in going further and inquiring what the degree of the misconduct or culpability is. 38 L.W. 714=1933 M. 825. When Court passes the preliminary decree under R. 12 and directs an enquiry as to mesne profits, it should, at the same time, decide the basis upon which the mesne profits are to be assessed. There is no provision in the Code for deciding the basis upon which mesne profits are to be assessed, at a date subsequent to the passing of the preliminary decree. 151 I.C. 922=38 C.W.N. 384=1934 C. 503. The character of the possession held by the decree-holder before ouster to be taken into consideration in cases where the intention as to the mode of occupation if there were no trespass has got to be gathered. 29 C. 622=6 C.W.N. 409. *See also* 35 C. 1000=12 C. W.N. 650; 30 I.C. 536; 1931 P.C. 209=61 M.L.J. 186 (P.C.). In arriving at net profits expenses of management and collection charges should be allowed. 1931 M.W.N. 813; 68 C.L.J. 152=1938 Cal. 563. Charity expenses such as temple kattalais and chatram expenses charged on the suit property cannot be treated as voluntary payments and should therefore be deducted in computing the mesne profits to be awarded to the plaintiff. 1931 M.W.N. 813. Basis of assessment of mesne profits—Some lands held at produce rent—Presumption. 53 C. 992=31 C.W.N. 112=1927 C. 182. Thus a landlord who dispossesses a ryot is liable, not merely for the profits which he makes by letting the land but to make good the loss which the ryot sustains. 15 W.R. 428; 11 W.R. 481; 12 W.R. 104. Cultivation expenses ought to be deducted. 24 M.L.J. 30=18 I.C. 615; 1931 M. W.N. 813. As to the other deductions which the trespasser is entitled to, *see* 23 A. 252; 24 A. 376; 1 A. 518 (F.B.). (Collection expenses); 27 C. 951 (P.C.); 17 B. 35. *See also* 3 W.R. 30; 16 W.R. 171; (1911) 2 M.W.N. 308



## NOTES.

=12 I.C. 385. No deduction for expenses incurred in obtaining decrees for rent, 20 A. 208. In a suit for recovery of possession of immovable property and mesne profits, it is the value of the property plus the mesne profits for the period up to the date of the suit that would determine the jurisdiction of the Court. The mesne profits accruing *pendente lite* would not enter as an element in determining the value of the suit at the time when the suit is filed. It would, therefore, be quite competent to the Court to award in the shape of *pendente lite* mesne profits a sum of money which might exceed its pecuniary jurisdiction. But as regards mesne profits accruing prior to the date of the suit, the Court can award mesne profits only to the extent of such an amount, which together with the value of the land would come up to amount which is its pecuniary jurisdiction, I.L.R. (1937) 2 Cal. 176=1937 Cal. 761.

CLAIM FOR MESNE PROFITS AGAINST TRESPASSERS—NATURE OF DECREE TO BE PASSED.—In the case of a claim for mesne profits two courses are left open to Court. A decree for mesne profits may be passed jointly and severally against all the trespassers who may have jointly kept the plaintiffs out of possession for any particular period, leaving them to have their respective rights adjusted in a separate suit for contribution; or, the respective liabilities of such trespassers may be ascertained in the plaintiff's suit against them and a decree on the basis of such several liabilities may be passed against the respective trespassers in plaintiff's favour, 58 C.L.J. 8=1933 C. 554=147 I.C. 466.

DECREE FOR MESNE PROFITS ONLY—VALIDITY.—Though ordinarily a decree for mesne profits can only follow a decree for possession and when the plaintiff fails to obtain a decree for possession, a claim for mesne profits should not be allowed still when the plaintiff is precluded from obtaining *khas* possession, he cannot be deprived of his right to mesne profits till the date to which he is entitled to possession, 58 C.L.J. 8=1933 C. 554=147 I.C. 466.

SUIT FOR MESNE PROFITS—BURDEN OF PROOF.—In a suit for mesne profits, if the defendant asserts that a particular amount and no more was received by him, the duty of establishing it affirmatively rests upon him, that fact being especially within his own knowledge. On his laying before the Court sufficient evidence to prove that fact, he shifts the burden to the opposite party of proving that more might have been received, 38 L.W. 714=1933 M. 825.

INTEREST ON MESNE PROFITS.—See note under S. 2, Cl. (12). See also 35 C. 329 (Mesne profits shall carry interest unless expressly refused.); 27 C. 951=4 C. W. N. 631 (P.C.); 6 A.L.J. 327=2 I.C. 464; 15 M. 203. But see 22 A. 262 and 8 C. 332 (P.C.) in which it was held that where interest is not given by a decree, it is not obtainable in execution. On this point, see also 10 C. 785 (P.C.); 4 P. 57=84 I.C. 272.

C. C. M.—117

When profits are earned or might have been earned by the wrongdoer yearly, interest on those profits must be calculated yearly and year by year, 68 C.L.J. 152=A.I.R. 1938 Cal. 563. Mesne profits include interest, but it is settled then that the Court may in its discretion either refuse to give interest or give interest at such a rate as it thinks fit. There is no reason for making any distinction between different periods for calculation of interest. In absence of special circumstances six per cent. is the usual rate, 68 C.L.J. 152=A.I.R. 1938 Cal. 563.

FUTURE MESNE PROFITS.—Although Court may pass a decree directing an enquiry into future mesne profits under R. 12, this provision is only directory and not mandatory. It does not compel plaintiff to unite the claim for future mesne profits in a suit for recovery of possession of immovable property, 1931 A.L.J. 673=1931 A. 429=53 A. 951 (S.B.).

PROCEDURE.—R. 12 does not require that after the preliminary decree has been passed the decree-holder should apply to the Court for starting the proceedings in connection with an enquiry as to mesne profits. On the other hand R. 12 (2) provides that where an enquiry is so directed a final decree in respect of the mesne profits shall be passed in accordance with result of such enquiry. The proceedings should be taken to continue till the result of the enquiry into mesne profits is known. And under the Code the Court has no power to direct the ascertainment of mesne profits in execution, 151 I.C. 755=1934 A.L.J. 86=1934 A. 465. See also 1934 C. 472. The enquiry and ascertainment as to mesne profits is a part of the proceedings in the suit consequent on the preliminary decree and is terminated by a final decree after the mesne profits are ascertained, 41 I.C. 231=2 Pat.L.J. 394; 1931 A.L.J. 413=1931 A. 538 (It has nothing to do with the execution department). Suit for possession by heir—Enquiry into mesne profits from date of suit should be directed, 66 I.C. 494=2 L. 383. Where Court by an order determines the principle for ascertaining mesne profits, such an order is one made in a pending suit and is therefore not appealable, 13 I.C. 186 (19 C. 132; 5 I.C. 272, Rel. on.) Decree for mesne profits does not become operative till the amount has been ascertained by the Court and the Court-fee paid thereon under S. 11 of the Court Fees Act, 27 I.C. 300. See also 1931 A.L.J. 413=1931 A. 538. Decree directing enquiry into mesne profits in execution, though it was in contravention of the provisions of R. 12 is a case of an irregular exercise of jurisdiction and not a nullity, 30 L.W. 810=57 M.L.J. 728. Non-compliance with—Irregularity or illegality—Executing Court whether can refuse to execute on the ground that R. 12 was not complied with, 31 Bom.L.R. 400=118 I.C. 700=1929 B. 217. The cases mentioned in O. 20 of the C. P. Code are not exhaustive of the orders which may form the basis of final decrees, 27 C.W.N. 989=38 C.L.J. 255. In



LOC. AM.—[MADRAS]. Add the following to O. 20, R. 12 :—

(3) Where an Appellate Court directs such an inquiry, it may direct the Court of first instance to make the inquiry ; and in every case the Court of first instance may of its own accord, and shall whenever moved to do so by the decree-holder inquire and pass the final decree.

#### NOTES.

the absence of a period for the calculation of mesne profits in a decree awarding mesne profits, the decree should be construed as awarding mesne profits for three years. 24 I.C. 484=1 L.W. 443. When decree is passed both for possession and mesne profits, decree for possession only must be executed first. 2 L.W. 688=30 I.C. 246. Application for ascertainment of mesne profits—Death of defendant—No abatement. 129 I.C. 84=11 Pat.L.T. 796=1931 P. 57. The dismissal of an application for ascertainment of mesne profits to be made in execution does not amount to the dismissal of the entire claim for mesne profits. 151 I.C. 913 (2)=38 C.W.N. 141=1934 C. 472. See also 1934 A. 465.

JURISDICTION.—Jurisdiction is not taken away by the mesne profits ascertained by the Court exceeding the pecuniary jurisdiction of the Court. 21 C. 550; 40 C. 56; 15 I.C. 252; 2 Pat.L.T. 143=6 Pat.L.J. 54. See also 2 Pat.L.T. 648=68 I.C. 903; 32 I.C. 788; 1934 P. 380. Suit for mesne profits is cognizable by Small Cause Courts. 23 C. 884 (F.B.); 22 M. 196; 24 M. 118. But see 25 B. 85; 14 C.W.N. 1001. After an order has been finally made determining the amount of mesne profits due, a formal decree should be drawn up to give effect to the order which terminates the suit. 32 C. 175. See also 15 B. 416. Suit against several trespassers—Decree for mesne profits—Form of. 59 C. 859=138 I.C. 882=1932 C. 600. See also 58 C.L.J. 8=1933 C. 554. Where a preliminary decree in a partition suit has omitted to direct an enquiry into mesne profits the final decree cannot award mesne profits or direct an enquiry as to mesne profits. 42 M. 296=1919 M.W.N. 284. Decree directing delivery of possession and awarding mesne profits without directing enquiry is final and not preliminary. 22 L.W. 347=90 I.C. 789. Mesne profits—Limitation. 16 C.L.J. 135=17 I.C. 121; 41 M. 188=33 M.L.J. 699 (F.B.); 77 I.C. 497=1923 B. 268. Decree—Application for ascertainment of mesne profits—Death of defendant—No abatement. 11 Pat.L.T. 796.

LIMITATION.—Limitation for execution runs from the date of the final decree, that is, from the ascertainment of mesne profits. 4 C. 629; 8 M. 137; 14 C. 50; 19 C. 132 (F.B.); 25 C. 203; 14 A. 531; 25 A. 385; 32 C. 175; 25 A. 623. Under Art. 109 of the Limitation Act, mesne profits can be recovered only for a period preceding three years next before the institution of suit. 10 C. 785 (P.C.); 8 C.L.J. 181=35 C. 996=13 C.W.N. 15. See also 5 M. 236. But see 33 C. 23 (P.C.). The period of three years has no reference to the time when the rents fall due. 24 C. 413; 32 C. 118. An application for ascertainment of mesne profits being an application in the suit itself is not governed by any provisions in the Limitation Act. 8 P. 482=10 Pat.L.T. 762=1929 P. 368. Contract procured by undue

influence—Possession under—Contract set aside—Account for mesne profits—Period of. See 59 I.A. 147=36 C.W.N. 461=1932 P.C. 89=62 M.L.J. 451 (P.C.). See also 41 M. 188=33 M.L.J. 699 (F.B.).

COURT-FEES.—As to the Court-fees leviable on mesne profits ascertained subsequent to the decree, see under S. 11 of the Court Fees Act. See also 55 I.C. 24=1 Pat.L.T. 235. Fees are payable on the difference between the amount paid on the mesne profits claimed in the plaint and the amount ascertained to be due subsequent to the filing of the suit. 10 L.B.R. 276=62 I.C. 175=13 Bur.L.T. 165. Application for ascertainment of further mesne profits—Court-fee if and when payable. 93 I.C. 939=5 P. 361=1926 P. 218 (F.B.). A person applying under R. 12 for ascertainment of mesne profits prior to suit need not pay any Court-fee which should be paid only after the amount of mesne profits has been ascertained. 1935 A.L.J. 254=1935 A. 206. Application for mesne profits—Appeal claim for higher amount than that awarded—*Ad valorem* fee on the claimed amount not payable—No Court-fee apart from the fixed fee can be claimed from party till the amount of mesne profits actually due has been ascertained. 11 Pat.L.T. 703. See also 49 L.W. 652.

APPEAL ON REVISION.—An interlocutory order of the lower Court relating to the maintainability of an application for mesne profits before the passing of the final decree is not open to appeal or revision; it can only be challenged in an appeal from the final decree. 138 I.C. 30=1932 O. 271.

SECOND SUIT.—Decree for possession—Question of mesne profits left open—Second suit for future profits maintainable. 130 I.C. 785=12 Pat.L.J. 127=1931 P. 1.

O. 20, R. 12 (3)—MADRAS AMENDMENT LIMITATION.—The word application in sub-R. (3) to R. 12 of O. 20, added by the Madras High Court, should be read as meaning a motion entirely free from the mischief of Art. 181 of the Limitation Act; and the words "and in every case the Court of first instance shall, on the application of the decree-holder, inquire and pass a final decree" must necessarily be subject to this limitation, "irrespective of any other limitation". On an appellate Court directing a Court of first instance under O. 20, R. 12 (3), to make an inquiry into mesne profits the proper course for the Court of first instance to adopt on receipt of the record from the appellate Court is to fix a date for the appearance of the parties. If the decree-holder does not appear, the Court of first instance has no right to pass a final decree depriving him of the mesne profits awarded by the appellate decree, but should adjourn the matter *sine die*. It is not obligatory on the decree-holder to file an application asking for an inquiry into mesne profits and for the passing of a final decree, within three years of the final de-



13. (1) Where a suit is for an account of any property and for its due administration under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree, ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.

(2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent; and all persons who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

#### NOTES.

decree as required by Art. 181 of the Limitation Act. There is no question of limitation in such a case. I.L.R. (1940) Mad. 372=1940 Mad. 124=(1940) 1 M.L.J. 54 (F.B.).

O. 20, R. 13.—The Code of Civil Procedure nowhere lays down what are to be the contents of a final decree in an administration suit. The contents must depend upon the nature of dispute in each case. Where after passing of a preliminary decree in an administration suit the Court passed an order which determined all the matters in dispute between the parties but refused to frame a final decree sheet, such order must be construed as a final decree to that extent, and is appealable. 1936 L. 879. The rules to be observed as to the respective rights of secured and unsecured creditors, etc., are to be found in the Provincial Insolvency Act. See also 15 C. at 208. Priority of Crown debts, see 45 C. 653=22 C.W.N. 793. Though an administration suit is filed only by one creditor, the decree passed in the suit is in favour of all the creditors of the deceased debtor. No one should be allowed to have an advantage over another with respect to the enforcement of his claim against the estate of the deceased. The Court passing the administration decree has jurisdiction to pass appropriate orders to prevent the execution of his decree by any particular creditor, so that the Court may administer the entire estate for the benefit of all the creditors—all of whom after the preliminary decree should be considered as having become parties to the suit. It can pass orders staying execution by a creditor of his decree, or an order, in the nature of injunction restraining him from executing his decree. Such orders are consequential orders and have to be passed to give full effect to the decree in the suit. It is unnecessary to invoke section 151 or O. 39, Rr. 1 and 2, C.P. Code, for the purpose of passing such orders. 48 L.W. 849=1938 M.W.N. 1127. The right of an unsatis-

fied or unpaid creditor, who has not come in under an administration decree to obtain payment in respect of his debt, unless he is precluded from exercising it by reason of negligence, default or laches or any other circumstance, which would make it inequitable for the Court to make a decree in his favour is not by way of action but by way of a petition under the administration action itself; such a petition can, however, succeed only if the fund is in Court or subject to the control of the Court, and further the claim can only be made against satisfied legatees and can never succeed against the creditors who have already been paid in respect of their debts. 38 Bom.L.R. 864=1936 B. 423. Rule does not apply where Administrator-General has obtained letters of administration of estate of deceased insolvent. 38 M. 500. See also 5 Bur.L. T. 5=14 I.C. 508. A suit for mesne profits is not a suit for an account. 22 M. 118. Administration suit in Rangoon High Court—Change in form of preliminary decree—Practice—Rangoon High Court. 1925 P. C. 261=50 M.L.J. 644 (P.C.). See also 1940 Rang.L.R. 136. In the case of an administration action, *unsecured creditors* are entitled to interest up to the date of the preliminary decree and not up to the date of payment or any other date, whereas secured creditors are entitled to interest, from the proceeds of the sale of the secured property, up to the date of payment. 112 I.C. 621=1929 M. 242. When a preliminary decree is passed in an administration suit all the *attaching creditors* stand on the same footing, even though the attachment may have been effected before the decree, provided that the decree was passed before any payment is made. (15 C. 202, Foll.) 61 C. 240=152 I.C. 69=1934 C. 559. As to what is an administration decree. See also 1935 Pesh. 63. Suit for rents and profits of property held in trust which is alleged to have failed—Nature of decree. 1939 Rang. 365=1940 Rang.L.R. 136.



14. (1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money Decree in pre-emption suit. has not been paid into Court, the decree shall—

(a) specify a day on or before which the purchase-money shall be so paid, and

(b) direct that on payment into Court of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct,—

(a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and

(b) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

#### NOTES.

**O. 20, R. 14: APPLICABILITY.**—*See* 1939 N.L.J. 13. The rule does not apply where the vendee is not entitled to possession. 45 A. 482=21 A.L.J. 417. Sub-rule (2) is new and is based upon the rulings in 6 A. 455; 11 A. 164. The words “whose title thereto shall be deemed to have accrued from the date on such payment” give effect to the observations in 24 M. 449 at 463. The pre-emptor’s rights to or in the property accrued only when he has complied with the conditions laid down in the decree and paid the purchase-money into Court and it is then and only then the property vests in him and is divested from the vendee. Such ownership does not vest from the date of sale notwithstanding success in the suit and the actual substitution of the owner of the pre-empted property dates with possession under the decree. (25 P.R. 1908, overruled.) 11 L. 128=1930 L. 273 (F.B.). Pre-emption decree—Form of—Date of payment to be fixed. 24 A.L.J. 63=1926 A. 158; 158 I.C. 78=1935 L. 523.

“SPECIFY A DAY.”—When the day specified happens to be a Sunday, payment may be made on the following day. 3 A. 850. *See also* 7 A. 107; 134 I.C. 201=1931 L. 388. The day on which judgment was passed, ought to be excluded in computing the period specified. 3 A. 830. *See also* 14 A. 529. When appellate Court dismisses an appeal, it can extend the time fixed by the lower Court. 2 A. 744. *See also* 11 A. 346. But *see* 18 A. 223. Court cannot extend the time after the period mentioned in the decree has elapsed. 13 A. 400. *See* S. 148. But *see* 45 A. 456=74 I.C. 745; I.L.R. (1940) Nag. 157.

**Costs.**—Rule makes no provision for cases

where costs are awarded in favour of pre-emptor. In such cases he can pay the sum after deducting costs. 6 A. at 353. *See also* 1937 A.L.J. 1114=1937 All. 756. It is well established that a pre-emptor can deduct the costs awarded to him from the sum which he is directed to deposit in Court, although the Civil Procedure Code does not expressly permit a pre-emptor to deduct the amount of costs awarded to him from the sum which he is directed to deposit in Court. The rule permitting such deduction of costs awarded to the pre-emptor from the purchase price is a rule of equity. Where there are cross-decrees as to costs, i.e., where both the pre-emptor and the vendee are awarded costs, the pre-emptor should in equity, only deduct from the purchase price deposited by him the actual amount of costs which he could recover, that is, the balance due to him after deducting the costs payable by him to the vendee under the decree. It would be unjust to permit the pre-emptor to deduct from the decree amount to be deposited the whole amount of costs awarded to him and to leave the vendee to recover the costs awarded to him from the pre-emptor subsequently. If the pre-emptor in such a case deducts the whole amount of costs awarded to him from the purchase price and not merely the balance after deducting the costs awarded to the vendee, the deposit is not valid deposit. 1937 A.L.J. 1114=A.I.R. 1937 All. 756.

**CASES.**—Where a pre-emptor joins with himself a stranger in suing to enforce his right he thereby forfeits it. 5 A. 197. For further cases, *see* 15 C. 224; 15 C. 184; 4 A. 420; 16 A. 126; 44 C. 675=32 M.L.J. 459=44 I.A. 80 (P.C.). The transferee of a pre-emption decree cannot execute it



15. Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

## NOTES.

but the pre-emptor can execute it for the benefit of the transferee. 7 A. 109; 7 A. 107. Pre-emption decree—Failure to deposit whole amount by mistake—Effect of. 1923 L. 250; 18 I.C. 600=141 P.L.R. 1913. Decree silent as to standing crops—Plaintiff entitled to them on paying money into Court. 76 I.C. 193=1923 N. 327. R. 14 (1) (b) provides that in pre-emption suits the title to property should be deemed to have accrued from the date of the payment of pre-emption money. The mere passing of a decree in such a case does not confer any title on the plaintiff. 27 A.L.J. 1049=1929 A. 953. A registered document is not necessary for passing of title to the pre-emptor. 27 A.L.J. 423=115 I.C. 113=1929 A. 237.

O. 20, R. 15.—It is desirable that the Court passing a preliminary decree for accounts should decide who is to be the accounting party. But the omission to do so is not fatal and does not render the judgment illegal. It is open to the Court to give instructions at any time to facilitate and regularise the taking of accounts. 157 I.C. 1113=37 P.L.R. 663. The preliminary decree ought to declare the several rights and liabilities which have been adjudicated upon and embody an order which is contemplated by this rule and R. 16. 18 M. at 87. A direction in a final decree leaving distribution of assets undisposed of is in essence a preliminary decree and the decree is final as regards matters finally decided and preliminary as regards matter still undisposed of. 53 M. 378=1930 M. 528. For the purpose of working out a partnership decree each party should produce all documents and accounts in his possession. See 18 C.W.N. 1025=27 M.L.J. 192 (P.C.). On this rule see also 25 I.C. 146=17 O.C. 193; 45 I.C. 727; 41 P.L.R. 1918; 40 A. 446=16 A.L.J. 305. Proceedings between preliminary decree and final decree are continuation of suit for carrying out the directions in the preliminary decree. 53 M. 378=1930 M. 528. The proof of an agreement between the partners of firm, which forms an exception to the general rule of law that no interest is to be allowed on the capital account of each partner after dissolution, is not a matter concerning the mode of taking accounts. Even if such an agreement is pleaded in the plaint, it has to be proved before the Court and not before the Commissioner who takes accounts in accordance with the preliminary

decree of the Court. A Commissioner taking accounts has no power to decide questions relating to the terms of the partnership, its duration or the shares of the partners. He is bound by the terms of the decretal order of reference. 38 Bom.L.R. 1058.

O. 20, Rr. 15 and 17: OBITER.—Under O. 21, R. 15, the Court is by its preliminary decree to direct such accounts to be taken as it thinks fit, while R. 17 of O. 20 enables the Court by any subsequent order to give any special directions with regard to the mode in which the account is to be taken. An order by the Court made after the preliminary decree, awarding certain amounts to a partner as damages or compensation for breach of covenant by another partner and giving directions to the Commissioners as to the taking of accounts cannot be said to be a supplementary preliminary decree, but is only in the nature of an interlocutory order which can be passed under O. 20, R. 17, C. P.Code. 19 Pat. 1=188 I.C. 337=6 B. R. 653=12 R.P. 697=A.I.R. 1940 Pat. 204. A suit by one partner against another for damages for breach of a covenant of the partnership deed, brought before the dissolution, is liable to be defeated on the ground that a suit between partners should be a suit for general accounts in which the defaulting partner could be debited with any loss that might have been caused by his act. On the other hand a claim for damages for breach of covenant by a partner does not disappear when accounts are taken (upon a dissolution or otherwise), though where the claim is advanced in the suit for (dissolution or) general accounts, it may be included in the decree under "just allowances". If the breach is subsequent to the institution of the suit for dissolution, and the claim is advanced while accounts are being taken under the preliminary decree, the aggrieved party can get his damages or compensation, where the preliminary decree is in sufficiently wide terms, by an application in the proceedings leading to the final decree. Where the preliminary decree passed in the suit is not an ordinary one in an ordinary partnership action with accounts in common form, but the Court has proceeded to pass it as if it had to settle all claims between the parties, and the decree is intended to settle all such claims between the parties, it cannot be said that the Court has no jurisdiction to award damages subsequent to the suit on application made to it in that behalf and to order the amount to be shown in the final account. 19 Pat. 1=A.I.R. 1940 Pat. 204.



16. In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit.

Decree in suit for account between principal and agent.

17. The Court may either by the decree directing an account to be taken or by any subsequent order give special directions with regard to the mode in which the account is to be taken or vouched and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised.

Decree in suit for partition of property or separate possession of a share therein.

18. Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,—

#### NOTES.

O. 20, R. 16.—The order portion in a preliminary judgment need not specify all details and need not be exhaustive. 132 I.C. 195=35 C.W.N. 17=1931 C. 358 (2). Under the Code of 1908, the proceedings under a preliminary decree for accounts to obtain a final decree for money are proceedings in the suit and are not proceedings in execution in the technical sense of that word as used in the Code. 18 L. 502=41 C.W.N. 814=64 I.A. 191=A.I.R. 1937 P.C. 163=(1937) 2 M.L.J. 1 (P.C.). Although in O. 20, R. 16, C.P. Code, the expression "shall pass a preliminary decree" is used, there are two clear qualifications to it: (1) the rule says "where it is necessary . . . that an account should be taken" and (2) that the Court is to direct "such accounts to be taken as it thinks fit." Accordingly, where it is not necessary, the Court need not pass a preliminary decree and the words "such account to be taken as it thinks fit" obviously mean that the Court need not order any account to be taken unless it thinks fit. No hard and fast rule can be drawn between cases which are simple where a preliminary decree is unnecessary and cases which are complicated where a preliminary decree is necessary. I.L.R. (1940) Nag. 569=A.I.R. 1940 Nag. 207. Where a decree requires an agent to render accounts, he can only discharge himself by accounting for all the moneys that have come into his hands, and it is always open to the decree-holder to show that this has not been done. 15 W.R. 260. The Court should order an account to be taken of the defendant's dealings with the plaintiff's money. 14 C. 147; 12 B. 675. See 24 W.R. 70. See also 7 C. 654; 62 I.C. 537; 49 I.C. 441; 28 I.C. 452; 36 I.C. 210. On the fact of agency being established, it is the duty of the Court to direct an account to be taken of the defendant's dealings as agent. 27 A. 374. See also 123 I.C. 7. The question as to which of two defendants is the accounting party is essentially a matter for decision at the stage when the preliminary decree in a

suit for rendition of accounts is to be passed. 146 I.C. 297=34 P.L.R. 676=1933 L. 891. In a suit for rendition of accounts brought by a principal against a commission agent, it is permissible to a Court to pass a decree in favour of the defendant, if it turns out that a balance is due to him. 1937 A.L.J. 115=1937 A.W.R. 16=1937 A. 276. A preliminary decree in a suit for rendition of accounts does not conclude the proceedings and those intervening between the passing of the preliminary decree and the final decree are not fresh proceedings but continuation of the same suit. 1931 L. 268. Suit for accounts—Preliminary decree not imperative—Facts if simple—Court can proceed direct to final decree. 53 M. 475=59 M.L.J. 316. Objection to particular item—When to be taken—Object and purpose of preliminary decree. 95 I.C. 171=1926 N. 393. The order portion in a preliminary judgment need not specify all details and need not be exhaustive. 35 C.W.N. 17=1931 C. 358 (2)=132 I.C. 195.

COSTS.—In a suit for accounts, which on second appeal, has been remanded to the District Judge, the actual decree for costs should not ordinarily be made until the stage of final decree is reached. But if the preliminary decree has specified the costs in the decree and such decree is put in execution, High Court cannot interfere to amend the decree. 148 I.C. 572=1934 P. 146.

O. 20, R. 17.—[See also notes under O. 20, R. 15, *supra*.] A comparison of O. 34, R. 7 and O. 20, R. 17 makes it clear that directions by the Court with regard to the mode in which the account is to be taken or vouched will not at least in *redemption suits* amount to preliminary decrees. 14 Pat.L.T. 735=1934 P. 97 (2)=149 I.C. 311.

O. 20, R. 18.—Difference between old and new Code, see 43 M.L.J. 406=46 M. 47. The partition of revenue paying properties is to be effected by the Collector or by his subordinate in accordance with S. 54 read with O. 20, R. 18. It is only if the Collector is unable or declines to effect the parti-



(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54 ;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

#### NOTES.

tion, the Court will appoint a Commissioner to partition the same by metes and bounds. 70 C.L.J. 355=44 C.W.N. 114=1940 Cal. 33. After a preliminary decree in a partition suit has been passed it is not competent to the Court to dismiss the suit. The preliminary decree can only be reversed on appeal, and whatever default may be in the subsequent stages of suit, the preliminary decree itself cannot be vacated. 139 I.C. 761=1932 M. 519. [51 I.A. 321 (P.C.); 51 M. 701 (F.B.); 6 P.L.T. 152, Foll.; 1928 M. 963, Ref.] Under certain circumstances, in partition suits final decree in the first instance would be proper. 17 I.C. 390=246 P.L.R. 1912. See also 1931 M. W.N. 846; as in the case of a consent decree. See 144 I.C. 95=1933 M. 516. O. 20, R. 18 enjoins the Court first to ascertain judicially who all the persons are who are interested in the property to be partitioned and then in its decree to declare who they are and also what their rights are. It goes to the whole root of the matter that at the outset the entire interests in the property should be ascertained and fixed. Not only must the parties themselves to the partition suit take care that they bring before the Court all persons who are or may be interested in what it is proposed to divide but the duty lies upon the Court itself in matters such as these to see that it has before it every one whose presence is necessary to enable it to make the declaration which it is required to make by O. 20, R. 18. The rights of the parties cannot be judicially determined in the absence of the persons interested to contest them. When O. 20, R. 18 lays upon the Court the duty of declaring what the rights of the parties interested in the property are it means that there shall be a judicial declaration and not a mere *ex parte* declaration in the absence of some of the parties. 190 I.C. 384=1940 All. 399. Preliminary decree in partition suit effects severance of status. 28 I.C. 543=2 L.W. 325; 1931 M.W.N. 846; 1931 M.W.N. 586. Preliminary decree does not terminate the suit or action which must be considered as still pending. 1933 Sind 371. Preliminary decree for partition of movables (as) jewels, must determine whether they exist, their value, if they are

partible property, and in whose possession they are, 50 I.C. 876. Where the decree gives no directions as required by R. 18, Cl. (1) and is defective, it is incumbent upon the plaintiffs to have it corrected within the time allowed by law, and if they fail to do so they cannot ask the Court to transfer the proceedings to the Collector in the absence of any such directions contained in the decree. 158 I.C. 373 (2)=1935 Sind 192. Preliminary decree omitting to direct enquiry into mesne profits—Final decree cannot award the same. 42 M. 296; 1931 M.W.N. 846. See also 1941 R.D. 425. Partition suit—Preliminary decree not granting interest—Whether Court can award interest in the final decree. 94 I.C. 686 (2)=1925 B. 406. See also 1931 M.W.N. 846. In an ordinary partition suit the Court may, in working out the preliminary decree, create a charge in favour of one co-parcener over another's share by way of adjustment of shares. 1930 M. 988=60 M.L.J. 79. Interlocutory order embodied in final decree—Appeal against order not maintainable. (*Ibid.*) The usual *practice of the Lahore High Court* is to stay the proceedings for the partition of the property by metes and bounds pending the decision of the appeal preferred from the preliminary decree. 144 I.C. 596=1933 L. 790. See also 1940 Cal. 33. Where in a partition suit, an order is made decreeing partition of lands assessed to Government revenue and directing the parties to be put into possession and referring it to the Collector to carry out the partition, the duties of the Court are finished, and it is for the Collector to partition the property and put the parties into possession. The Court would send the papers to the Collector without being asked. But if as a matter of practice the parties ask the Court to send the papers to the Collector in the form of an ordinary dakhast, that is not an application in execution at all, for there is nothing in a case of this sort for the Court to execute. Asking the Court to send the papers to the Collector is really asking the Judge to do a ministerial act. There is no article of the Limitation Act relating to an application of that sort, and Art. 182 of the Limitation Act does not apply to such an application. 41 Bom.L.R. 921=A.I.R. 1939 Bom. 454. See also 1940 Cal. 33.



19. (1) Where the defendant has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

Decree when set-off is allowed.

(2) Any decree passed in a suit in which a set-off is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off had been claimed.

Appeal from decree relating to set-off.

(3) The provisions of this rule shall apply whether the set-off is admissible under rule 6 of Order VIII or otherwise.

LOC. AM.—[ALLAHABAD]. In R. 19, sub-rule (1) :—

(a) *Substitute* a comma for the full stop at the end ; and

(b) at the end *add* the following :—

“but no decree shall be passed against the plaintiff unless the claim to set-off was within limitation on the date on which the written statement was presented.”

Certified copies of judgment and decree to be furnished.

20. Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense.

LOC. AMS.—[ALLAHABAD]. *Add* the following to O. 20, as R. 21 :—

21. (1) Every decree and order as defined in S. 2, other than a decree or order of a Court of Small Causes or of a Court in the exercise of the jurisdiction of a Court of Small Causes, shall be drawn up in the Court vernacular <sup>1</sup>, or in English, if the Court so orders]. As soon as such decree or order has been drawn up, and before it is signed, the Munsarim shall cause a notice to be posted on the notice-board stating that the decree or order has been drawn up, and that any party or the pleader of any party may, within six working days from the date of such notice, peruse the draft decree or order and may sign it, or may file with the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case, or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error. Such objection shall state clearly what is the error, defect or variance alleged, and shall be signed and dated by the person making it.

(2) If any such objection be filed on or before the date specified in the notice, the Munsarim shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment, or if such Judge has ceased to be the Judge of the Court, before the Judge then presiding.

(3) If no objection has been filed on or before the date specified in the notice, or if an objection has been filed and disallowed, the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

#### LEG. REF.

<sup>1</sup> Inserted by High Court Notification dated 8th October, 1941.

#### NOTES.

O. 20, R. 19.—As to applicability of the rules, see 25 W.R. 275. See also 39 I.C. 508=62 P.R. 1917. The question whether an attorney's lien should or should not be allowed to intercept a set-off between the parties is, in India, a matter for Court's discretion. The lien has no overriding priority. 34 Bom.L.R. 1429=1932 B. 619. In a suit for accounts where the defendant counter-claimed Court may, by way of equitable set-off, dismiss plaintiff's suit and pass a decree in favour of defendant. 132 I.C. 195=35 C.W.N. 17=1931 C. 358. Where under a lease of a supply of water the lessor is bound to carry out the usual repairs of the embankments which resulted in such supply, the lessee, in a suit for arrears of rent against him, is entitled to claim a set-off on account of the expenses connected with the repairs which he had to do. Such a claim is admissible within the provisions of R. 19, and it is not necessary for a set-off that it should be limited to O. 8, R. 6. 163

I.C. 872=1936 A.L.J. 625=A.I.R. 1936 A. 522.

O. 20, R. 19 (3).—Set-off—Legal set-off and equitable set-off—Set-off and counter-claim—Distinction. See 1936 C. 277. [See also Notes under O. 8, R. 6, *supra*.]

O. 21.—As to applicability to sales in insolvency. See 48 A. 209=24 A.L.J. 26=1926 A. 124; 102 I.C. 543=1927 N. 262; 1929 L. 622. To execution of Revenue Court decree under Agra Tenancy Act. 1936 R.D. 197; 1937 R. D. 37; to execution of order for costs by Registrar under S. 75 (4) of Registration Act. (1937) 1 M.L.J. 635. The law as to solicitor's lien in India, which has been governed by the principles of English law, has not been altered or abrogated by the provisions of O. 21. 38 C. W.N. 1031=1935 C. 168.

PAYMENT TO UNRECOGNISED ASSIGNEE OF DECREE.—There is no provision for judgment-debtor paying a third party merely because he happens to know of the assignment of the decree in the latter's favour by decree-holder; if he were to make such payment, he would run the risk of having to pay money over again to the decree-holder. 144



(4) If an objection has been duly filed and has been allowed, the correction or alteration directed by the Judge shall be made. Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of Rr. 7 and 8.

(5) When the Judge signs the decree he shall make an autograph note stating the date on which the decree was signed.

[RANGOON.] To O. 20 the following shall be added as Rr. 21, 22 :—

21. As soon as the decree of a Court of first instance in a suit relating to land in a district in which there is a Land Records Establishment has become final, or if the decree has been appealed against, when the decree in appeal has become final, and the interest of any party to the suit in any land included in the survey has been effected thereby, the Court of first instance shall certify the nature and extent of such change of interest in each plot of land in suit to the Superintendent of Land Records of the district in which the land is situate. A copy of the certificate in every such case should also be sent to the Sub-Registrar within whose sub-district the land or any part thereof is situate.

22. The certificate shall be in the prescribed Form (Civil) 96, and shall be signed by presiding officer of the Court.

## ORDER XXI.

### EXECUTION OF DECREES AND ORDERS.

#### *Payment under Decree.*

Modes of paying money under decree.

1. (1) All money payable under a decree shall be paid as follows, namely :—

- (a) into the Court whose duty it is to execute the decree ; or
- (b) out of Court to the decree-holder ; or
- (c) otherwise as the Court which made the decree directs.

(2) Where any payment is made under clause (a) of sub-rule (1), notice of such payment shall be given to the decree-holder.

#### NOTES.

I.C. 237=1933 M. 523=64 M.L.J. 732. Before execution sale can be set aside the matter has necessarily to be brought within O. 21. O. 21 is a very formal matter, and no property can be declared to be attached until all the formalities prescribed by the Code and the rules are complied with. 1939 M.W.N. 573=A.I.R. 1939 Mad. 811. Court has obviously no jurisdiction to set aside a sale outside O. 21. 155 I.C. 228=1935 P. 242.

O. 21, R. 1: EXECUTION OF DECREES AND ORDERS.—Procedure in execution is not a very unimportant branch of the work. It ought to be conducted with as much gravity care, and decorum as procedure in suits if not with more care and attention. 12 A. 179 (183). See also 1939 Mad. 811. Order 21 has no application to sales under administrative order. 69 I.C. 718=40 P.L.R. 1922; 1924 L. 70. Nor to sales by Receivers though with approval of Court. 90 I.C. 116. "Decree-holder" in the singular includes also the plural. 25 M. at 440 (F.B.). Judgment-debtor can make payment out of Court to the creditor of decree-holder who has stepped into shoes of the decree-holder

C. C. M.—118

and is carrying on execution of the decree. 1930 A. 659. As to procedure to be adopted in execution, where a party to a suit was directed to pay costs of the day, see 12 M. 120. Payment out of Court only to one of several joint decree-holders cannot bind the others unless he was also constituted by them an agent for this purpose. See 26 A. 318. Or in the absence of evidence that he received it on behalf of all. 1936 A.M.L.J. 32. As to whether deposit under O. 21, R. 80 to prevent confirmation of sale is payment under R. 1, see 1925 N. 17. As to whether a decree is satisfied where money is paid into Court by judgment-debtor with a request to pay it to plaintiff on his giving security, see 29 M. at 210. See also 11 B. 724; 20 A.L.J. 353=1922 A. 190. As to the effect of payment by third parties, see 34 I.C. 350=(1916) 1 M.W.N. 195. Payment into Court must be notified to the decree-holder and served on him like summons. 81 I.C. 1001=1925 N. 52; 20 A. L.J. 353=66 I.C. 744. Interest ceases when the decree-holder receives notice. 42 M. 576=50 I.C. 410; 35 C.W.N. 544; 183 I.C. 256=1939 Nag. 191. Decree-holder will be entitled to interest and costs of execution *bona fide* incurred till he had notice



LOC. AMS.—[CALCUTTA.] (1) For cl. (a) of sub-rule (1) *substitute* the following clause :—

“(a) By deposit in or by postal money order sent to the Court whose duty it is to execute the decree, or”.

(2) In sub-rule (2) :—

(i) Read the number 2 as 2 (a).

(ii) After the words “the decree-holder,” *add* the words “or the person in whose favour the order is made.”

(iii) *Add* the following as cl. (b) :—

“(b) the cost of giving such notice shall be borne by the person making payment who shall have the option of having the notice served either by the process-server of the Court or by a registered post. No such notice shall issue until the said cost shall have been paid.”

[LAHORE.] O. 21, R. 1. *Add* to sub-rule (1) :—

*Explanation.*—The judgment-debtor may, if he so desires, pay the decretal amount, or any part thereof, into the Court under clause (a) by postal money order on a form specially approved by the High Court for the purpose.”

[NAGPUR.] Rule 1.—In R. 1—

(a) In sub-rule (1) after the words “a decree” *insert* the words “or an order” ;

(b) for cl. (a) of sub-rule (1), *substitute* the following clause :—

“(a) by deposit in, or by postal money order to, the Court whose duty it is to execute the decree or order ; or” ;

(c) in cl. (c) of sub-rule (1), after the word “decree” *insert* the words “or order” ; and

(d) to sub-rule (2), *add* the following proviso :—

“Provided that when the payment is made by money order the notice may be given by registered post by the judgment-debtor direct to the decree-holder.”

[PATNA.] For R. 1, *substitute* the following :—

“(i) All money payable under a decree or order shall be paid as follows, namely :—

(a) by deposit, or by special postal money order to the Court whose duty it is to execute the decree or order ; or

(b) out of Court to the decree-holder ; or

(c) otherwise as the Court which makes the decree or order shall direct.

(ii) Where a judgment-debtor makes any payment under cl. (a) of sub-rule (1) he may give notice thereof to the decree holder—

(a) either through the Court, on payment of the fees laid down in the rules framed by the High Court under cl. (i) of S. 20 of the Court-Fees Act (1870) ; or

#### NOTES.

of deposit. 35 C.W.N. 544. Judgment-debtor must pay process-fee when Court orders notice. If not, Court must inform decree-holder of payment into Court when executing decree. 67 I.C. 242. Where decree for payment of annuities was passed creating a charge on certain properties and a Receiver was appointed to realize the amounts, and the Receiver absconded after receiving certain amounts from judgment-debtor for payment to decree-holder under the decree, *held*, that the charge affirmed by the decree was in no way affected or impaired by the embezzlement of the Receiver. The decree provided in express terms that all the annuitants were entitled to recover their annuities from the properties charged. The decree-holder having received no part of the annuity due to her, is entitled to recover it by sale of the properties as the payments to Receiver were made by the judgment-debtor at his own risk, in the absence

of an order of Court authorising the judgment-debtor to pay the sums to the Receiver. 59 I.A. 311=36 C.W.N. 882=63 M.L.J. 658 (P.C.). [1929 O. 231=117 I.C. 748 (F.B.), Reversed.] Payment to attaching creditor is not payment to a decree-holder. 80 I.C. 947=1925 A. 123 (2). If the last date fixed for payment was a holiday the money can be deposited on the re-opening date. 87 I.C. 620=1925 A. 687; 1925 M. 743=48 M.L.J. 596. But *see* 51 A. 527=1929 A. 207, even if the amount be due under a compromise decree which has fixed a certain date. 158 I.C. 352=1935 L. 369. But *see* 1938 All. 199. In the absence of a special direction the judgment-debtor is entitled to choose between Cls. (a) and (b). It makes no difference that the decree is a compromise decree. 158 I.C. 352=1935 L. 369. A decree for mesne profits is a decree for money. 4 P.L.J. 336=48 I.C. 183. Rule does not apply to mortgage decree not being money-decree. 45 M.L.J. 687=18 L.



(b) notwithstanding anything contained in O. 48, R. 2 by registered post direct.

Where interest is payable under the decree or order, such notice shall, if duly proved, operate as a bar to the accrual of such interest upon the amount so paid, after the date of receipt of such notice by the decree-holder."

2. (1) Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree.

LOC. AMS.—[MADRAS.] Substitute the following for r. 2 (2) :—

"(2) Any party to the suit or his legal representatives or any person who has become surety for the decree-debt also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly."

[PATNA.] Substitute the following for sub-rule (2) of R. 2 :—

"(2) The judgment-debtor may also inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause on a date to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and where certification has been made by an endorsement of such payment or adjustment by the decree-holder or by any person authorised by him in that behalf upon the process issued by the Court, the Court shall issue such notice of its own motion. If after service of the notice the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly."

#### NOTES.

W. 686. Deposit without notice of the assignment of the decree or of petition put in by assignee of execution—The deposit serves as discharge. 76 I.C. 55=2 P. 754.

O. 21, R. 2: SCOPE OF RULE.—Rule 2 contemplates a stage in execution proceedings when the question lies only between judgment-debtor and decree-holder. After sale has been duly carried out in execution, the interests of the third party, namely, the auction-purchaser cannot be ignored. So thereafter it is not competent for decree-holder and judgment-debtor to get rid of it by merely asserting that the decree has been satisfied out of Court. The only method by which the sale can be set aside is indicated by R. 89. 58 I.A. 50=35 C.W.N. 381=1931 P.C. 33=60 M.L.J. 423 (P.C.). See also 1932 L. 238=136 I.C. 735. Distinction between adjustment and agreement to adjust, pointed out. 38 M. 897; 1927 M. 911=53 M.L.J. 533. See also 102 I.C. 753=1927 L. 544; 132 I.C. 670=1931 L. 608; I.L.R. (1939) Kar. 725; compromise not adjustment, 1939 A.M.L.J. 21. As to effect of agreement prior to decree, see 1935 C. 177; 54 L.W. 157. The rule applies to awards under Indian Arbitration Act. 97

I.C. 321. Court cannot recognize payment or adjustment which has not been certified, for any purpose whatsoever. An uncertified payment or adjustment cannot now operate to prolong the period of limitation for applying for execution. See 19 M. 162; 21 C. 542 (549); 21 B. 122; 17 A. 42; 26 A. 36. See also 1941 Bom. 20=42 Bom.L.R. 867; 35 I.C. 234=38 A. 289; 13 I.C. 424; 16 C. W.N. 396; 51 I.C. 567=13 S.L.R. 71; 29 M. 312; 13 I.C. 944=15 C.L.J. 88. Oral adjustment is covered by this rule. 1926 C. 643. An oral agreement between parties to a decree varying the terms of the decree can be proved and not barred by S. 92, Evidence Act. But an oral agreement that an instalment of the decree is to be paid into Court, which is later on actually so paid, amounts to an adjustment of decree within the meaning of R. 2 and is capable of proof provided the adjustment has been certified within 90 days of its alleged completion. Else the executing Court could not recognise the alleged adjustment. (1931 S. 42, Foll.) 14 L. 668=34 P.L.R. 887=1933 L. 806. See also 25 S.L.R. 29=1931 S. 42. The rule is general and does not limit the payment to decree-holder only. 45 A. 304=21 A.L.J. 97; 1914 M.W.N. 346=23 I.C. 530. Where



## NOTES.

a judgment-debtor applies under O. 21, R. 2 (2) for recording of certain payments and the decree-holder in reply files a statement that certain sums of money were received but that they were paid on account of interest, not allowed by the decree, but agreed to be paid in consequence of a separate agreement entered into after the passing of the decree, it cannot be an admission that the payments were in satisfaction of the money due under the decree and cannot therefore amount to a certification. A.I.R. 1939 All. 581. A decree-holder who admits to the executing Court that he has received a payment cannot be allowed by that Court to execute his decree for the same amount over again. If the payment is brought by the decree-holder to the notice of the executing Court, that is enough to constitute certification and would satisfy the requirements of O. 21, r. 2. It does not matter under what circumstances the payment is brought to the notice of the Court by the decree-holder. If it is brought to the notice of the Court that is sufficient to prevent him from executing over again for the sum that he admits having received and he cannot contend that is an uncertified payment. 45 L. W. 291=A.I.R. 1937 Mad. 511=(1937) 1 M.L.J. 296. There is no limitation for a decree-holder to certify payments received by him under the decree, and if the decree-holder has really certified at one stage, the judgment-debtor is entitled to take advantage of it and request the Court to record satisfaction to that extent. 1940 M.W.N. 547=A.I.R. 1940 Mad. 893. See also 1940 Pat. 594; 21 Pat.L.T. 650. When one party performs his part of a consent decree he has to apply for execution for performance by the other party. 53 I.C. 882=30 C.L.J. 118. When execution petition is dismissed by consent of the decree-holder, he cannot raise the question of mistake and his remedy is by way of review. The order of Court, if not appealed against, becomes final. 35 I.C. 369=10 Bur.L.T. 30. The rule provides for the adjustment of any decree and not merely money decrees. 46 B. 226=23 Bom.L.R. 981. Applies to decree for possession. 165 I.C. 358 (1)=1936 L. 842. Applies also to complex decrees. 40 I.C. 820=1917 M.W.N. 327. Also to mortgage decrees. 1925 M. 467=48 M.L.J. 121; 5 Pat.L.J. 672=57 I.C. 473. See also 40 I.C. 845=21 C.W.N. 920; 1930 L. 814; 43 Bom.L.R. 880 (Nature of application to record part payment). Also to partition decrees which provide for payment of money as for other relief. 43 M. 476=56 I.C. 289; 1928 C. 715=I.C. 833. Where preliminary mortgage decree directs payment into Court, Court is bound to pass a final decree for sale. It cannot recognise a payment out of Court. 1932 L. 231=136 I.C. 732; 155 I.C. 231=1935 O.W.N. 541=1935 O. 313.

A preliminary decree passed in a mortgage suit for sale under O. 34, r. 4, not being executable the provisions of O. 21, r. 2, do not apply. I.L.R. (1939) Lah. 313=41 P. L.R. 26=A.I.R. 1939 Lah. 79. O. 21, r. 2 applies only where money payable under a decree is paid out of Court. But where money is paid at a time when there was no executable decree in existence, O. 21, r. 2 cannot apply. 1938 N.L.J. 148=A.I.R. 1938 Nag. 265. A final decree in a mortgage suit is capable of adjustment. 34 I.C. 137=37 M.L.J. 356; 68 I.C. 443=1923 N. 20. A compromise which has been entered into after a decree does not come within the meaning of this rule. 5 Bom.H.C. (A.C. J.) 78. See also 1939 A.M.L.J. 21. Clause (3) of r. 2 can only relate to an adjustment of the decree under execution and not to an agreement in respect of a claim which remains to be investigated by the Court—as is the case of a claim for a personal decree under O. 34, r. 6. 42 L.W. 968=69 M. L.J. 765 (F.B.). But other considerations may arise in cases where the agreement relates not only to the personal liability but also to the liabilities of the properties directed to be sold or where a composite decree has once for all been passed awarding a personal decree for any deficiency that may arise on sale of the hypotheca. 69 M.L.J. 765 (F. B.). In the case of a compromise which involves a future payment, the question whether the compromise amounts to an adjustment is not a question of the terms to be performed in the future or the present, but the question is whether parties intended to make the decree no longer executable in whole or in part. If they did so intend, there is an adjustment, if not there is not an adjustment. (But in this case, his Lordship was constrained to hold that a compromise involving a future payment is not an adjustment). (1931 L. 608, Ref.) 1933 L. 732 (1). See also 144 I.C. 721=1933 Pesh. 53; 41 P.L.R. 220. Where an alleged compromise was admittedly subsequent to the passing of a final decree in a suit, and it was filed under O. 23, r. 3, to be recorded and the application was rejected, it was held that there was no bar in law to the recording of that compromise under O. 21, r. 2. I.L.R. (1940) All. 190=1940 A.L.J. 88=A.I.R. 1940 All. 184. Where a decree-holder puts his money decree payable by instalments into execution on default in payment of the instalment, and the Court, after recording the statements of the parties, found that the matter had been adjusted between them by a compromise by which instalments were to be again allowed, it would fully be justified in allowing the adjustment. 1935 A. 155 (2)=4 A.W.R. 846. See also 1929 L. 886=118 I.C. 908. Where part payment of the amount due under a decree is made by judgment-debtor and it is agreed between the parties that not only the balance of the decree but also another decree should be paid by



## NOTES.

instalments and that the decree-holder would accept the instalments without interest, the arrangement amounts to an agreement which is certifiable under R. 2, although only part of the decree is paid. Such an agreement affects the right of decree-holder to execute the decree and it amounts to an adjustment and cannot be recognised unless certified. 162 I.C. 482=1936 P. 253. An executing Court has no power to record satisfaction of a decree over which it has no jurisdiction and a report to the executing Court of satisfaction of some decree pending before another Court is of no effect. 51 L.W. 148=A.I. R. 1940 Mad. 534=(1940) 1 M.L.J. 292. Court can inquire whether a decree for possession of lands has been satisfied. 25 M. L.J. 586=21 I.C. 639. Rule recognises discharge by operation of law. 23 I.C. 848. But see 41 C.W.N. 406 noted *infra*. This rule does not debar a Criminal Court from recognizing an uncertified payment when the decree-holder is charged with fraudulently executing satisfied decree. 9 M. 101; 4 M. 325. It has reference only to proceedings in execution as between parties to the decree. 10 M.L.J. 213. Nor does it limit the operation of S. 47. A separate suit does not lie to declare that a decree has been satisfied. 8 C.W.N. 395. This rule covers a much larger ground than what is covered by S. 47. It deals with all adjustments arrived at between decree-holder and judgment-debtor. 25 C. 718 (724). An agreement intended to govern the liability of the debtor under the decree and to have effect upon the time and manner of its enforcement is a matter to be dealt with under S. 47, and can be properly recorded by the Court. [43 C.W.N. 501 (P.C.), Rel. on.] 70 C.L.J. 5=43 C.W.N. 907=A.I.R. 1939 Cal. 569. Executing Court can investigate the adjustment of a decree out of Court. 50 I.C. 443=135 P.R. 1919. (36 M. 357; 24 C.L.J. 462, Rel.; 34 B. 575; 40 B. 333, Diss.) See also 37 Bom.L.R. 230=157 I.C. 646=1935 B. 303. A claim for restitution before it is allowed by the Court of first instance, cannot be regarded as a decree or order of Court and adjustment of a claim to restitution, which is uncertified, is not hit by R. 2. 44 L.W. 287=1936 M. 840=71 M.L.J. 344. Agreement to give time to judgment-debtor is valid. 24 I.C. 391. As regards agreement prior to decree to execute the decree for a lesser sum, see 4 R. 118=96 I.C. 773=1926 R. 140; 49 M. 513=50 M.L.J. 364. See also 1941 Rang. 316 (Effect of compromise relating to the whole subject-matter of suit on mortgage before end of proceedings). Where an agreement is anomalous in character, i.e., while in point of time it is post-decree, in point of character and intention it is pre-decree, having been executed in ignorance of the fact that a decree had already been passed, it should be treated as a pre-decree agreement,

not coming within the terms of r. 2, but falling under S. 47; and a suit brought on the basis of such an agreement for recovery of money realised in execution of the decree is barred by S. 47. 130 I.C. 187=1931 M. 26 (2). By the terms of a decree passed in accordance with an award in a suit for partition, defendant was directed to pay a sum of money to plaintiff. The decree was attached by creditors of plaintiff but defendant pleaded in bar of execution that he had paid certain sums of money to plaintiff prior to the decree and that credit should be given for those sums. *Held*, (1) that R. 2 was not applicable to the case of payments made prior to decree; (2) the payments could not be pleaded in bar of execution. 54 M. 184=1931 M. 399=60 M. L.J. 721. Where only some of the conditions provided in a compromise are performed, decree-holder is entitled to proceed with execution of the rest. 16 I.C. 972=16 C. L.J. 101. There is illegality in adopting the procedure provided for arbitration to execution proceedings, if those proceedings are regarded merely as a means to the adjustment of the decree. It is open to the parties to adjust their differences under O. 21, R. 2, in execution proceedings and it is perfectly competent to the executing Court to give permission to the parties to refer their disputes to arbitration. The award would be valid and the result of the award would be only an adjustment of the original decree, and not the passing of a new decree which the executing Court cannot do. The order of the Courts directing the award to be filed and a decree to be drawn up accordingly is a sufficient record of the adjustment. 1941 Bom. 20=42 Bom.L.R. 867. Joint decree-holders—Right of one to receive payment and give valid discharge—Adjustment between judgment-debtor and one of several joint decree-holders does not bind the rest—It cannot be recorded by the Court. See 1940 Sind 230 cited under O. 21, R. 15.

O. 21, R. 2 and O. 23, R. 3: RELATIVE SCOPE.—The terms of R. 2 must be understood in the light of the scheme of the Code and with due regard to the scope of O. 23, R. 3. One noteworthy difference between the terms of the two rules is that, whereas under the latter rule, Court may not only record an agreement, compromise or satisfaction, but also pass a decree in accordance therewith, under R. 2, the Court can only record the adjustment, but cannot pass a fresh executable decree on the agreement of the parties, and further proceedings, if any, when part satisfaction only has been recorded can only take place on foot of the original decree. 42 L.W. 968=69 M.L.J. 765 (F.B.). Where an unregistered agreement was alleged to have been executed by the decree-holder after the passing of the preliminary decree and before the final decree whereby he agreed not to execute the decree against some of the items of the



## NOTES.

hypotheca, it was held that there was nothing in the above agreement which showed that it was intended to attack the decree sought to be executed, for it could not be said that it was intended to attack the final decree which had not yet been passed. Any agreement which merely relates to the execution of the decree and does not attack the decree itself could be pleaded in bar of execution. I.L.R. (1938) Mad. 451=48 L. W. 448=A.I.R. 1938 Mad. 456=(1938) 2 M.L.J. 404.

SCOPE AND OBJECT OF CL. (3).—93 I. C. 53=1926 O. 482; 105 I.C. 163=26 L. W. 349=1927 M. 876. The provisions of R. 2 (3) are highly technical and must, therefore, be construed. 1935 N. 230. They are also mandatory. 162 I.C. 482=1936 P. 253. The embargo under R. 2 (3) is limited to "Court executing the decree" only. 79 I.C. 278=1923 R. 44 (1); 19 N.L.J. 175. It cannot be said that the Court which passed the decree and which is hearing an application under O. 21, R. 16, is not a Court executing the decree within the meaning of O. 21, R. 2 (3). An application by the assignee of a decree to the Court which passed the decree under R. 16 of O. 21, is an application for execution of the decree and not merely an application for leave to execute the decree. The Court which passed the decree and which hears the application under R. 16 is hearing it as an executing Court and is accordingly bound by the prohibition in O. 21, R. 2 (3). It cannot therefore recognise or give effect to an uncertified payment or adjustment. 43 Bom. L.R. 751 (F.B.). Unsuccessful applicant (judgment-debtor) under R. 90 appealing to High Court—High Court ordering sale to be set aside provided judgment-debtor pays certain amount to decree-holder on or before certain date—Judgment-debtor's application to have his payment recorded as certified will not lie to execution Court but to High Court, R. 2 (2) having no application where execution has come to an end. 1929 P. 400. Judgment-debtor cannot plead uncertified adjustment in opposition to application under O. 21, R. 16. 55 M. 720=62 M.L.J. 562=1932 M. 372 (F.B.). Uncertified payments by judgment-debtor to insolvent after adjudication is not valid against Receiver. 137 I.C. 394=1932 M. 250. R. 2 (3) does not apply to proceedings under S. 52 (2), Oudh Rent Act. 15 R.D. 776. R. 2 requires that adjustment to be certified, quite regardless of whether there is or is not an appeal pending against that decree and if any adjustment is come to after the decree and before the decision of the appeal and is not certified or recorded as required under R. 2, Court is debarred by sub-R. 3 from recognizing such an adjustment. 161 I.C. 751=43 L. W. 601=1936 M. 494. An adjustment of a decree must be presumed to have been duly certified. The burden of proving that an ad-

justment has not been duly certified is on the party who alleges it. 19 N.L.J. 175.

MEANING OF TERMS.—Receipts by mortgagee in possession, after decree, will not be "money payable under the decree" and need not be certified. 28 M. 473 (478) (F.B.). See also 30 M. 255 at 265; 38 I. C. 675=39 M. 1026. As regards decree-holder, see 25 M. 431 (440) (F.B.). See also 28 A. 252; 26 A. 318; 29 M. 183; 26 A. 334 and 9 C. 831. "To show cause"—For the meaning of these words, see 11 C. 166. The words "of any kind" have been added, after the word "decree" in the first paragraph to give effect to the ruling in 6 C. 786. See also 49 M. 716=50 M.L.J. 547; 8 C.W.N. 1028 and 22 M. 182 are not now good law. The term "decree of any kind," means a decree of any kind capable of execution. 14 P. 488=155 I.C. 976=16 Pat.L.T. 311=1935 P. 385. The words "to the satisfaction of the decree-holder" shows that the section is not applicable to a case in which the adjustment was not accepted by the decree-holder. 1935 A.L.J. 543=1935 A. 513.

"COURT".—An application for recording adjustment may be made to the Collector to whom a decree has been transferred for execution. 16 A. 228. Also to a Court to which a decree is sent for execution. 5 C. 448. When a decree has been transferred for execution and execution has been taken out in the transferee Court, the judgment-debtor can make an application to that Court for the certification of a satisfaction of the decree and such transferee Court has jurisdiction to record the satisfaction, if it finds after due enquiry that the satisfaction has been made. Certification of adjustment is governed by O. 21, R. 2. In construing the expression 'the Court' occurring in sub-R. (2) of R. 2 of O. 21, reference must be made to sub-R. (1) of the same rule, and sub-R. (1) says that the Court is the Court whose duty it is to execute the decree. 1940 Rang.L.R. 356=A.I.R. 1940 Rang. 236. Certificate of payment or adjustment should be filed in the Court which passed the decree or in Court to which it was sent for execution. 25 M.L.J. 586; 5 C. 448. But see 34 Bom.L.R. 203=137 I.C. 517=1932 B. 202. Filing in wrong Court and obtaining an order "recorded" from that Court cannot be treated as valid. 25 M.L.J. 586=21 I.C. 639. Court proceeding against surety is not strictly Court executing decree. 20 S.L.R. 362=96 I.C. 234=1926 S. 105.

WHAT ARE ADJUSTMENTS.—The rule contemplates an adjustment which is binding between decree-holder and judgment-debtor as an agreement by reason of their consent to it. It does not contemplate an adjustment which, although not consented to, is made binding by operation of law. 41 C. W.N. 406=1937 C. 211. So, a scheme which is sanctioned by the Court under S.



## NOTES.

153 of the Companies Act and which supercedes a decree, is not an adjustment of the decree as contemplated by R. 2, and is not, therefore, required to be certified or recorded by that rule. (*Ibid.*) The adjustment referred to under R. 2, is such an adjustment as completely or partly extinguishes the decree under execution and cannot mean an adjustment to give effect to the terms of which would be to create a new decree at variance with the decree under execution and which will again have to be executed. 32 C.W.N. 434; 1931 M. 26 (2); 132 I.C. 670=1931 L. 608; 156 I.C. 807=1935 L. 347. See also 62 C. 28=158 I.C. 1074=1935 C. 596; 1937 Sind 229. Rowland, J.—An adjustment to which the decree-holder is not a party cannot be recognised by the executing Court. O. 21, R. 2 does not recognise any payment or adjustment to the satisfaction of some third party. 21 Pat.L.T. 138=18 Pat. 318=A.I.R. 1939 Pat. 411. The term "adjustment" must be taken *ejusdem generis* with payment and it means any method or mode whereby the decree is satisfied to the satisfaction of decree-holder. 144 I.C. 721=1933 Pesh. 53. It includes any step which alters the liability under the decree, whether by reducing the amount recoverable, or by reducing the number of persons against whom the decree would otherwise be executed. 146 I.C. 3=1933 P. 576. See also 1936 C. 518. In all cases it is a question of fact to determine whether the alleged adjustment was intended to extinguish the decree, and if it did, the adjustment will be completed, no matter whether the compromise that is made to wipe out the decree is to be performed at some future date. 158 I.C. 701 (1)=37 P. L.R. 288=1935 L. 589; see also 15 P. 390=165 I.C. 940=1936 P. 619. An agreement made before the date of the decree cannot be looked upon or treated as an adjustment of the decree under R. 2, and an execution Court can therefore look at such an agreement and receive evidence of it in order to see whether it prevents execution according to the terms of the decree. 58 B. 610=36 Bom.L.R. 798=1934 B. 370. See also 1935 C. 177; 1938 Nag. 265; I.L.R. 1938 All. 294=1938 All. 141; 1930 Mad. 673. An agreement for payment of enhanced interest on the decree amount is not an 'adjustment'. 151 I.C. 541=11 O.W.N. 1103=1934 O. 465. An agreement to accept a portion of the decree amount to be paid in instalments in full satisfaction of decree is an adjustment and if certified as required by law it can be recorded and acted upon if proved. It is not necessary that such an agreement should be reduced to writing. It is open to the Court to accept oral evidence of the same. 37 Bom. L.R. 230=1935 B. 303. See also 1936 C. 518; 40 P.L.R. 264=1938 Lah. 602. An agreement by which decree-holder agrees not to take out execution against the person

of judgment-debtor and not to attach moneys due to judgment-debtor from a third person is not an adjustment of the decree which should be certified but still the agreement is binding on the decree-holder, and the execution Court should refuse execution contrary to the provisions of the agreement. 154 I.C. 292=1935 A.L.J. 287=1935 A. 364; I.L.R. 1938 Lah. 470. Adjustment what is—Pre-decree agreement operating as adjustment—Must also be certified. 1930 M. 673=1930 M.W.N. 240=125 I.C. 543. See also 32 L.W. 919. It is not necessary that there should be an actual payment in order to constitute a valid adjustment withing the meaning of R. 2. 60 B. 729=38 Bom.L.R. 505=1936 B. 277. Service rendered by the judgment-debtor to decree-holder amounts to an adjustment. 12 I.C. 169=11 M.L.T. 380. Decree for specified amount against two persons and for costs against them and another—Receipt by decree-holder of amounts by way of rateable distribution amounting to half of the decree-amount—Appropriation—Right of decree-holder to adjust towards decree-amount proper excluding costs—Liability in respect of costs—Reduced *pro tanto*. 50 L. W. 908. An agreement whereby the rights under it should supersede the decree is an adjustment of it. 35 M. 75=21 M.L.J. 709. O. 21, R. 2 does contemplate an inquiry into an alleged payment or adjustment by the Court to which an application is made under that provision and that Court is bound to hold such inquiry. 15 Luck. 712=1940 O.W.N. 629=A.I.R. 1940 Oudh 381. A decree can be adjusted or satisfied by the making of an agreement between decree-holder and judgment-debtor. An obvious instance is the taking of a negotiable instrument which is nothing but a particular form of promise. 1937 C. 222. Decree-holder may accept and parties may have recorded in lieu of the performance of the terms of the decree an agreement to perform something else. 1937 C. 222. But the new agreement is not *prima facie* capable of execution because, if it is made capable of execution, it would automatically vary the decree. The same principle applies even where the agreement itself contains a condition or term that the subsequent agreement shall be capable of execution. 1937 C. 222. The agreement is capable of being recorded as an adjustment but incapable of being the subject-matter of execution. It is an agreement merely. 1937 C. 222. Rule 2 (1) covers an agreement extinguishing the right of execution. 12 I.C. 364=7 N.L.R. 136. An award on arbitration is binding upon the parties as an adjustment. 1927 S. 66; 42 I.C. 46. Agreement not to execute one decree if another is satisfied is a sufficient adjustment and satisfaction can be recorded for the former. 1925 R. 349. But see 32 C.W.N. 434. A compromise at the time of execution must be treated as if incorporated in the decree itself. 57 I.C. 591. An



## NOTES.

incomplete, inchoate contract cannot bar execution. Judgment-debtor cannot claim completion of such contract. 43 I.C. 537. "Adjustment" does not include an executory contract. 123 I.C. 604=1930 M. 410; 113 I.C. 238 (1). But see 63 M.L.J. 598. An oral agreement not performed by either party cannot bar execution. 103 I.C. 86=1927 L. 537. Part-payments towards money decrees can be certified by decree-holder in execution application. 26 C.W.N. 534=35 C.L.J. 566. It is sufficient if the payment or adjustment is either certified or recorded. 30 I.C. 45=21 C.L.J. 362. Proceedings to set aside a sale under O. 21, Rs. 90, are not proceedings in execution inasmuch as execution proceedings ordinarily end with sale and therefore a compromise made in such a proceeding should be recorded under O. 23, R. 3 and not O. 21, R. 2. 118 I.C. 908 (1)=1929 L. 886 (2). A consent order passed in an execution appeal will not amount to an adjustment and binding on persons who were not parties in the appeal. 41 L.W. 594=1935 M. 429=68 M.L.J. 593.

**O. 21, R. 2 (3): ADJUSTMENT AND PAYMENT—DIFFERENCE BETWEEN—LIMITATION—STARTING POINT.**—Per *Mya Bu, J.*—That there is a substantial distinction between an adjustment and a payment cannot be doubted; for such distinction is recognized by Art. 174, Limitation Act. A payment is not a contract of an executory nature whereas an adjustment is a contract of such nature. Art. 174 fixes the time of commencement of the period of limitation at the date of the making of the adjustment. A.I.R. 1938 Rang. 328.

**ADJUSTMENT—EXECUTORY AGREEMENT TO ADJUST, NOT SUFFICIENT.**—Before an executory agreement to adjust becomes an executed agreement and thereby an adjustment to the satisfaction of the decree-holder, the agreement itself cannot amount to an adjustment which may be taken into account in the execution of the decree. (44 A. 258, Foll.). 149 I.C. 95 (1)=1934 R. 190 (1). See also 123 I.C. 604=1930 M. 410; 113 I.C. 236; 171 I.C. 477=1937 Sind 229; 1938 Rang. 202 (F.B.); 1938 Rang. 353; 1935 L. 973; 1939 A.M.L.J. 21; I.L.R. 1939 Kar. 725. If there is a completed contract which immediately extinguishes and takes the place of the decree, that contract is an adjustment within the meaning of O. 21, R. 2, although it is to be performed at some future date. If, on the other hand, there is only an agreement to adjust the decree on the fulfilment of a future condition and the decree is still left in existence pending the fulfilment of the condition, then there is no adjustment. It is, of course, a question to be decided in each case by the executing Court whether there has been a completed contract or not. (37 P.L.R. 288. Appr.). 43 P.L.R. 192=A.I.R. 1941 Lah. 149 (F.B.). An oral agreement to sell some

lands to decree-holder in satisfaction of the decree, not being capable of being enforced or executed, would not constitute adjustment under O. 21, R. 2. 30 S.L.R. 249=1936 S. 191. See also 164 I.C. 106=1936 R. 289; 1935 A. M.L.J. 97.

**WHO CAN CERTIFY.**—The holder of a decree that is attached may certify satisfaction of decree after the attachment. 2 M.L.J. 288; 1 Luck. 428=1927 O. 7. See also 16 B. 522. The law casts on the decree-holder the duty of certifying payment. 30 M. 545. See also 1923 R. 88. *Vakil's duty* to report to Court payment of decree amount to him as early as possible. 105 I.C. 86=1927 M. 947=53 M.L.J. 901. Court, as a general rule, will not, for the purpose of preserving the *solicitor's lien*, interfere in an adjustment or compromise which is *bona fide*. But if the compromise is not *bona fide* but collusive and is entered into between the parties specifically for depriving the solicitor of his lien, Court will interfere for protection of the solicitor who in such an event can claim payment of the costs by either of the parties. "Collusion" in relation to such a case will be held to exist if parties enter into it knowing and intending that the outcome will be that the solicitor is deprived of his lien. 38 C.W.N. 1031. See also 43 C.W.N. 1133. When the parties have agreed that a decree should be executed in a certain way and that agreement has been recorded in Court, it is not permissible for a third party to object to execution in the way the parties to the suit have chosen. 41 C.W.N. 1133. A *manager of a joint family* can certify satisfaction of a decree so as to bind the other members. 35 A. 380=19 I.C. 645. So also one partner on behalf of a firm. 1926 S. 167. Any one of *joint decree-holders* cannot report satisfaction of the entire decree but only so far as his own share goes. 89 I.C. 195=1925 P. 822; 1928 C. 759; 119 I.C. 426=1929 L. 462; 1930 L. 814; 126 I.C. 124=1930 C. 78. See also 1935 N. 25; 72 C. L.J. 443. Unless he is authorised by his co-decree-holders to do so. 62 C.L.J. 560. **Decree-holder—If includes attaching decree-holder—Holder of attaching decree—If competent to certify satisfaction of attached decree.** See 51 L.W. 148=(1940) 1 M. L.J. 292. Adjustment should not be recognized by Court if not perfected by the *guardian obtaining leave of Court* in that respect. If guardian fails to apply for leave of Court and resiles from adjustment, the other party to adjustment cannot apply for leave in order to perfect the adjustment. 146 I.C. 707=1933 R. 186. Decree-holder and his judgment-debtor can adjust their rights and liabilities and some of the judgment-debtors may be released. See 40 I.C. 1. [25 M.L.J. 586 and 1915 M.W.N. 225, Dist.] Where there is an adjustment in respect of a money decree and the party agreeing to pay a certain amount under the adjustment fails to do so the other party can



## NOTES.

enforce the terms of the adjustment in execution. 142 I.C. 220 (1)=35 Bom.L.R. 91=1933 B. 100. If an adjustment is not certified, it is entirely the fault of judgment-debtor. 1923 R. 103. (See also same case as to fraud of decree-holder.) Judgment-debtor is not bound to wait and see whether decree-holder applies or not. He can apply as soon as payment or adjustment is made. 12 M.L.J. 94. Judgment-debtor can prove that he is discharged, even where an adjustment of a decree is not certified. 18 L.W. 453=1924 M. 189. Assignee or transferee of the decree cannot continue any proceedings nor can he institute any fresh proceeding for the execution of the decree. He must make an application under O. 21, R. 16 to the Court which passed the decree and the Court must order that execution may proceed at his instance. It is then open to judgment-debtor to plead that the claim has already been satisfied. 47 B. 643=1923 B. 404. An uncertified adjustment between the assignee and the judgment-debtor before the former applies under O. 21, R. 16, can be validly pleaded as bar to execution. 31 C.W.N. 921=104 I.C. 4=1927 C. 694; 1935 N. 230. Where a decree-holder attaches another decree without notice to the judgment-debtor and the latter pays money to his decree-holder satisfaction should be entered in his decree notwithstanding the attachment. 61 I.C. 815=13 L.W. 34. A surety can apply. 49 M. 325=50 M.L.J. 584; 1926 S. 105. Adjustment by surety with decree-holder may be proved. 108 I.C. 376=1928 L. 61. If the judgment-debtor is unable by lapse of time or any other reason to obtain order under this rule, surety for the judgment-debtor is also prevented from obtaining same relief by applying under S. 47. 59 C. 1354=36 C.W.N. 653=1932 C. 729. Auction-purchaser of property in execution of money decree has a right to apply for entering up satisfaction of a decree affecting that property. 50 I.C. 931=9 L.W. 596. Adjustment between decree-holder and judgment-debtor cannot affect the rights of a third party auction-purchaser. 33 P.L.R. 146=1932 L. 238=136 I.C. 735. See also 58 I.A. 50=1931 P.C. 33=60 M.L.J. 423 (P.C.). An agent acting under the power-of-attorney obtained decrees on mortgages and pending proceedings for the sale of the mortgaged properties, the principal applied under R. 2 for satisfaction of the decrees. But the agent assigned the decrees to a third party who applied under O. 21, R. 16 for recognition of the assignment and for execution. *Held*, that it was not open to the Court to go into the question whether the alleged satisfaction was *bona fide* or fraudulent, and that the decree being alleged to have been satisfied, the petition under O. 21, R. 16, should be dismissed. 144 I.C. 237=1933 M. 523=64 M.L.J. 732. See also 40 C.W.N. 301=1937 Cal. 31. Pay-

ment towards decree uncertified—Assignment of decree—Deed reciting payment and transferring right to execute for balance—Application by transferee for recognition of assignment would amount to certification Assignee has no right to ignore payment and to execute for entire amount. 45 L.W. 291=1937 Mad. 511=(1937) 1 M.L.J. 296.

O. 21, Rr. 2 and 16.—Scope—Transfer of decree by assignment—Subsequent adjustment of decree between decree-holder and judgment-debtor and certification by former without knowledge of transferee—Application by transferee for execution not competent—Plea of adjustment by judgment-debtor is bar to execution—"Decree-holder"—Remedy of transferee. The transferee has his remedy by way of suit against his transferor, but the executing Court is not concerned with it. 169 I.C. 704=45 L.W. 562=A.I.R. 1937 Mad. 605.

DUTY OF COURT.—If a Court is seized of an application to enter up satisfaction of a decree it must make an inquiry whether the decree has been satisfied. The application should not be allowed to be withdrawn. 51 I.C. 411=35 M.L.J. 252. Where decree-holder has been induced by the fraud of judgment-debtor to file application for certification, he has a separate cause of action on the fraud, but the Court has no jurisdiction to refuse to record satisfaction where such an application is made, or re-open execution proceedings subsequently. 1931 R. 332=134 I.C. 213. Opportunity must be given to prove adjustment. 102 I.C. 753=1927 L. 544. 39 P.L.R. (J. & K.) 164. Even where alleged adjustment is disputed by the decree-holder, Court can enquire into the matter and record the adjustment if it is proved. The expression "the decree-holder fails to show cause" does not merely mean fails to appear but would include "fails to satisfy the Court". 113 I.C. 760=1929 A. 79. Court will not inquire into the truth of the decree-holder's statement. Certificates of satisfaction are not conclusive in any way and the judgment-debtor can show that no such payment was made and raise the plea of limitation. 47 I.C. 177=21 O.C. 161. See also 12 I.C. 580. Where decree-holder admits that payments have been made but states that they were not certified, *held*, that the Court executing the decree is not precluded from inquiring into the payments admitted although there was no direct certification. 30 L.W. 526=1929 M. 783 (1). See also 165 I.C. 804=1936 N. 281. In recording an adjustment out of Court, Court must enquire into the factum of adjustment and if there is anything still due to the decree-holder. 41 A. 443=50 I.C. 65; 45 B. 91=59 I.C. 399. No appeal lies for dismissal of an application for default. 63 I.C. 855; 132 I.C. 206=1931 L. 505. No particular form is prescribed for certifying payment to Court. No particular words are essential. The rule should be construed so as not to defeat



## NOTES.

justice. 54 I.C. 257=55 P.L.R. 1919; 35 I.C. 70=31 M.L.J. 207; 30 C. 357=29 M.L.J. 219. Adjustment need not be in writing and judgment-debtor need not have carried out all the terms for satisfying the decree. 102 I.C. 753=1927 L. 544. Enquiries in a suit or in execution proceedings should be confined to matters which could be taken advantage of by parties to the proceedings in the suit or execution itself. 28 I.C. 376=1915 M.W.N. 225. Enquiry under sub-rule (2) can take place **only** between persons standing in the relation of judgment-debtor and judgment-creditor. 19 M. 230 (232). The representative of a deceased judgment-debtor can apply. See S. 146. Court has no power to enquire into a compromise—Power of executing Court. See 17 I.C. 752=24 M.L.J. 88. S. 92 of the Evidence Act does not bar oral evidence to prove an agreement adjusting decree. 60 I.C. 316=16 N.L.R. 204; 156 I.C. 834=42 L.W. 384=1935 M. 424. But see 50 M. 897=1927 M. 911=53 M.L.J. 533. Executing Court cannot enquire into a prior agreement between the parties that no decree should be obtained in the suit. 8 L.W. 205=1918 M.W.N. 547. See also 29 I.C. 838=11 N.L.R. 110; 9 Lah.L.J. 7; 119 I.C. 705=1929 N. 339. But see 40 M. 233. As to the power of executing Court to enquire into adjustment of decree, see 5 R. 833; 39 C.W.N. 961; 157 I.C. 646=37 Bom.L.R. 230=1935 B. 303. Notice of deposit in Court must be served on decree-holder. 1925 N. 52. Once admission of payment is made, it cannot be allowed to be retracted, and no proof of such payment is necessary from judgment-debtor. 54 I.C. 257=55 P.L.R. 1919. When decree is admitted to be satisfied by decree-holder, it is not executable. 18 N.L.R. 134=1922 N. 248. See also 1937 Rang. 507. Admission of payment in an execution application can be treated as an application to certify such payment. 83 I.C. 360 (2); 26 A.L.J. 966=112 I.C. 73=1928 A. 629 (F.B.); 1930 A. 123=124 I.C. 22; 8 R. 310; 1931 S. 28; 141 I.C. 745=1933 Pesh. 14. A payment is certified when decree-holder mentions such payment in his application. And it is sufficient to entitle the executing Court to consider such payments. 58 B. 610=152 I.C. 575=36 Bom.L.R. 798=1934 B. 370. If payment is brought by the decree-holder to the notice of the executing Court, that is enough to constitute certification and would satisfy the requirements of R. 2. It does not matter under what circumstances it is brought to the notice of the Court. 45 L.W. 291=(1937) 1 M.L.J. 296. Where a deed of transfer of a decree recites an uncertified payment and states that the transferee has to recover the balance remaining due, judgment-debtor is entitled to the deduction of the uncertified payment. The transferee cannot acquire more than what that deed recites and it is not neces-

sary for the judgment-debtor to go behind this transfer-deed or to give evidence of the uncertified payment. 161 I.C. 830=43 L.W. 585=1936 M. 472. When a decree-holder certifies part satisfaction and the materials put before the Court by the decree-holder are such as to put the Court on notice that there was a dispute between the parties as to whether the amount certified was less than the amount which had been actually paid, it is quite competent for the Court to give notice to the judgment-debtor and enter into an enquiry as to whether more has been paid than that which the decree-holder certifies. 164 I.C. 434 (1)=1936 M. 468. But see also 1922 C. 200, *infra*. Mere statements in the execution application that payments towards the decree have been made out of Court cannot be treated as an application for certification. 64 I.C. 32=1922 C. 200. But see 4 Pat.L.J. 159=50 I.C. 364. A Court can certify part-payments towards money decree in an application for execution. 26 C.W.N. 534=35 C.L.J. 566. Rule requires that a decree-holder should certify payment. The application need not be distinct from an application for execution of decree. 23 I.C. 753=12 A.L.J. 387; 35 C.L.J. 71=26 C.W.N. 529. See also 54 C. 143. When such application is acted upon no formal order of Court is necessary. 43 C. 207=20 C.W.N. 272; 54 I.C. 257=55 P.L.R. 1919. No record by Court is necessary before adjustment is recognised. 98 I.C. 698=1927 M. 155. Withdrawal of appeal by judgment-debtor and stay of execution in the lower Court is sufficient compliance with the requirements of the rule. 16 C.W.N. 923=13 I.C. 63; 49 I.C. 141=1918 M.W.N. 507; 52 I.C. 764. A casual reference in a plaint or civil proceeding is not sufficient. 52 I.C. 901=13 S.L.R. 130. Confirmation should not be ordered when decree is admitted to be satisfied. 66 I.C. 331=1922 N. 248. Full satisfaction can be recorded if a smaller sum is paid under a composition scheme to which the decree-holder is also a party. 22 L.W. 853=49 M.L.J. 730. See also 91 I.C. 1051=1926 M. 184. Dismissal of an application for recording satisfaction does not operate as *res judicata*. 89 I.C. 195=1925 P. 822. See also 132 I.C. 206=1931 L. 105. Where a transferee of a decree is only a benamidar for one of the judgment-debtors, the others can plead that he has no title to execute the decree. 40 M. 296=32 I.C. 952. Also see 35 M. 659=22 M.L.J. 170. Where a compromise is made and is inconsistent with the subsequent decree of the Court, the clauses of the compromise cannot operate. 1 L. 445=57 I.C. 153. Whether payment to one of many decree-holders can be recorded in full satisfaction, when paid to manager of joint Hindu family without leave of Court. See 1925 M. 230 (2)=47 M.L.J. 498. A decree can be executed when satisfaction has been wrongly entered up. 7 M. 167. A fresh decree is unnecessary when parties



## NOTES.

adjust claim. 20 N.L.R. 122=1925 N. 49. Where there is an adjustment in respect of a money decree and the party agreeing to pay a certain amount under the adjustment fails to do so the other party can enforce the terms of the adjustment in execution. 35 Bom.L.R. 95. Where in a decree no order regarding Court-fees is passed and subsequently an order under O. 33, R. 12 is passed, the Government's existing interest to get Court-fee cannot be defeated by any adjustment, collusive or otherwise, the parties may enter into and the Court is entitled to refuse to record an adjustment which is calculated to achieve such a result. 159 I.C. 765=1935 S. 111.

INSTALMENT DECREE—CERTIFICATION.—If a statement purporting to certify a payment out of Court is made by decree-holder after the controversy has arisen, it cannot have the force of a certificate. The mere placing of certain cross-mark after the instalments alleged to have been paid does not amount to any intimation to Court that the decree-holder is certifying payment of those instalments. These payments are not certified within the meaning of R. 2 and therefore the execution Court cannot take cognizance of any such alleged payments. 149 I.C. 598=1934 A.L.J. 772=1934 A. 534. See also 17 Pat. 128.

AS TO UNCERTIFIED PAYMENTS AND ADJUSTMENTS.—Where the payment is made out of Court and is not certified the Court cannot take any legal notice of it. 14 L.R. 859 (Rev.). The judgment-debtor has no right to plead an uncertified adjustment whether it is the original decree-holder or his assignee that applies for execution, and whether alleged adjustment consists of a direct payment by judgment-debtor himself or a payment by his vendee as satisfaction of the decree. [19 M. 230, Not foll.; 35 M. 659, Ref.] 56 M. 316=1933 M. 157=64 M.L.J. 22; 163 I.C. 671=1936 R. 218. In order that a certification of adjustment by the decree-holder may have effect, it is not necessary that there should be any specific order by the Court. A certificate presented by the decree-holder is none the less operative and enures none the less for the benefit of the judgment-debtor, because the Court has passed no order recording satisfaction of the decree. The record contemplated under O. 21, R. 2 (1) is merely an order that the certificate of the decree-holder be placed on the record. The Court is not required to go into the question whether there has or there has not been an adjustment as stated. The certificate is sufficient and all that the Court need do is to say that the certificate shall be kept upon the record. It is only under sub-R. (2) of O. 21, R. 2, when the judgment-debtor makes an application that it is necessary for the Court to go into the question whether his allegations are true or not. 174 I.C. 254=1937 A.L.J. 1305=A.I.R. 1938 All.

116. Court merely because a decree has been attached will not recognise a payment or adjustment of that decree which has not been duly certified or recorded under R. 2. 11 R. 420=145 I.C. 525=1933 R. 239. See also 1934 S. 205. Execution of decree is barred by sub-R. (3) of R. 2 if satisfaction of decree is not certified under sub-R. (1) or (2) of R. 2. 1928 O. 195; 49 B. 548 (F.B.); 32 C.W.N. 434. A suit lies to enforce a mortgage executed in consideration of a sum paid in cash, and a debt due under a decree, although satisfaction of the decree has not been certified. 12 M. 61. As to recovery of amount paid and not certified, see 10 C. 354; 21 M. 409; 3 A. 538; 30 M. 545; 5 M. 397 (F.B.); 8 M. 277 (F.B.); 23 B. 394 (396); 95 I.C. 410=1923 B. 253. Judgment-debtor entitled to recover it. 11 I.C. 1. A decree-holder can be *sued in damages* for not certifying an adjustment and for repayment of money again realised in execution. 15 M. 302; 30 M. 545; 21 B. 463; 20 A. 254; 20 M. 369; 12 C.L.J. 312; 36 M.L.J. 376; 42 M. 338; 1939 All. 495=1939 A.L.J. 403; 1939 Pat. 156. See 7 R. 310=1929 R. 269. If a contracting party has suffered damages through breach of contract by the other contracting party, it is his duty to minimise that damage and if he fails to do so when it was in his power he cannot recover in respect of the damage which he could have avoided; and as under R. 2, it is within the power of the judgment-debtor to certify any payment made by him, if he fails to do so he puts himself out of Court as regards his claim for damages. 1933 A.L.J. 670=1933 A. 511. The filing of the execution petition itself gives cause of action and successive applications constitute fresh breaches. Rule governed by Art. 115, Limitation Act. 48 I.C. 810=36 M.L.J. 175. Separate suit does not lie on uncertified adjustment for setting aside sale under the satisfied decree. 50 I.C. 956=15 N.L.R. 158. Where an adjustment is not certified when Court can take cognizance of it, see 77 I.C. 337=1924 O. 208. It is not competent to a Court executing decree to enquire into the fact of a payment or adjustment which has not been certified as required by R. 2 even if fraud be imputed to decree-holder. 32 C.W.N. 434; 1929 A. 79. See also 97 I.C. 608 (1)=1926 M. 945. Maintenance decree charging properties—Execution against one property—Sale and purchase by decree-holder—Sale subsequently set aside—Subsequent execution against another item in the hands of purchaser in execution of money decree—Plea that decree was satisfied by receipt of usufruct by decree-holder between sale and its setting aside not maintainable. 1939 P.W.N. 716=1940 Pat. 56. Whether suit maintainable to restrain decree-holder from execution when payment not recorded. 1925 L. 54. A suit to set aside sale held under a decree adjusted, but not certified does not lie. 50 I.C. 956=15 N.



## NOTES.

L.R. 158. *See also* 14 C. 376; 21 M. 356; 17 M.L.J. 527. A suit for declaration that a decree has been adjusted and is not capable of execution is maintainable. Art. 97, 115 or 120, Limitation Act, is applicable. 21 I.C. 557=330 P.L.R. 1913; 1925 L. 54. Interest ceases to run from the date when tender was made. 38 I.C. 295=5 L.W. 718. Failure of an adjustment on the basis of an oral agreement cannot be pleaded as a bar to execution of the decree by judgment-debtor. He has his remedy by a suit for specific performance of it. 44 A. 258=20 A.L.J. 65. If judgment-debtor admits making payments though uncertified it is not necessary to prove them. 52 I.C. 362. Uncertified payments cannot be recognised for any purpose. 30 A. 204; 11 R. 420=1933 R. 239; 56 M. 316=1933 M. 157=64 M.L.J. 22; 32 I.C. 590=14 A.L.J. 132; 13 I.C. 21. *See also* 25 Bom.L.R. 247=1923 B. 253 (1). An adjustment of a decree out of Court by an agreement to accept a smaller sum in full satisfaction of the decree, cannot, unless certified, be pleaded as a bar to execution of decree for balance. 17 M.L.J. 527. A surety for the judgment is bound so long as the judgment-debtor is bound. 60 I.C. 885=1923 C. 313 (1). Executing Court will not recognise adjustment of uncertified payment. 55 I.C. 669; 48 I.C. 765; 50 I.C. 331; 33 I.C. 71. Payment out of Court if not certified can be ignored only in execution of the decree but not otherwise. 58 I.C. 123. Decree-holder can execute decree as if no payment has been made out of Court, if it is not brought to the notice of Court in time. 6 P.L.J. 337=63 I.C. 535. An attaching Court cannot recognise an uncertified adjustment and cannot refuse to proceed with execution. 65 I.C. 830=1922 M. 66. An uncertified adjustment of a preliminary decree in a mortgage suit cannot be pleaded in bar to execution of a final decree. 54 I.C. 137=37 M. L.J. 356; 68 I.C. 443=1923 N. 20; 30 L.W. 551=1929 M.W.N. 867. But it may be pleaded against an application for the passing of final decree itself as this is not a proceeding in execution. 14 P. 488=16 Pat.L.T. 311=1935 P. 385. An agreement to give time for the satisfaction of a judgment-debtor is void if uncertified and has no proper consideration. No suit for damages for breach. 1918 M.W.N. 292=45 I.C. 16. Arrangement pending appeal that original decree should be inexecutable in part cannot be pleaded as a bar in execution of the appellate decree. 44 M.L.J. 599=1923 M. 619. Case where Court can take cognizance of an alleged adjustment though it has not been certified. 77 I.C. 337=1924 O. 208; 32 C.W.N. 434. *See also* 40 B. 333=33 I.C. 232 (case where decree-holder fraudulently denies execution). 1925 M. 230 (2)=47 M.L.J. 498; 53 I.C. 443=135 P.R. 1919; 27 Bom.L.R. 403=49 B. 548 (F.B.). Court has no dis-

cretion to refuse execution by transferee on the ground of uncertified adjustment. 54 I.C. 922=10 L.W. 179; 119 I.C. 480. *See also* 64 M.L.J. 22. And the order declining to proceed with the execution is liable to be set aside in revision by High Court. 1935 R. 481. Adjustment of decree out of Court and uncertified cannot be recognised. 40 I.C. 889=5 L.W. 644. Rule prohibits proof of uncertified payment. 26 I.C. 944=2 L.W. 109; 18 L.W. 453=1924 M. 189. Where the decree-holder has exempted the judgment-debtor from liability though uncertified, his sons cannot execute the decree after his death. 14 I.C. 574=16 C.W.N. 951. Executing Court has no power to recognise payment out of Court and uncertified. 22 I.C. 963=1 U.B.R. 191. A written statement of judgment-debtor alleging uncertified adjustment should be entered as an application by the Court and disposed of. 11 I.C. 780; 113 I.C. 139=1929 A. 674; 9 P. 521. But *see* 18 I.C. 944=15 C. L.J. 88. After a decree has been satisfied and certified, subsequent sale is void and can be set aside. 9 I.C. 452.

**RIGHT OF SUIT.**—Where a judgment-debtor has made payments but they are not certified by the opposite party he can file a suit for recovery of such amount, whether or not he raised the point in the execution proceedings. 1935 P. 65. Where, on a failure to get all the payments alleged to have been made by a judgment-debtor to the decree-holder certified, the judgment-debtor files a suit against the decree-holder for the recovery of such of the payments not certified, he has no cause of action and his suit is premature. It is in substance a suit for damages for breach of contract though no damages have in fact resulted so far. The plaintiff will have a cause of action only if the defendant puts the decree into execution and realises any amount from the plaintiff over and above the payments alleged to have been made by him. 1939 A.L.J. 403=A.I. R. 1939 All. 495.

**LIMITATION.**—A decree-holder may apply to have a payment certified, at any time. 21 B. 122. *See also* 17 I.C. 617=12 M.L.T. 592; 1940 Mad. 893; 47 A. 873=1925 A. 802; 4 Pat.L.J. 159=50 I.C. 364; 54 C. 143; 1 Luck. 428=98 I.C. 353=1927 O. 7; 1929 C. 687. *See also* 25 S.L.R. 360; 1931 A. 219. In computing the period of limitation, the date when payment was made and not the date when the payment was certified, is to be taken into consideration. Therefore, a certification under R. 2 (1) can take place when execution of the decree is barred but for the payment certified. [56 I.A. 30 (P.C.); 29 M.L.J. 669; 44 M. 902 (F.B.), Foll.] 159 I.C. 38=1935 M. 922; 165 I.C. 804=1936 N. 281. Certification to Court under R. 2 (1) by a decree-holder of payments or adjustments is not governed by Art. 181, Limitation Act, nor expressly limited by any other article. (*Ibid.*) But a judgment-debtor must apply within 90 days. *See* 27 I.



## NOTES.

C. 11=20 C.L.J. 131; 24 M.L.J. 541=36 M. 357; 6 P.L.J. 337=63 I.C. 535; 86 I.C. 1051=1925 C. 1012; 26 C.W.N. 529=35 C.L.J. 71. A certification by the decree-holder under R. 2, C. P. Code, has no period of limitation and can be made at any time and without notice to the judgment-debtor. But an application by the latter would fall under Art. 181, Limitation Act. (3 Luck. 684, foll.) 15 P.L.T. 457=1934 P. 380. See also 1940 Pat. 594; 1940 Mad. 893. Having regard to the provisions of R. 2, and Art. 174, it is not open to judgment-debtor to prove adjustment or satisfaction, if he did not take steps to have the same certified within a period of 90 days from the date on which the alleged payment or adjustment was made. This rule would apply whether the payment pleaded is sought to be proved against the decree-holder or his assignee. 148 I.C. 1118=1934 A.L.J. 198=1934 A. 209. But there need not be any formal application by judgment-debtor, nor is it necessary that judgment-debtor must certify the adjustment before execution proceedings begin. 157 I.C. 646=37 Bom.L.R. 230=1935 B. 303. The information given to the executing Court in a written statement put in by judgment-debtor in answer to an application by decree-holder for execution of the decree is a sufficient compliance with the requirements of R. 2 (2). (*Ibid.*). See also 1940 Pat. 594. It cannot be laid down as a matter of law that the decree-holder's certification is in itself a step-in-aid of execution. In order to save limitation, the payment must fall within S. 20, Limitation Act. 35 C.W.N. 1192=134 I.C. 922=1931 C. 719 (F.B.). Decree-holder applying to record satisfaction of decree—Absence at the time of enquiry—Dismissal of application—Subsequent application by judgment-debtor to enter satisfaction—Dismissal of it as being time barred—Not proper procedure. The Court ought to have proceeded with the original application of the decree-holder, treating the application of the judgment-debtor only as an application to continue the former proceeding. [35 M.L.J. 253, Foll.] 48 L.W. 916=1938 M.W.N. 1245=(1938) 2 M.L.J. 936. Decree-holder cannot certify after three years. 50 I.C. 242=23 C. W.N. 320. An uncertified adjustment will not save the period of limitation for execution. 13 I.C. 424=16 C.W.N. 396; 29 I.C. 274=13 A.L.J. 666; 24 I.C. 215=12 A.L.J. 825; 35 A. 178=18 I.C. 731; 25 A.L.J. 933. Failure to certify satisfaction of a decree out of Court is fraud upon the Court. 45 I.C. 222=5 O.L.J. 92. In case of uncertified payment, Court will not go into the question of fraud on the part of the decree-holder. 16 C.W.N. 923=16 C.L.J. 174; on the part of the judgment-debtor. 63 I.C. 238=15 S. L.R. 77. Part-payments and the certification must take place before the application for execution is barred by limitation. 26 C.W. N. 534=35 C.L.J. 566. Interest paid by judgment-debtor operates to save limitation. 43 C. 207=20 C.W.N. 272. See also 21 I.C.

926=19 C.L.J. 126. No time or manner is prescribed for the decree-holder to certify payment. An application within three years can be accepted as a certificate. 51 A. 237=112 I.C. 73 (F.B.); 117 I.C. 790=1929 M. 811. An uncertified payment of a portion of the decree amount made before the the expiry of the period saves the decree from bar of limitation. 33 M.L.J. 219=41 M. 251. Court is bound to recognise payments previously made and S. 20 of Limitation Act comes in to save limitation. 29 M.L.J. 669=31 I.C. 318. See also 1935 M. 922=159 I. C. 38. Rule does not refer to payments in kind which need not therefore be certified to Court. 21 I.C. 177=25 M.L.J. 442. Court has no power to order repayment or over-payment but judgment-debtor has got his remedy in law to claim refund. 11 I.C. 200. As to limitation, see 1933 A.L.J. 670=1933 A. 511. A Court other than a Court executing a decree can recognise an uncertified payment or adjustment of decree and direct a refund of the amount in a suit brought for the purpose. 39 I.C. 15. Limitation Act, Art. 174—Application by judgment-debtor stating that a portion of the decree amount had been paid and tendering the balance—Nature of application—Limitation. 115 I.C. 139=1929 A. 674. Application by decree-holder under R. 2 (1) certifying payment is not a step-in-aid under Art. 181, Limitation Act. 27 A.L.J. 33=56 M.L.J. 233=1929 P.C. 19 (P.C.); 1930 R. 4; 55 A. 393=1933 A.L.J. 256=1933 A. 364 (56 I.A. 30; 1930 R. 64; 1931 C. 719; 1932 O. 141, Foll.) Agreement not to sell property in execution—Omission to certify—Sale in spite of—Application to set aside sale—Limitation. 40 L.W. 622. Limitation—Application by one judgment-debtor to certify payment by another—Limitation—Execution sale of properties of one judgment-debtor—Application to set aside on ground of satisfaction of decree by uncertified payment by co-judgment-debtor—Maintainability after 90 days—S. 47—If applicable. 17 Pat.L.T. 195. When two of the four joint decree-holders apply for execution and the judgment-debtor induces the third decree-holder to come forward and depose to a payment said to have been made out of Court more than two years before, such decree-holder does not act on his own initiative in attempting to certify the payment and hence certification cannot be allowed in respect of the shares of other decree-holder. 31 N.L.R. 271=1935 N. 25. Decree-holder purchasing property in Court sale and taking possession in pursuance of agreement with judgment-debtor—Application by latter to record satisfaction—Limitation—Starting point. 69 M.L.J. 77.

FRAUD.—Omission to certify the adjustment of the decree does not amount to fraud. 5 P.L.J. 70=55 I.C. 890. Decree-holder's failure to report satisfaction is fraud upon the Court, and subsequent purchase of the judgment-debtor's property in execution is vitiated by fraud and is a nullity. 45 I.C. 222=5 O.L.J. 92. Court



## COURTS EXECUTING DECREES.

3. Where immovable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure.  
 Lands situate in more than one jurisdiction.
4. Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras, <sup>1</sup>[or Bombay], such Court may send to the Court of Small Causes in Calcutta, Madras <sup>1</sup>[or Bombay] as the case may be, the copies and certificates mentioned in rule 6; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.  
 Transfer to Court of Small Causes.
5. Where the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, where the Court to which the decree is to be sent for execution is situate in another district, the Court which passed the decree shall send the same to the Court to which it is to be sent for execution.  
 Mode of transfer.

## LEG. REF.

<sup>1</sup>Substituted for "Bombay or Rangoon" by A.O., 1937.

## NOTES.

would not allow execution of a decree where decree-holder is fraudulently denying satisfaction of decree made out of Court. 40 B. 338=33 I.C. 232. Sons of a decree holder cannot execute a decree after father's death if he had during his lifetime exempted judgment-debtor from all liability, though he has not certified the adjustment to Court. 14 I.C. 574=16 C.W.N. 951. In case of fraud judgment-debtor must inform the Court and protect himself, but he can't evade Art. 174, Limitation Act. He has his remedy by a proper suit. 13 I.C. 424=16 C.W.N. 396. Adjustment made by fraudulent arrangement between decree-holder and judgment-debtor should be certified. 13 I.C. 326=15 C.L.J. 451. In case of fraud, the defrauded party will have his right of action. 46 B. 226=1922 B. 380. O. 9, R. 9 (Restoration) does not apply to an application under this rule. 63 I.C. 855. An application to set aside an *ex parte* order certifying adjustment of a decree under R. 2 is maintainable. 30 Punj.L.R. 512=115 I.C. 467.

**BURDEN OF PROOF.**—In an application under R. 2 (2), the burden is on judgment-debtor to prove the adjustment set up. When he asks the Court, in the face of a denial by the decree-holder, to hold that the latter has agreed to substitute for his decree an oral agreement for delivery of some property when admittedly no property has as yet been delivered, the burden is heavily on the judgment-debtor to prove the agreement and the factum of adjustment of the decree. Nor is the burden discharged by evidence of talk of compromise or by proof of the terms which he was putting forward to secure such a compromise. 1935 A.M.L.J. 97. See also 19 N.L.J. 175.

**APPEAL.**—An order refusing a certificate of payment is appealable. 146 I.C. 1018=1932

P. 634. An appeal lies against an order dismissing an application under this rule. 14 M. 99; 18 M. 26; 16 A. 129; 3 P.L.T. 487=1 P. 644.

**REVIEW.**—Negligence on the part of a party or his agent is not any sufficient reason analogous to those mentioned in O. 47, R. 1 (1). Where therefore through negligence, the agent or pleader of a party has certified full satisfaction of decree, the executing Court has no power to review the order striking off execution as fully satisfied. 150 I.C. 44=1934 N. 143.

**O. 21, R. 2 (PATNA AMENDMENT)—APPLICABILITY—PENDING EXECUTION.**—O. 21, R. 2 refers to the case when there is no execution case pending and when the judgment-debtor comes to notify to the Court an adjustment outside the Court. The rule therefore does not apply when an execution case is pending. 174 I.C. 1007=A.I.R. 1938 Pat. 204.

**O. 21, R. 3.**—This rule is new, and follows the ruling in 12 C. 307. See also 12 C.L.R. 404 and 23 W.R. 154. Court having no jurisdiction over immovable property cannot validly sell it in execution of a decree, except under this rule. If Court sells property entirely outside its jurisdiction, the sale is a nullity. 27 C.W.N. 542=1923 C. 619. [17 C. 699 (F.B.), Foll.] 1933 S. 231.

**O. 21, R. 4.**—Rule 4 applies to decrees of foreign Courts. 40 I.C. 670=33 M.L.J. 539. Once decree has been transferred after notice to judgment-debtor, the transferee Court must take the transfer to be valid and execute the decree; it has no jurisdiction to determine the correctness or propriety of the order transferring the decree to it. 165 I.C. 625=40 C.W.N. 267. Decree in suit excluded from cognizance of Small Cause Court—Order transferring decree for execution to Small Cause Court—Validity of order—No jurisdiction for Small Cause Court to question. (*Ibid.*)

**O. 21, R. 5.**—When a decree passed by a Munsiff in one District is sent direct for



cution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.

LOC. AMS.—[ALLAHABAD AND OUDH.] Rule 5. *For the word "District" where it occurs after the words "same" and "different" read "Province."*

[BOMBAY.] Rule 5. The following shall be substituted.

"Where the Court to which a decree is to be sent for execution is situate within the same province as the Court which passed the decree, the latter Court shall send the same directly to the former Court. But where the Court to which the decree is to be sent for execution is situate in a different province, the Court which passed it shall send such decree to the District Court of the district in which it is to be executed."

[LAHORE.] Rule 5 :—

Where the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court or the Court of any Judge having jurisdiction in the place where the decree is to be executed to whom power to receive plaints has been delegated by the District Judge of the district in which the decree is to be executed.

(High Court notification No. 72-R-XI-Y-14, dated the 23rd March, 1938).

[RANGOON.] Rule 5. The following Proviso shall be added :—

"Provided that where the Court to which the decree is sent for execution is presided over by the same Judge as the Court which passed the decree such transfer may be effected by recording a formal order of transfer in the diary of the execution proceedings."

Procedure where Court desires that its own decree shall be executed by another Court.

6. The Court sending a decree for execution shall send—

#### NOTES.

execution to the Court of a Munsiff in another District, the Court to which the decree is sent has no jurisdiction to execute it without an express order of the District Judge under R. 88. 22 C. 764. But see 15 M. 345; 164 I.C. 917 (L.) which held that it was only an irregularity in procedure which could be waived and did not affect the jurisdiction of the transferee Court. A Munsiff transferred a decree for execution to the Subordinate Judge in the same district, though there was no express prayer for the transfer by the decree-holders. There was some irregularity in the manner of transfer but the decree-holders acquiesced in it. *Held*, that the Munsiff could transfer the decree as both the Courts were situate in the same district, and the irregularity in the manner of transfer did not prevent the Subordinate Judge from having seisin over the execution. 64 C.L.J. 47=1936 C. 571. The provisions of O. 21, R. 5, are mandatory, and a decree cannot but be sent to the District Court. Consequently if it is sent to any other Court that Court has no jurisdiction at all from the very start. 42 P.L.R. 404=A.I.R. 1940 Lah. 394. Transfer of decree to another District—Certificate of non-satisfaction sent to Senior Subordinate Judge instead of to District Judge—*Held*, that it was only an irregularity, and that the proceedings in execution taken before the Subordinate Court are not illegal and *ultra vires*, especially when no objection is taken at the earliest opportunity by the judgment-debtor. 164 I.C. 693=38 P.L.R. 505=1936 P. 765. The Court ought to send it back to the Judge that sent it for adopting the correct procedure and not dismiss the execution application. 28 I.C. 682. It is open to the parties to question at any stage the jurisdiction of

the Court to execute it. 49 I.C. 374=4 P. L.J. 49. But see 164 I.C. 917 (L.) where it was held that the party who allows the Court to exercise jurisdiction in a wrong way cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation and negligence.

O. 21, Rr. 5 and 8.—Rr. 5 and 8 of O. 21, are distinct and independent. R. 8 applies only to those cases in which a decree is sent for execution to the District Court in the same or another District, in which cases the District Court is not obliged to execute the decree itself. When the decree is not sent to the District Court for execution, but for transmission to a Subordinate Court for execution, the District Court cannot execute decree. In such cases, the order of transfer takes effect from the date on which the order for transfer is made. 1940 Mad. 214=50 L.W. 764.

O. 21, R. 6.—An order of transfer of a decree takes effect from the date on which the order is made and the Court to which the decree is so transferred can from that date entertain an application for execution even though a copy of decree has not been received by it. (35 M. 588, Appr.; 55 M.L.J. 120, Overr.) 56 M. 692=144 I.C. 933 (2)=65 M.L.J. 137. See also 50 L.W. 764. The words "copy of any order for the execution of the decree" in Cl. (c) mean a copy of any subsisting order. 13 B. 371. Judgment of a Native State is a foreign judgment. British Indian Court has power to see whether a foreign Court had jurisdiction. R. 7 applies only to British Court. 40 B. 551=36 I.C. 363. No formal order necessary as to transfer when the transferring Court and the Court to which a decree is transferred are presided over by same Judge. 105 I.C. 654=5 R. 613. Notice to execute can be issued



- (a) a copy of the decree ;
- (b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied ; and
- (c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

LOC. AMS.—[ALLAHABAD, N.-W.F.P. AND OUDH.] Rule 6 to be *re-numbered* 6 (1) and the following sub-rule (2) to be *added* :—

(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the Court to which they are to be sent.

[RANGOON.] Rule 6. The following proviso shall be *added* :—

Provided that where a transfer is effected under the proviso to r. 5, it shall not be necessary to send the above documents.

[PATNA.] O. 21, r. 6. In r. 6 *insert* the following words after the word “decree” in cl. (a) :—

“and a copy of the suit register relating to the suit in which the decree was passed and a memorandum showing the costs allowed to the decree-holder subsequent to the passing of the decree.”

(See Notification dated 29th January, 1936, Pt. III, Bihar and Orissa Gazette.)

7. The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge, requires such proof.

Court receiving copies of decree, etc. to file same without proof.

#### NOTES.

only by Court to which the decree is transferred. 63 I.C. 116=26 C.W.N. 292. Where decree has been transferred to another Court for execution, decree-holder need not make a second application to the latter Court to execute it. Where notice is issued under O. 21, R. 22, the application must have been in form and substance one for execution and not only for transfer. 2 P. 909=74 I.C. 753. Where the Court transmitting a decree for execution to another Court has fully complied with all the requirements of O. 21, R. 6, and the copy of the decree sent to the executing Court contains all the correct particulars as to the number of suit and the names of the judgment-debtors, the mere fact that there is a mistake in the certificate of non-satisfaction of the decree as to the number of the suit and the names of the judgment-debtors would not affect the jurisdiction of the execution Court to proceed with the execution. The mistake is a mere irregularity. Even an omission to send the certificate of non-satisfaction would only be an irregularity and would not affect the jurisdiction of the transferee Court to entertain an application for execution of decree. 1938 P.W.N. 73=A.I.R. 1938 Pat. 513. Certificate wrong—Court to which the decree is transferred need not get the certificate amended, but can execute decree. 93 I.C. 257=1927 P. 807. On this section, *see also* 31 C.W.N. 1052. Omission to send certificate through no default of decree-holder is only an irregularity. 35 C.W.N. 308=134 I.C. 944=1931 C. 649. Order for—Simultaneous execution—Notice to judgment-debtor—Necessity. 39 C.W.N. 165=1935 C. 268; 41 Bom.L.R. 481. Simultaneous execution—Order of transfer of decree

while execution pending—Power to make 35 C.W.N. 308. Application to take decree papers from Court—Practice of Sind Judicial Commissioner's Court. 27 S.L.R. 312=1933 S. 343.

O. 21, R. 6 (2) (ALLAHABAD).—It is open to a decree-holder, who obtains personally the certificate and copy of the decree in accordance with R. 6 (2), either to take them to the Court to which they are sent, or to return the copy and the certificate to the Court which issued them. If he takes the latter action then the Court which passed the decree becomes again seized of the matter, and is either able to grant execution itself, or to grant a new certificate for transfer. 163 I.C. 231=1936 A.L.J. 254=1936 A. 369.

O. 21, R. 7.—Executing Court cannot question the jurisdiction of the Court passing the decree. 38 B. 194; 9 P. 829=1931 P. 27; 61 M.L.J. 520; 9 R. 480 (F.B.); 11 P. 94; 138 I.C. 376=1932 L. 601; 13 P. 17=151 I.C. 368 (2)=1934 P. 203; 38 Bom.L.R. 1023. But *see* 54 C.L.J. 593=137 I.C. 375=1932 C. 380; 46 I.C. 419=22 P.R. 1919; 9 Luck. 435=147 I.C. 1209=11 O.W.N. 169=1934 O. 75 (F.B.); 152 I.C. 135 (2)=25 P. L.R. 482=1934 L. 652. *See also* 10 Bur.L. T. 159=36 I.C. 10; 1931 P. 27. But *see* 1931 A.L.J. 653=1931 A. 689. But if decree is a nullity, executing Court can refuse to execute it. 1930 R. 337 (2)=8 R. 409. Rule does not apply to a foreign decree transmitted to a British Court. 1913 M.W.N. 605=20 I.C. 704. (*See on appeal* 26 I.C. 287=27 M.L.J. 535.) Judgment-debtor allowing minor to prosecute appeal—Newly appointed executor not impleaded—Objection to decree raised in execution—Sustainability—Waiver. 31 Bom.L.R. 1254.



8. Where such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction.

9. Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction.

#### APPLICATION FOR EXECUTION.

10. Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof.

#### NOTES.

O. 21, R. 8.—The mode of sending the decree for execution under O. 21, R. 5 is a necessary part of the conferring of jurisdiction and without the mode being carried out as prescribed in the statute no jurisdiction is conferred. 1933 L. 839. Order forwarding a decree for execution need not be signed by the District Judge himself. 23 C. 481. See 22 C. 764. Court having no jurisdiction over a decree transmitted to it cannot execute the same. The rule in execution is, a Court can only act through its officers within its territorial jurisdiction. 33 M.L.J. 750=43 I.C. 79. But see 152 I.C. 891=1934 M. 573=40 L.W. 284, where the words "competent jurisdiction" have been held to mean "competent to sell in execution" and not referable to territorial jurisdiction. The law of limitation prevailing at the time of application must be applied. 1 M. 52. When there are different laws of limitation in force in two Courts, the law applicable is the law of the Court to which the decree is sent for execution. Beng.L.R. Sup., Vol. 970. But see 17 C. at 497. When decree of a Court of a foreign state is being executed in British India the law of limitation applicable is the law which would have been applicable in case the decree had been passed in British India. 14 C. 570.

O. 21, R. 9.—The 'manner' of execution refers to the procedure under which the execution is to be had, and has no reference to limitation. 24 C. 473 (491). When the Original Side of the High Court executes its own decree it is at the same time the Court which passed the decree and the Court which executes it. But in no way can the Original Side of High Court be said to be a Court which passed the decree which actually was passed by the Court of Small Causes. In the case of a decree passed by the Small Cause Court and transferred to High Court for execution High Court cannot exercise its powers under R. 233 of the Original Side Rules and direct the payment of decretal amount by instalments. 149 I.C. 763=1934 R. 197.

O. 21, R. 10.—An application for transfer C. C. M.—120

of a decree for execution by another Court is not a substantive application for execution. The transmission order in such case is a ministerial and not a judicial order. Such an order can be passed *ex parte* and the Court passing it has no jurisdiction to decide whether a subsequent application in the transferee Court will be within limitation or not. Therefore, an order passed by the transferring Court cannot be regarded as a final adjudication on the question of limitation and an application for execution filed in the transferee Court more than 12 years after the passing of the decree is beyond time and cannot be considered a continuation of the prior applications before the transferring Court. 158 I.C. 127=1935 L. 508. There is nothing in the Code to prevent separate and successive applications for execution in respect of each item decreed. 18 C. 515. Where judgment-creditor has obtained a decree for principal and interest to date of payment and costs and has applied for execution and has executed it in respect of the principal and costs subsequently puts in a fresh application for interest only—a prayer omitted in the prior application—the application is not sustainable. 57 B. 468=35 Bom. L.R. 620=1933 B. 364. Where persons entitled to separate amounts under a decree join in one application for execution, and if one of them withdraws, the application can continue in the name of the remaining applicants. 1935 A. 402=157 I.C. 429. Where in a partition suit which was dismissed, three defendants were allowed separate costs and one decree was actually drawn up, one application by all of them for execution of the decree stating that they are entitled to the separate amounts of costs set forth is maintainable as the law does not require that separate applications should be made. (*Ibid.*) Rule governs only applications made to continue the suit but not made after the termination of the suit. 48 I.C. 840=41 M. 510. The person appearing on the face of decree as the decree-holder is entitled to execute it unless it be shown by some other person under R. 16, that he has taken the decree-holder's place. 18 C. 639. See also 2



LOC. AMS.—[LAHORE.] Add the following proviso to r. 10 :—

“ Provided that if the judgment-debtor has left the jurisdiction of the Court which passed the decree, or of the Court to which the decree has been sent, the holder of the decree may apply to the Court within whose jurisdiction the judgment-debtor is, or to the officer appointed in this behalf, to order immediate execution on the production of the decree and of an affidavit of non-satisfaction by the holder of the decree pending the receipt of an order of transfer under S. 39.”

[RANGOON.] Add the following, namely :—

“ At the time of presenting the application for execution or at the time of admission thereof the holder of a decree may, if he wishes, deposit in the Court the fees requisite for all necessary proceedings in the execution.

Rule 10-A.—If no application is made by the decree-holder within six months of the date of the receipt of the papers, the Court shall return them to the Court which passed the decree with a certificate stating the circumstances as prescribed by S. 41.”

11. (1) Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

#### NOTES.

M. 216. “Holder of a decree”—Meaning of 1937 Pat. 607; 21 Pat.L.T. 146. A person claiming under the decree-holder can also apply. See S. 146. Every decree-holder must apply for execution, and no exception is made in cases arising under O. 38, R. 11. 12 B. 400. Until the Court has received a decree it has no jurisdiction to entertain an application for execution. 27 L. W. 423. In case where decree is transferred, application for execution must be made to transferee Court and not to parent Court. 1931 L. 14=130 I.C. 521; 152 I.C. 128=1934 L. 728. See also 1940 Sind 111 (Power of transferring Court to execute decree before return of satisfaction certificate). Execution petition against a dead judgment-debtor is not in accordance with law and does not save limitation. 148 I.C. 131=1934 A. 463. An application for execution presented to a clerk duly authorised to receive it, is valid though it is presented beyond the office hours, provided the clerk has accepted it. I.L.R. (1938) Nag. 451. Where a decree of a British Indian Court is transferred for purposes of execution to a Court in Burma before the 1st of April, 1937, the date on which Burma became separated, but the application for execution as required by O. 20, Rr. 10 and 11 was in fact made after that date, it cannot be executed by Courts in Burma as after the 1st of April, 1937, the British Indian Court has become a foreign Court and its decree cannot be executed when there is no reciprocal arrangement between India and Burma for purposes of execution. 1938 Rang.L.R. 355 = A.I.R. 1938 Rang. 385.

O. 21, R. 11.—As to applicability of this rule to application for restitution, see 1937 M. 173. Decree for payment of money—Proceedings between husband and wife under Guardians and Wards Act for custody of minor children—Consent order for payment of maintenance and school expenses of children to wife or school authorities not executable as money decree. 1939 Bom. 367=41 Bom.L.R. 625. S. 51 of the Code should be read along with this rule and O. 40, R. 1. 35 C.W.N. 1066. See also 1937 A.M.L.J. 113

(Application of the rule to a petition under S. 39 for transfer of decree for execution to another Court). Burden of proving application is not time-barred and in accordance with law is on applicant. 134 I.C. 1182=1931 S. 160. Mistaken entry as to date of decree in the application is an immaterial irregularity. (Ibid.) Where relief asked for is for sale of property outside jurisdiction of Court, the application is not in accordance with law. (Ibid.) Applications for execution of a decree are proceedings in the suit. 20 B. 198. Where an erroneous order of Court has prevented decree-holder from proceeding with execution of his decree, Court may treat a subsequent application to amend the previous one, as a fresh application itself. 53 I.C. 111. A defective application for the execution of a decree, unless it is cured, is liable to be dismissed. 11 I.C. 696 (1). See also 1937 Sind 108. Refusal to correct mistakes pointed out by Court, and consequent dismissal of execution petition—Effect on limitation. 131 I.C. 33=1931 A. 722. Application under S. 73 for rateable distribution is not one in execution, but Court can allow amendment of same. 9 O.W.N. 1079. Execution application without giving necessary particulars is mere scrap of paper. 7 P.L.T. 350=1926 P. 533. Rule makes no mention of a temporary alienation of land. 58 I.C. 603. Rule does not apply to applications for an order absolute under S. 89 of the Act (O. 34, r. 5). 21 C. 818. A mortgage decree cannot be executed against some of the owners of the equity of redemption. 47 I.C. 907. A mortgagee-decree-holder having obtained delivery of possession found out subsequently that the execution proceedings became infructuous owing to the property having been transferred *pendente lite* by the mortgagor, and applied for execution afresh against the transferee. Held, that the application was one under R. 11 and not under R. 97, 55 A. 235=1933 A.L.J. 113=1933 A. 201. See also 153 I.C. 422=1935 A.W.R. 534=1935 A. 179. Rule does not bar the maintenance of concurrent execution. Court may allow amendment and R. 17 does not bar it. 4 P. 328=71 I.C. 741. An order by Court at the



(2) Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely :—

(a) the number of the suit ;

#### NOTES.

time of the decree that the attachment effected before the judgment shall continue is not an order in execution. Nor can an application made by the plaintiff under O. 39, R. 6, for sale of the goods attached before judgment be regarded as an application for execution of a decree as contemplated by O. 21, R. 11 or by rule 10 of Ch. 27 of the High Court (O.S.) Rules. 40 C.W.N. 1317. All decree-holders desirous of enforcing their decrees must apply for execution. There is no exception in cases arising under O. 38, R. 11. 12 B. 400. But where the property is described in the plaint and in the mortgage decree and a plan of the property is also on the record, it is doubtful whether an application in the form prescribed under R. 11 is in every case necessary. Where a final decree has been passed and the decree-holder applies to the Court to sell the property, it is the duty of the Court to sell the property on such application after obtaining the necessary particulars from decree-holder. 149 I. C. 1066 (1)=1934 L. 58. Non-compliance with immaterial provisions will not vitiate an execution application. 65 I.C. 14=1922 S. 29; 96 I.C. 554=1926 C. 1146. Mere omission from execution application of particulars required by R. 11, would not always make it otherwise than in accordance with law, if the omissions are not such as to make it impossible for Court to issue execution on it. If application, though defective in some particulars is one on which execution could be lawfully ordered, then the application must be held to be one in accordance with law. What has to be looked at is whether the executing Court would or would not issue execution on the application as preferred to it. An application in substantial compliance with law is effectual to stay the progress of limitation under Art. 182 (5), Limitation Act, whether the Court admits, or rejects, or returns the application or allows it to be amended. 36 Bom.L.R. 643=1934 B. 307. It is only under O. 7, R. 6, that the ground of exemption from the law of limitation should be expressly urged but no corresponding provision is made in the case of applications for execution. Consequently an omission to mention the ground of extension of the period of limitation in an application for execution cannot be treated as fatal. 42 P.L.R. 10=A.I.R. 1940 Lah. 178. Failure to file affidavit and encumbrance certificate along with execution petition in respect of final mortgage decree for sale does not render application not in accordance with law. 1932 A.L.J. 578=1932 A. 484=139 I.C. 201. Nor does failure to specify mode of execution. 1932 L. 534=138 I.C. 249. Nor

omission to state names of persons interested in decree. 33 P.L.R. 549=139 I.C. 151. Nor omission to mention uncertified payment out of Court. 151 I.C. 1015=38 C.W.N. 163=1934 C. 465. Application headed as one under R. 11 but not in proper form—Court acting thereon and granting relief—Application is one in execution and order is legal. 1925 M. 129 (2). A person appearing on the face of the decree as the decree-holder is entitled to apply for execution, unless it be shown by some other person that he has taken the decree-holder's place. 18 C. 639. An application for execution made by A as guardian of B, who was a major at the time of execution, cannot be considered as an application of B under this rule. 28 M. 396. But see 1930 L. 603. O. 21, R. 11 (2) only describes the form of an execution application and merely sets out the forms in which the application is to be drafted. Any person acquainted with the facts can sign or verify the written application, but only the holder of the decree can apply to the Court for execution. An execution application which is not signed by the decree-holder and presented by a vakil without proper authority is not a proper application at all. It cannot be regarded as effective as having been presented by a person acquainted with the facts. 1937 M.W.N. 355=A.I.R. 1937 Mad. 760. Where an application for execution was presented by the son of a decree-holder on his behalf and the Court returned the application for amendment as not being made by the proper person under R. 11 (2), no mention being made in the application that the son was acquainted with the facts of the case; *Held*, that the application was rightly returned by the Court under R. 11 (2), and such application could not be said to be pending in Court when it was not filed afterwards by making proper amendment. 1937 Sind 108=170 I.C. 493. The Code in its provisions relating to execution does not seem to provide for the execution of a conditional decree which is to become absolute upon the failure of defendant to do a certain thing. 10 C.W.N. 306. Application for execution—Decree affirmed on appeal—Appellate decree not expressly mentioned in application—Effect. 9 P. 829.

VERIFIED.—Where an execution application was not verified, nor contained the particulars required by R. 11 of O. 21 it should not be entertained. 1937 A.M.L.J. 89. An application to amend an existing or pending execution application should be in the form prescribed by R. 11. 1937 A.M.L.J. 89. An application to take effect under O. 21 should be presented in accordance with the provisions



- (b) the names of the parties ;
- (c) the date of the decree ;
- (d) whether any appeal has been preferred from the decree ;
- (e) whether any, (and, if any) what payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree ;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results ;
- (g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed ;

## NOTES.

as laid down therein, and unless the Court rejects the application or calls upon the decree-holder to amend it under sub-R. (1) of R. 17, there is no proper application before the Court. 40 P.L.R. 857=A.I.R. 1938 Lah. 515. An application verified by the general attorney for the decree-holder, is properly verified even if the principal is residing within the jurisdiction of the Court. 26 A. 154. Requirement as to verification—Pleader conducting trial, application filed by—Presumption—Saving of limitation. 31 Bom.L.R. 355=117 I.C. 526=1929 B. 196; 151 I.C. 886=1934 N. 224. Where there are a number of decree-holders some not acquainted with the facts of the case, all that the law requires is that the application should be verified by some person acquainted with the case. 2 P. 809=4 Pat.L.T. 513. Decree-holder's disappearance—Nothing known as to his death—Pleader can apply. 7 Pat.L.T. 220=1925 P. 692.

O. 21, R. 11 Cl. (b).—When a decree is binding upon a minor, execution might be sought against him through his guardian. 16 C. 40; 18 W.R. 56. All that O. 21, R. 11 (2) (b) requires is that the names of the parties should be specified in the application. It says nothing about the addresses. An application not specifying addresses of judgment-debtors cannot, therefore, be said to be not in accordance with law. A.I.R. 1941 Nag. 152

CLAUSE (d).—Where the judgment-debtor objected to execution of decree on the ground that decree-holders were trying to execute the decree of the first Court, which had been superseded by the appellate decree, which alone could be executed, *held*, that what the decree-holders were trying to execute was the mandatory part of the decree of the first Court as affirmed by the Court of appeal, and it would be the merest technicality to say under these circumstances that the decree-holders were asking for the execution of the decree of the first Court as something distinct from the decree of the appellate Court. 9 P. 829=129 I.C. 138=1931 P. 27. (Case-law reviewed.)

CLAUSE (e).—All that O. 21, R. 11, sub-Cl. (e) requires is that the payments made should be specified in the application. It says nothing about the dates of these payments. Therefore application not specifying such dates is in accordance with law. A.I.R. 1941 Nag. 152. Decree-holder was bound to

state in his application any adjustment between the parties after decree, whether such adjustment had or had not been certified to the Court. 10 B. 288. Sale in execution is invalid where decree-holder ignored part-payment of decree amount and applied for the entire decree amount. 11 P. 796. A certification of payment made by decree-holder after the decree is barred is not a step in-aid of execution and cannot revive limitation. 1933 S. 365=147 I.C. 30.

CLAUSE (f).—O. 21, R. 11 (2) (f) requires an applicant for execution to state whether any and what previous applications have been made for the execution of the decree and their results. The word "result" does not mean completed results and does not imply that no further application for execution can be entertained so long as one is pending. The rule is complied with if in a further application for execution the result of a previous application is stated whatever the result may be, as for instance that it has been completely infructuous. The mere fact that execution has already been levied under the decree does not operate as a stay of execution on the decree in law. 1941 Bom. 37=42 Bom. L.R. 948. An application which does not contain the particulars mentioned in this clause is only formally defective, and substantially complies with the requirements of the rule. 16 M. 142; 65 I.C. 120. Executing Court must either allow a defective application to be amended or reject it. 2 L.L.J. 104=55 I.C. 16. A *bona fide* mistake can be amended. 26 M.L.J. 83=21 I.C. 782. A defective application is in accordance with law. 40 M. 949=32 M.L.J. 621. See also 96 I.C. 554=1926 C. 1146. Where a person relies upon a particular ground as reviving limitation for an execution application, it is incumbent upon him to specify that ground in the application. If he fails to do so, it is not open to him to take advantage of it subsequently. 1933 S. 365=147 I.C. 30.

CLAUSE (g).—Particulars of interest due are not required by O. 21, R. 11 (g) or by any other provision of the Code; that is to say, as it is not required that applications for execution shall contain these particulars they can be furnished by the decree-holder at any time after issue of notice to the judgment-debtor, when evidence is taken or before orders are passed for the purpose of ascertaining the amount due. 184 I.C. 769=A.I.



- (h) the amount of the costs (if any) awarded ;  
 (i) the name of the person against whom execution of the decree is sought ;  
 and  
 (j) the mode in which the assistance of the Court is required, whether—  
 (i) by the delivery of any property specifically decreed ;  
 (ii) by the attachment and sale, or by the sale without attachment, of any property ;  
 (iii) by the arrest and detention in prison of any person ;  
 (iv) by the appointment of a receiver ;  
 (v) otherwise, as the nature of the relief granted may require.

(3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.

LOC. AMS.—[ALLAHABAD]. Rule 11. *Substitute* for clause (f) of sub-rule (2)—

“(f) The date of the last application, if any” ; and *add* the following proviso to sub-rule (2) :—

“Provided that when the applicant files with his application a certified copy of the decree the particulars specified in clauses (b), (c) and (h) need not be given in the application.”

#### NOTES.

R. 1939 Rang. 345. Interest from date of application and date of sale may be ordered, even though not specifically claimed. 36 C. W.N. 404=138 I.C. 718=1932 C. 555. Purchaser under sale in execution is not bound to inquire whether judgment-debtor had a cross-judgment for a higher amount. 14 C. at 25 (P.C.). Omission to state date of prior application is not a material defect but omission to mention the existence of cross-decrees however may be a material defect. 71 I.C. 1054=1924 C. 398.

CLAUSE (h).—If the decree-holder asks for more costs than are actually due to him, that might be another matter, but when he asks for something less, and the difference is of a trivial character, it cannot be held that the application is so vitiated as to be incapable of execution at all. A.I.R. 1941 Nag. 152.

CLAUSE (i).—In the case of a decree against a firm, the decree-holder or a transferee decree-holder has a right to apply for execution against any one or more of the partners of the firm, the firm being only a collective name of the individuals who are the members of the partnership. 39 Bom. L.R. 540=I.L.R. (1937) Bom. 691=1937 Bom. 365.

CLAUSE (j): SCOPE OF.—Any method suggested by the decree-holder for the satisfaction of his decree which method is not actually prohibited by law, falls within the purview of R. 11 (2) (j) (v). 1928 L. 7. As regards proper form of decree, *see* 19 B. 34. O. 21, R. 11 (2) (j) states nothing about the specification of the property. All that the decree-holder is required to set forth is the mode in which he seeks the assistance of the Court. This mode is sufficiently indicated when he states that he seeks attachment of the movables of the judgment-debtor. It is clear from O. 21, Rr. 11 and 12 that the Code has drawn a distinction between movables in the possession of the judgment-debtor and movables belonging to him but not in his possession and immovable property in his

possession. When the Code itself draws such a distinction and does not ask for a list of movables when they are in the possession of the judgment-debtor, it is impossible to state that an application which does just what the Code requires is not in accordance with law. Hence an application which does not specify particulars of movable to be attached is, therefore, in accordance with law. A.I.R. 1941 Nag. 152. The method of executing is one of procedure and not a substantive right. 9 I.C. 800. Judgment-debtor should be arrested only when he shows bad faith or negligence in satisfying decree. 11 I.C. 848=246 P.L.R. 1911. A decree declaring a party entitled to a constantly recurring right to receive certain payments in kind, valued at a certain annual sum, cannot be executed, as the applicant would not be able to state definitely, as required by the Code, to what extent relief was desired. 4 M. at 220. *See also* 27 I.C. 804=13 A.L.J. 136. In an application for execution of a decree to remove a building, the assistance of the Court should be asked for in the manner provided by R. 32. 8 C. 174; 18 C. at 465; 17 C. 532. “Otherwise as the nature of the relief may require” includes several methods. Sale without attachment is one method of execution; attachment of a decree or debt is another. An application for execution by one method cannot be converted into another method. 91 I.C. 240. Ejectment for money decree is a method under Oudh Rent Act, S. 61. 19 I.C. 38=15 O.C. 381. Rateable distribution is not a form of execution—C. P. Code, S. 73. 25 N.L.R. 94=116 I.C. 665=1929 N. 148. Except in a case where decree itself directs the appointment of a receiver to work out the relief, no decree-holder has a right to ask for appointment of a receiver only under clause 4 of R. 11. It would always be an alternative mode to the relief mentioned in cl. (2) (i) of R. 11, i.e., attachment and sale. 114 I.C. 839=1929 M. 20.

O. 21, R. 11, Cl. (3).—Order for a copy



[MADRAS.] (a) *Insert*—“(ff) Whether the original decree-holder has transferred any part of his interest in the decree and if so, the date of the transfer and the name and address of the parties to the transfer.”

(b) *Add* the following to sub-rule (2) (j) :—

“In an execution petition praying for relief by way of attachment of a decree of the nature specified in sub-rule (1) of r. 53 of this order, there shall not be included any other relief mentioned in this clause.”

(c) *Add* the following proviso at the end of sub-rule (2) :—

“Provided that when the applicant files with his application a certified copy of the decree, the particulars specified in clauses (b), (c) and (h) need not be given in the application.”

[NAGPUR.] RULE 11.—*After* sub-clause (v) of clause (j) of sub-rule (2), of r. 11, *insert* the following proviso :—

“Provided that, when the applicant files with his application a certified copy of the decree the particulars specified in clauses (b) (c) and (h) need not be given in the application.”

[OUDH.] In r. 11 for clause (f) of sub-rule (2); *substitute* the following :—

“(f) the date of the last application if any.”

[PATNA.] O. 21, r. 11. *Add* the following as sub-r. (1-A) of r. 11 :—

“(1-A) Where an order has been made under S. 39 of the transfer of a decree for the payment of money for execution to a Court within the local limits of the jurisdiction of which the judgment-debtor resides, such Court may, on the production by the decree-holder of a certified copy of the decree and an affidavit of non-satisfaction, forthwith order immediate execution of the decree by the arrest of the judgment-debtor.”

(2) *Substitute* the words and figures “sub-rr. (1) and (1-A)” for the word and figure “sub-r. (1)” in line 1 of sub-r. (2) of r. 11.

[SIND.] O. 21, r. 11.—*Add* the following as clause (ff) to sub r (2) :—

“(ff) Whether the original decree-holder has transferred any part of his interest in the decree and, if so, the date of the transfer and the name and address of the parties to the transfer.”

12. Where an application is made for the attachment of any movable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

Application for attachment of movable property not in judgment-debtor's possession.

Application for attachment of immovable property to contain certain particulars.

13. Where an application is made for the attachment of any immovable property belonging to a judgment-debtor, it shall contain at the foot—

#### NOTES.

of decree is wholly needless when the Court in which the application is filed is the very Court which passed the decree. 57 C. 996.

O. 21, R. 12.—Execution of decree falling under S. 52 must be accompanied by an inventory. 28 Bom.L.R. 1322=98 I. C. 941=1927 B. 52. The rule does not contemplate any enquiry before Court whether the property belongs to judgment-debtor or not. 12 W. R. 329. A reasonable and accurate description of what is sold is required. A wrong date of the sale does not invalidate the title acquired at such sale. 9 I.C. 729=9 M.L.T. 319. Execution creditor is liable for damages for wrongful seizure of property belonging to a stranger. 3 B. 74. Where the movable property sought to be attached is in the possession of the judgment-debtor, the decree-holder cannot reasonably be called upon to supply either an inventory with an accurate description of the articles sought to be attached or their approximate value. 42 C.W.N. 285=A.I.R. 1938 Cal. 235. Scope—Father of Hindu joint family sued—Death of father after decree—Sons impleaded as parties in execution—Decree-holder whether need file

inventory. 31 Bom.L.R. 1291.

O. 21, R. 13.—Intention of the rule is that the description in notice of attachment should be sufficient to identify the property. 12 W.R. 488; 14 A. 190; *see* 17 C. 631 (F. B.) under R. 17. Application not giving particulars required by this rule is one not in accordance with law for purposes of limitation 32 Bom.L.R. 1368=129 I.C. 159=1931 B. 128. *See also* (1940) 1 M.L.J. 477. Court can call for an amendment to furnish necessary particulars. 65 P.L.R. 1016=35 I.C. 955. List of properties filed not with application but at a time when execution is barred—Order of dismissal—Effect. 1926 M. 260. An application for execution which refers to a list filed with a previous application is valid. 12 C. 161. But *see* 18 C. at 465 and 17 C. 631. Where decree is not clear regarding proclamation of property, decree-holder in his execution application can give an amplified description of the property giving the value of the property. 35 I.C. 368. In case a decree-holder fails to specify an incumbrance which he holds, he is estopped from suing on it. 15 M. 412. *See also* 100 I.C. 493=52 M. L.J. 222. Property attached specified as



(a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers ; and

(b) a specification of the judgment-debtors' share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

LOC. AM.—[RANGOON.] *Substitute :—*

" 13. (1) When application is made for execution of a decree relating to immovable property included within the cadastral or town Survey and the decree does not contain a plan of the property or for execution of decree by the attachment and sale of such property, the application must be accompanied by a certified extract from the latest *kwin* or town map with the boundary of the land in question marked with a distinctive colour. The particulars specified in the annexed instructions, which have been issued regarding the filling up of forms of process concerning immovable property must also be furnished so far as they are not given in the plan. In the case of other immovable property a plan is not required, but such of the particulars in the annexed instructions as can be given must be supplied :—(1) If the property to be sold is agricultural land which has been cadastrally surveyed and of which survey maps exist, the area *kwin* number ; latest holding number (if different kinds of holding ; e.g., rice land and garden holdings, are numbered in different series, the kind of holding must be stated), field numbers (if the property does not coincide with one complete holding year of *kwin* map from which the holding number is taken), and revenue last assessed upon the land must be given ; (2) in the case of other agricultural land, the area and village tract within which it falls, distance and direction from nearest town or village and boundaries should be specified ; (3) in the case of land in large towns the area, block or quarter, name or number, the lot number (if there are separate series of lots, the series should be stated, and where the land forms part only of a lot particulars regarding that part), the holding number in the latest town survey map if any, and year of the map ; the rent or revenue last assessed on the land, must be given ; (4) in the case of buildings situated in a large town when the land on which such buildings stand is not affected, the name or number of the street, or, if the street has neither name nor number, the quarter or block name or number, the number of the building in the street, or, if it has no number, the lot number must be given ; (5) in the case of immovable property situated in a small town or village, such of the particulars in paragraphs 3 and 4 above as can be given should be given ; (6) the purpose to which land or buildings are put, the material and age of buildings, all incumbrances and municipal taxes should be stated ; (7) the judgment-debtor's share or interest in the property should be specified.

(2) The cost of the certified extract shall be reckoned in the costs of the application.

14. Where an application is made for the attachment of any land which

Power to require certified extract from Collector's register in certain cases.

is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered, as proprietors of, or as possessing any transferable interest in, the land or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors.

15. (1) Where a decree has been passed jointly in favour of more persons

#### NOTES.

owned by judgment-debtors—Share of each judgment-debtor need not be mentioned. 1938 Rang. 433. Decree-holder has the right to choose the property against which he will proceed. 27 L.W. 594=109 I.C. 872=1928 M. 713 (F.B.). Erroneous description of judgment-debtor's interest in the property sold, due to gross negligence of decree-holder, will render him liable to pay damages to the auction-purchaser. 27 N. L.R. 318=134 I.C. 269=1931 N. 116. See also (1940) 1 M.L.J. 477.

O. 21, R. 14.—An application by the decree-holder for a certificate that the extract, from the revenue register is necessary, to enable him to obtain such a copy from the Collector's Office is a step-in-aid of execution. 5 M. 141. Application for attachment is unnecessary in a decree passed for sale of mortgaged property. 47 I.C. 639; 167 I.C. 34= 1937 O.W.N. 169=1937

O. 233.

O. 21, R. 15: JOINT DECREES.—The object of R. 15, is clearly to enable the Court to protect the interest of a decree-holder who has not applied for execution when such an application has been made by a co-decree-holder. Where one of several decree-holders applies for execution and the others do not object, it is not for the judgment-debtor to plead that sufficient steps have not been taken to safeguard the interest of the other decree-holders. One of two decree-holders applied to execute the decree and in the appropriate column of the application, the names of both were mentioned. The other decree-holder actually appeared in the execution proceedings. The Court also took steps to protect the interest of the latter. Held, that the execution application was maintainable and it could not be said to be not in compliance with O. 21, R. 15. 1941 P.W.N. 183. R. 15 does not require



Application for execution by joint decree-holder. than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

#### NOTES.

that any particular form of words should be used to express the undertaking required by Cl. (1) of that rule. Where an application for execution is made by one of two decree-holders stating that the other decree-holder will be produced at the time of the recovery of the money the application must be held to be on behalf of both, and if the undertaking in the application is observed and the other decree-holder is produced when the money is paid, all necessary protection of his interest would be secured. It would make no difference if payment or an adjustment under these conditions is made out of Court and provided that the other decree-holder is produced at the time of any payment or adjustment and is aware that the payment or adjustment is made in satisfaction of the decree, the payment or adjustment would be binding upon him. I.L.R. (1940) Kar. 461=A.I.R. 1940 Sind 230. The payment made by a judgment-debtor to one of several joint decree-holders is not binding on others, unless the decree-holder to whom the payment is made represents the other decree-holders in some way or other. But it would be binding on the person to whom it was paid, if he could give a valid discharge of his own share. 1941 O.W.N. 487=1941 O.A. 335=1941 A.W.R. (C.C.) 126. In the case of an execution application by one of joint decree-holders if express authority of the executing decree-holder to receive the decretal amount on behalf of all joint decree-holders is proved or if it is established that in fact all decree-holders have received their shares of the amount, then an adjustment binding all decree-holders can and should be recorded. But when no express authority or receipt by other joint decree-holders has been established then the provisions of O. 21, R. 15 have to be looked to. I.L.R. (1940) Kar. 461=A.I.R. 1940 Sind 230. It is not open to one of several decree-holders to apply for execution of a joint decree in respect of his share only; nor can the Court allow such execution for a share only. 1936 A.M.L.J. 32. It is incumbent on the applicant to state specifically in the application that it is filed on behalf of all the decree-holders. Omission to so state is fatal to the application. (*Ibid.*). See also 1937 A.M.L.J. 89; 17 Pat. 223=1938 Pat. 457; 49 L.W. 115=1939 Mad. 278=(1939) 1 M.L.J. 39; 1939 A.M.L.J. 154. For scope of rule, see 57 M. 696=1934 M.

330=66 M.L.J. 656. Object of rule explained. 13 Pat.L.T. 579=140 I.C. 393=1932 P. 359. Rule refers to a decree which has been passed jointly in favour of more than one plaintiff. It does not apply when the decree is passed in favour of one person only. 152 I.C. 776=1934 P. 627. Joint decree includes cases where rights of several parties have been determined by one and the same decree. 11 P. 445=1932 P. 261=139 I.C. 397. When once a joint decree is given, it ever after remains a joint decree, any act or conduct of the decree-holder notwithstanding. 8 W.R. 132. See also 17 W.R. 497. It is not competent to one of several joint decree-holders to grant full discharge of the decree out of Court or to certify to Court complete satisfaction of the decree without concurrence of all the decree-holder. 45 A. 401=74 I.C. 687=1923 A. 494; 20 I.C. 457=16 O.C. 146. In the case of joint decree-holders a payment made out of Court by the judgment-debtor to one of them can only absolve the judgment-debtor in respect of the share of that particular decree-holder. 1935 N. 25=156 I.C. 1003=31 N.L.R. 271. Where out of four joint decree-holders two decree-holders have themselves applied for execution and the third decree-holder has admitted payment, and the remaining decree-holder has taken no interest in the proceedings, Court is fully justified in permitting execution by the decree-holders without making any order as to calling the other decree-holders, (*ibid.*). A decree obtained by a father becomes a joint decree on the son subsequently obtaining a decree against the father declaring his right to a share of the debt due under the decree obtained by the father. 14 M. 252; see 5 A. 27; 10 A. 570. See also the observations in 12 M. L.J. 181=25 M. 431. Validity of execution application by one of several surviving co-parceners. See 29 Bom.L.R. 75. A manager of a joint Hindu family can give full discharge and the other members have no right beyond their share. 27 I.C. 603=60 P.L.R. 1915; see also 21 I.C. 177=25 M.L.J. 442. Decree against several persons—Death of one judgment-debtor—Right of deceased surviving to decree-holder and some judgment-debtors—Executability of decree. *Held*, (i) though O. 21, R. 16, did not in terms apply to the case, the principle underlying the section applied, namely, that where the decree-holder's right and the judgment-debtor's liability became united in one and



## NOTES.

the same individual, the decree should be treated as satisfied. 48 L.W. 32=A.I.R. 1938 Mad. 814=(1938) 2 M.L.J. 156. The rule is not applicable to the case of joint decree-holders, the execution of whose decree is conditional on their joint performance of a particular act. 6 A. 69. See also 152 I.C. 443=1934 Pesh. 40; 1937 Pat. 253. A partition decree cannot be regarded as one passed jointly in favour of all the defendants so as to enable one of them to apply for its execution for the benefit of all under O. 21, R. 15. 41 P.L.R. 135=A.I.R. 1939 Lah. 302. O. 21, R. 15, can be applied by way of analogy to a case where the right, title and interest of a judgment-creditor under a decree is assigned to more than one person jointly and severally and any one of such assignees can validly present an application for execution of the decree. Such an application presented by any one of the co-assignees is one in accordance with law and will save limitation. 43 Bom.L.R. 883. One of joint decree-holders is entitled to apply for an order absolute without joining the other party, subject to such orders as the Court might see fit to pass to safeguard the other party's rights. 11 I.C. 700=34 A. 72. See also 152 I.C. 443. And the judgment-debtor is entitled to look for a valid discharge to him who executes the decree. 7 Pat.L.T. 708=103 I.C. 75=1927 P. 329. No necessity to state in execution application that it is made by one decree-holder for the benefit of all the decree-holders—Application must not be dismissed merely because the name of one of the decree-holders is not mentioned in it. 1930 L. 603. But see 1936 A.M.L.J. 32 (noted *supra*); 1937 Pat. 253. The judgment-debtor has no right to object to any one of several joint decree-holders executing the whole decree. 8 N.L.J. 91=54 I.C. 924. Such an objection cannot be raised in appellate Court when it has not been raised in executing Court. 24 L.W. 711=97 I.C. 375=1926 M. 1198. Judge has a discretion to allow one of several decree-holders to execute the decree. 36 M. 357=24 M.L.J. 541. Where two of three decree-holders have certified satisfaction but an assignee from the third applies for recognition of the assignment and execution, Court has a large discretion under R. 15 and though it cannot entertain a plea of uncertified adjustment by judgment-debtor, yet if it smells fraud, Court is entitled to disallow execution. 56 M. 316=1933 M. 157=64 M.L.J. 22. The rule does not contemplate a case where a decree is passed in favour of two Hindu widows, and one of them alone applies for execution of the entire decree. 26 A. 318; 15 M. 343; 25 M. 431 (F.B.) and 7 C. 831. Where a decree is passed in favour of two brothers and only one of them signs the execution application and purchases property in execu-

C. C M.—121

tion, the other brother is also entitled to a share in that property. (42 I.A. 177, Foll.) 157 I.C. 482=1935 L. 484. A member of the joint Hindu firm in whose favour the decree existed is entitled to apply for execution of the whole decree for the benefit of them all, especially when all the other members of the firm have come forward in Court and stated that they had no objection to the execution of the decree by him. 151 I.C. 575=1934 Pesh. 76 (2). In the case of partners who have become joint decree-holders (and are not merely joint private creditors), one of them as such decree-holder is not competent to receive the joint decree debt so as to release the judgment-debtor from liability in execution for even a portion of the decree debt. If satisfaction of a decree should be entered on the report of one of the joint decree-holders it would amount to a violation of O. 21, R. 15, C. P. Code. If, however, express authority of the executing decree-holder to receive the decree amount on behalf of all the joint decree-holders is proved, or if it is established that in fact all the decree-holders have received their shares of the amount, then an adjustment binding on all of them can and should be recorded under O. 21, R. 2, C.P. Code. If no such express authority or receipt be proved, then O. 21, R. 15 has to be looked into. I.L.R. (1940) Kar. 461=1940 Sind 230. Decree in favour of firm can be executed by some of the partners. 131 I.C. 376=1931 L. 507. Suit in the name of a firm—Names of partners not disclosed—Payment of decree amount to a partner of the firm after dissolution operates as a valid discharge. 105 I.C. 892=1928 S. 37. Where one or any of the decree-holders file an execution application without stating on that application that they are acting in the interests of the whole body of the decree-holders, their action does not necessarily invalidate the execution application and if any such defect is pointed out amendment of the application should be allowed. But these remarks do not apply strictly where a firm is concerned. So soon as the name of the firm is entered in an application, this entry automatically signifies that the application is being made on behalf, of all the partners in the firm. 1939 A.M.L.J. 154. Court to which a decree is transferred for execution has no jurisdiction to entertain an application for bringing on record the legal representatives of a deceased decree-holder which must be made to the Court passing decree. So the execution of a decree so transferred need not necessarily be stayed. 55 I.C. 156. A decree for costs in favour of 13 defendants cannot be executed by two defendants in respect of their proportionate share of the sum awarded. 18 M. 464. Non-compliance with requirements of R. 15—Court can allow amendment subsequently. 122 I.C. 179=1930 A. 188. As to decree for costs in different Courts, see 58 I.C. 212



16. Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder :

Application for execution by transferee of decree.

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment notice of such application shall be given to the transferor and the judgment-debtor and the decree shall not be executed until the Court has heard their objections (if any) to its execution :

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

#### NOTES.

=1 Pat.L.T. 426. On the death of one decree-holder the surviving decree-holders can execute on behalf of the legal representatives also. The Court can inquire into the heirship in the course of execution when any person raises that question. 43 I.C. 1008. It is not obligatory on the Court to issue notice to the other joint decree-holders. 33 C. 306; 25 M. at 447 (F.B.). See also 96 I.C. 692=30 C.W.N. 562=1926 C. 811; 7 Pat.L.T. 27=1925 P. 591. But see 1931 L. 600=32 P.L.R. 290. Any one of the decree-holders may, unless the decree imposes a condition to the contrary, apply for execution of the whole decree. 29 I.C. 181; 1928 M. 800. A joint decree cannot be executed by one of several joint decree-holders in respect of his own share. 4 Pat. L.J. 575=53 I.C. 803; 2 Luck. 259; 97 I.C. 896=1926 O. 605. But see 32 C. W. N. 1107=1928 C. 861. Joint decree—Some applying for execution of portion of decree giving up the rest—Others not objecting though parties—Subsequent application for execution as to balance—Maintainability. 56 C. 12=117 I.C. 677=1928 C. 559. One of two joint owners of a decree, though such decree was passed in favour of one single decree-holder, can execute the decree, if the other joint owner refuses to join in executing it. When the latter has been impleaded as a party to the execution and has been served with notice, but takes no interest in the matter, his rights need not be safeguarded as required by R. 15, but the applicant cannot on that ground be refused permission to execute the decree. 39 C. W. N. 961. See also 1937 Pat. 253. Where the heirs of a deceased decree-holder are themselves parties to an execution application there is no question of any order having to be made under sub-R. (2). 1933 P. 609.

**LIMITATION.**—This rule is controlled by S. 7, Limitation Act. 130 I.C. 403=1931 L. 5. Where one only of several joint decree-holders is a minor, S. 7, Limitation Act, saves an application for execution by the

minor decree-holder from being barred. 28 C. 465. See also 25 M. 431 (F.B.). Application though defective saves limitation. 1 P. 609=69 I.C. 668. An application for partial execution is a step-in-aid of execution. 15 B. 242. If notice under this section amounts to "revivor", see 15 P. 102. Court can allow execution of cross-claims under the same decree providing safeguards for the rights of other parties. 44 I.C. 445. Similarity between the rights of each of the parties does not make partition decree a joint-decree in favour of co-sharers. 43 M. L.J. 379=70 I.C. 296=1922 M. 456. No appeal is provided against an order under R. 15 or R. 16. 70 I.C. 329=1924 M. 518. Where in execution of a decree for sale in favour of joint decree-holders, one of them purchases the property with previous leave of the Court to execute the decree on behalf of all, the other joint decree-holders have in equity a right to recover from him their share. 11 I.C. 517=33 A. 563. The decree can be executed by the decree-holder or the transferee as per S. 49 and O. 21, R. 16. Although portions of a decree can be legally transferred, the decree must be executed as a whole. 39 I.C. 654=15 P. R. 1917. See also 2 Luck. 259. An assignee of a portion of the decree amount must apply for execution on behalf of all. Where a certificate is issued on behalf of all the decree-holders there is in fact a discharge of the decree and the other decree-holders cannot execute the decree. 49 I.C. 141=1918 M.W.N. 507. Where in a joint and several decree against B and C, they were individually awarded costs as against A, A is entitled to execute his decree against only one of the judgment-debtors without deducting the costs of both, but after deducting the costs due to that judgment-debtor alone. 34 I.C. 388=3 L.W. 267.

**O. 21, R. 16: SCOPE AND APPLICATION OF RULE.**—This rule does not apply to case of devolution by survivorship. 140 I.C. 393=1932 P. 359. Under R. 16, Court has no discretion and the assignee of decree is entitled to execution as of right, provided the other



LOC. AMS.—[BOMBAY.] Rule 16. The following explanation shall be *added* to r. 16 of O. 21 :—

*“Explanation.—In an application under this rule, any payment of money made under a decree, or any adjustment in whole or in part of the decree arrived at to the satisfaction of the decree-holder, which payment or adjustment has not been certified or recorded by the Court under r. 2 of this order, shall not be recognised by the Court entertaining the application.”*

[CALCUTTA.] O. 21, r. 16. In the first proviso to r. 16, O. 21, *cancel* the words “and the decree shall not be executed until the Court has heard their objections (if any) to its execution” and *substitute* therefor the following words :—

“and until the Court has heard their objections (if any) the decree shall not be executed provided that if, with the application for execution, an affidavit by the transferor admitting the transfer or an instrument of transfer duly registered be filed the Court may proceed with the execution of the decree pending the hearing of such objections.”

[NAGPUR.] Rule 16. In r. 16, *after* the words “which passed it” *insert* the words “or to any Court to which it has been sent for execution.”

#### NOTES.

conditions mentioned in the rule have been satisfied. 1934 L. 648 (2). R. 16, does not contemplate an order of substitution being made in favour of an assignee on the basis of a deed of assignment in place of the assignor. It gives the transferee the right to apply for execution of the decree directly without the necessity of obtaining a prior order for substitution in his favour. 1941 O.W.N. 488. Where an application for execution of a decree is made by a transferee of the decree, he has to establish his title in the first instance under O. 21, R. 16, he has to apply to the Court which passed the decree, and on the notice being issued on this application, the Court will decide if the applicant is the person entitled to execute the decree. The extent of his right and the conditions on which he may in fact proceed with the execution are not touched by this decision, because the Court does not at this stage decide how far the decree can be executed, or the objections, if any, to the decree being executed. It only decides that the decree may be executed as if the application were made on behalf of the decree-holder himself. On this notice being made absolute, the only right which the transferee acquires is the right to execute the decree in the same manner and subject to the same conditions as the decree-holder himself had. Any objections raised by the judgment-debtor or his legal representatives to the execution of the decree on the score of limitation or satisfaction of the decree, etc., cannot be considered at that stage. Where the decree in question has got to be revived under O. 21, R. 22, the objections can only be considered and disposed of when the notice under O. 21, R. 22, comes to be disposed of. 43 Bom.L.R. 266. Assignee by operation of law (by succession or inheritance) can execute decree. 59 B. 417=37 Bom.L.R. 150=1935 B. 298. A legal representative of a deceased decree-holder is deemed a transferee of the decree by operation of law, and as such is entitled to apply for the execution of the decree to the Court which passed the decree, under R. 16. The transferee of a decree or the heir of a decree-holder cannot present an application for its execution unless he first

obtains an order under R. 16, that he is the person entitled to execute the decree as the transferee or the legal representative of the original decree-holder, as the case may be. Where a decree has been transferred for execution to another Court, but the decree-holder dies before starting the execution proceedings in that Court, his legal representative cannot continue the proceedings in the Court to which the decree has been transferred; he has to start fresh proceedings in the Court which passed the decree under R. 16. He has to seek an order under R. 16 from the Court which passed the decree and have that order remitted to the Court to which the decree has been transferred for execution under O. 21, R. 6 (c). If the application under R. 16 is granted by the Court which passed the decree, it may make an endorsement of that order on the decree and send a copy of the order along with the other papers to the Court to which the decree is transferred. It is after such an order is passed that the legal representative is clothed with the status of a decree-holder, and is then empowered to institute execution proceedings in the Court to which the decree is transferred. If the decree has ceased to be capable of execution by being time-barred, then the legal representative is not entitled to have an order passed in his favour under O. 21, R. 16. 41 Bom.L.R. 1190. The sons of a deceased Hindu who was the sole decree-holder are not decree-holders who can execute the decree without recognition by the Court which passed the decree on the devolution upon them of the decree. The decree is, on their father's death, transferred to them by operation of law, and O. 21, R. 16, is applicable. 50 L.W. 605=1939 M.W.N. 1046 (1)=I. L.R. (1940) Mad. 79=1940 Mad. 89=(1939) 2 M.L.J. 758. See also (1938) 2 M.L.J. 156. The phrase “transfer by operation of law” in O. 21, R. 16, should receive a restrictive interpretation and not an extensive or comprehensive meaning. The expression “assignment in writing” cannot be regarded as illustrative of the supposed general term comprised in the expression “operation of law,” the specific import of the two expressions remains unaffected by their connection with one another in R. 16. Transfers “by operation



[N.-W.F.P.] For the first proviso, *substitute* the following proviso :—

" Provided that where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor ; and unless an affidavit by the transferor admitting the transfer is presented with the application, the decree shall not be executed, until the Court has heard his objections (if any) to its execution."

[PATNA.] In r. 16—

(1) *Add* the words " or to the Court to which the decree has been sent for execution as the case may be " after the words " to the Court which passed it " ;

(2) *Delete* the words " and the judgment-debtor " from the first proviso, and in the said proviso after the word " transfer " *insert* the words " unless an affidavit of the transferor admitting the transfer is filed with the application " and *substitute* the word " his " for the word " their " and the word " objection " for the word " objections."

[RANGOON.] For the first proviso *substitute* the following :—

" Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor ; and, unless an affidavit by the transferor admitting the transfer is filed with the application, the decree shall not be executed until the Court has heard his objections (if any) to its execution."

### NOTES.

of law" are intended to be confined to testamentary and intestate succession, forfeiture, insolvency, and the like. A decree declaring the title of a party to a decree passed previously cannot be regarded as sufficient to effect a transfer "by operation of law" of the right to execute the decree within the meaning of, R. 16; nor does it *ipso facto* constitute an assignment. At best it creates a right to obtain an assignment of the decree for the purpose of realization of the debt to which the title is conferred. A person who obtains a right to obtain an assignment of a decree already obtained or the monies recoverable thereunder is not a transferee "by operation of law." I.L.R. (1939) Bom. 271=41 Bom.L.R. 371=A.I.R. 1939 Bom. 221. The expression "by operation of law" in O. 21, R. 16, means by operation of the appropriate law, but the law in force in a foreign system is not one which Courts in British India will recognise. No Court will recognise the transfer of immovable property situate within its own jurisdiction by the operation of a foreign system of law. The title to immovable property is always governed by the *lex loci*. To transfer a decree which operates upon immovable property in British India cannot be transferred by the operation of a system of law other than that of British India where the immovable property is situate. 43 Bom.L.R. 724. Where decree-holder died pending execution application, his heir and legal representative can continue the same provided he obtains order under this rule, and he need not resort to a separate proceeding. 134 I.C. 720=33 Bom.L.R. 818=1931 B. 423; 55 M. 352=62 M.L.J. 1 (F.B.) (*Overruling* 50 M. 1). This rule supersedes 9 B. 179 and 20 C. 388 at 395, 396 and gives effect to 19 M. 306; 17 C. 341; 17 M.L.J. 391. *See also* 1937 Pesh. 18 (case law discussed). A person cannot be regarded as transferee of a decree by operation of law by his merely obtaining a decree against the decree-holder entitling him to a certain share in the decretal amount. Such a person, therefore, has no *locus standi* to maintain an application under O. 21, R. 16. 1937 O.W.N. 882=A.I.R. 1937

Oudh 471. The rule does not mean that each time the assignee comes to execute the decree he should come in under this rule. 31 C.W.N. 921=104 I.C. 4=1927 C. 694. *See also* 149 I.C. 98=1934 R. 101. There can be no assignment of rights pending suit under this rule even though a decree is passed subsequently. 28 Bom.L.R. 761=1926 B. 406. As to assignment of future decree and its executability after decrees is passed. *See* 54 L.W. 429=(1941) 2 M.L.J. 631. The rule also applies to assignees of awards filed in Court. 27 C.W.N. 666=1924 C. 117, and to assignees of part of a decree. 44 M. 919=41 M.L.J. 816 (F.B.); 24 W.R. 11; 26 M. 101; 17 M.L.J. 475; 17 M.L.J. 503; 48 A. 432=24 A.L.J. 430=1926 A. 346; 27 L.W. 544=109 I.C. 872=1928 M. 142. *See also* 53 L.W. 283=(1941) 1 M.L.J. 469 (Assignment of right to recover mesne profits by way of restitution). O. 21, R. 16, is primarily intended for those cases where the name of the applicant for execution of the decree does not appear as a decree-holder in the decree but in which he bases his claim to execute on the ground that he is an assignee or transferee of one or more decree-holders. Where a preliminary decree for mesne profits is assigned pending an inquiry into the mesne profits, and the assignee is substituted and gets a final decree passed, an application by him to execute that final decree is not governed by O. 21, R. 16 or the proviso thereto. 17 Pat. 206=A.I.R. 1938 Pat. 462. The transferee of a portion of an indivisible decree cannot execute it even partially. 35 A. 204=19 I.C. 304=11 A.L.J. 249; 58 B. 226=35 Bom.L.R. 1162=1934 B. 59. But unless the whole interest is exhausted there is not a transfer within the meaning of this rule. 66 I.C. 679=1922 A. 101. *Also* 39 I.C. 654=15 P.R. 1917. A decree-holder succeeding as heir to part of the property attached to a deceased judgment-debtor can proceed against the property for the whole debt. 103 I.C. 911=1927 M. 937. *See also* 1937 Pat. 607. A decree obtained by two persons was sought to be executed by one of them alleging that the other had relinquished his right during pendency of suit. On an objection being raised the other decree-holder gave a *purshis*



## NOTES.

stating that he had no objection if the decree were executed by the applicant alone. The application ultimately failed for want of prosecution. A question being raised whether application was according to law and served as a step-in-aid of execution *held*, that the statement made by the other decree-holder in the *purshis* did not amount to a relinquishment or to an assignment of his interest in the decree. The application made in reliance of the alleged relinquishment was mistaken. It was however made by a person entitled to make it and was thus in accordance with law. 58 B. 428=36 Bom.L.R. 437=1934 B. 216. The rule lays down how a decree has to be transferred in case the transferee desires to have it executed, and recognizes only two modes of transfer, viz., (1) transfer by assignment in writing, and (2) transfer by operation of law. An assignee under an oral assignment has, as such, no *locus standi* to apply for execution. 15 B. 307. *See also* 1941 R.D. 605. An execution application based on an oral assignment cannot be a step-in-aid of execution. (1911) 2 M.W.N. 559=13 I.C. 78. Oral assignment is not valid. 43 C. 990=43 I.A. 108=31 M.L.J. 248 (P.C.); *also* 16 I.C. 807; 134 I.C. 194=1931 L. 116; 41 Bom.L.R. 33. No particular form of assignment is prescribed in the case of decrees. Anything in writing which transfers a decree and clearly shows that the intention was to assign the decree is sufficient. What is required is an assignment in substance which is in writing. 44 L.W. 336=1936 M. 543=71 M.L.J. 161. *But see also* 1937 Cal. 570 (But the writing must contain express words of assignment of decree). Where a joint application is made to the Court by the holder of a decree and another wherein it is stated that the former has no objection to surrender all his rights to the latter and that the Court should confirm that arrangement by a decree declaring the latter's title to the monies claimable under the former's decree, and the Court sanctions such arrangement, there is in effect an assignment in writing as contemplated by O. 21, I. 16. There is no provision in law prescribing a particular form of such an assignment. Some written authority proceeding from the transferor of the decree is sufficient for the Court to take action on the application of the transferee. I.L.R. (1939) Bom. 271=41 Bom.L.R. 371=A.I.R. 1939 Bom. 221. Where pending a partnership suit, the Court with a view of protecting the assets of the partnership, itself sells a decree in Court, by auction through Commissioner to the highest bidder from amongst the parties, a formal assignment in the sense of document which in form purports to assign the decree is not required by law provided the orders of the Court amount to an assignment of the decree in substance. 71 M.L.J. 161. A receipt acknowledging money paid for the sale of a decree is not an assignment in writing within the meaning of O. 21, R. 16. 1934 L. 328 (2). A transfer by operation of law means a

transfer on the death or by devolution or by succession and a transferee by operation of law would be a legal representative of the deceased decree-holder or the person in whom the interest of the decree-holder has become vested under a statute, *e.g.*, the Official Assignee of an insolvent or the purchaser at a Court sale in execution of a decree. Where the plaintiff's adoptive grandmother had during her management of the estate obtained a money decree against a certain person and plaintiff having subsequently established his right to the estate as against the grandmother sought to enforce the decree obtained by her, *held*, that the execution proceeding was not legally sustainable and that all he he could do was to apply for the appointment of a receiver or follow the procedure laid down in O. 21, R. 53. 57 B. 513=35 Bom.L.R. 795=1933 B. 367. The words "operation of law" cannot apply to a case where a person has become the owner of a decree by some transaction *inter vivos*. 44 L.W. 336=1936 M. 543=71 M.L.J. 161. *See also* 1939 Bom. 221=41 Bom.L.R. 371; 41 Bom.L.R. 1190; 43 Bom.L.R. 724; I.L.R. (1939) Bom. 271. An assignment of a decree by partition is not valid. 9 I.C. 349=13 Bom.L.R. 22. *See also* 1937 Cal. 570. A release by the benami assignee to the real assignee does not amount to an assignment and the real assignee cannot then execute the decree. 8 P.L.T. 163=101 I.C. 616=1927 P. 170. True owner can execute a decree obtained in the name of benamidar. 114 I.C. 495. Judgment-debtor has a right to question validity of decree in favour of minor assigned by guardian *ad litem* without leave of Court. *See* 70 C.L.J. 115=1939 Cal. 588=43 C.W.N. 962. Decree-holder of decree-holder does not become transferee by operation of law. 5 P. 511=7 P.L.T. 793=1926 P. 320. The transfer of a decree made by an instrument in writing takes effect from the date of the instrument and not from the date of its recognition by Court. 106 I.C. 54; 26 S.L.R. 153=1932 S. 71. Assignment of personal decree does not require registration. 106 I.C. 485=1928 M. 142. Assignee of a part of decree can apply for its execution. 1928 L. 70=107 I.C. 603. When one of several decree-holders assigns the decree, and an application to recognize the assignment is filed, Court cannot recognize the assignment in respect of whole decree in favour of the assignee but only the interest of the assignor-decree-holder. 145 I.C. 891=1933 L. 473 (1). Transfer of decree by a decree-holder after insolvency—Official Receiver can object to execution. 1928 M. 360 (2)=109 I.C. 832. Amendment of decree subsequent—Fresh notice necessary under R. 16 (1)—If omission to give notice is of a technical nature it is cured by S. 99, C. P. Code. 1930 M.W.N. 166. Where transfer was recognised by Court, which passed the decree, and execution is transferred to another Court, the latter Court cannot question transferee's right to execute. 11 P. 94=1932 P. 168=137 I.C. 472. An agent act-



## NOTES.

ing under the power of attorney obtained decrees on mortgages and pending proceedings for the sale of the mortgaged properties, the principal applied under O. 21, R. 2 for satisfaction of the decrees. But the agent assigned the decrees to a third party who applied under R. 16 for recognition of the assignment and for execution. *Held*, that it was not open to the Court to go into the question whether the alleged satisfaction was *bona fide* or fraudulent, and that the decree being alleged to have been satisfied, the petition should be dismissed. 144 I.C. 237=1933 M. 523=64 M.L.J. 732.

APPLICATION.—Transferee should apply for execution of decree, and cannot apply merely for recognizing him as transferee. 14 M.L.J. 393; 14 M.L.T. 513=21 I.C. 609; 105 I.C. 611=4 O.W.N. 1021. *See also* (1939) 2 Cal. 325. The proper procedure to be followed by the transferee of a decree under O. 21, R. 16, is that he must first apply for execution of the decree to the Court which passed the decree, and pray that the usual notice do issue. After the objections, if any, are heard and the notice is made absolute, the decree may be executed by the transferee in the same manner and subject to the same conditions as if the application were by the decree-holder. 39 Bom.L.R. 540=1937 Bom. 365. The notice required by that rule must first be issued by the Court which passed the decree. Such a notice cannot be issued by the transferee Court. It is only when the notice is made absolute that the transferee acquires a right to apply for execution under R. 11 (2). 39 Bom.L.R. 540=1937 Bom. 365. There is no authority for the proposition that from the date of assignment of his decree the assignor-decree-holder is precluded from executing the decree. Until the necessary application under O. 21, R. 16, is made to the Court which passed the decree by the assignee thereof, the only person who can execute it is the person whose name appears on the record as the decree-holder, i.e., the assignor. 1939 Rang.L.R. 152=A.I.R. 1939 Rang. 245. Application by transferee to be brought on the record without asking for execution of decree is not an application in accordance with law, as it is not an application for execution of the decree; (Case-law discussed.) 27 S.L.R. 314=1933 S. 341. *See also* 1935 S. 26. But *see* 1933 R. 55. The prayer for substitution is necessarily implied in an application by a transferee for execution of the decree under R. 16 and the substitution of his name is in practice generally made before execution is proceeded with. 1935 N. 230. Application by assignee, for notice to issue under this rule, is an application for execution. 29 C. 235. *See also* 1936 A.M.L.J. 79. Application under—If can be combined with application under S. 39—Form and contents of—Tabular statement—Necessity—Calcutta High Court Rules (Original Side), Ch. 17, Rr. 1 and 2. *See* 39 C.W.N. 961. *Assignee of the decree*, and not merely *the transferee of the property forming the subject-matter of the suit*, can apply. 66 I.C. 878=1922 A. 98; 3 Pat.L.T.

625=69 I.C. 959=1922 P. 563; 4 A.L.J. 759. *See also* 55 I.C. 983=28 P.L.R. 1920. If a person obtains a decree for possession of certain property and sells portions of it to others the vendees could not apply to execute the decree. 4 A.L.J. 759; 98 I.C. 856=1927 M. 240. As to whether transferee of a pre-emption decree can apply under this rule, *see* O. 20, R. 14. Transferee of a decree for costs can apply. 7 A. 457. When decree has been assigned by one assignee to another the second assignee can apply under this rule even though the first assignee has not applied. 9 A. 46. A creditor who attaches a decree is in much the same position as the transferee of a decree under this rule. 15 C. at 376. *See also* 1936 A.L.J. 1355=1937 A. 63. Assignment during pendency of execution proceedings dates back to the date of execution application. 9 I.C. 549=13 Bom.L.I. 22. The provisions of this rule are mandatory; non-compliance renders all proceedings void. 2 L. 230=63 I.C. 884. *Also* 56 I.C. 461; 5 Pat.L.J. 390=57 I.C. 250; 54 C. 624. Transferee is entitled to the benefit of an attachment obtained by his transferor and can apply to execute for further sums becoming due under the decree in addition to the sum originally sought to be executed for. 13 M.L.T. 145=18 I.C. 691. Where properties were sold "with all arrears of rent" the purchaser should be treated as the assignee of the rent decrees as well. 57 I.C. 874=25 C.W.N. 863. But *see* 59 C. 297=137 I.C. 857=1932 C. 439. The assignee of a decree *pendente lite* is entitled to execute the appellate decree. 35 M.L.J. 294=44 I.C. 849. Where the assignee of a decree, has, at the time of assignment, knowledge of a suit pending at the instance of the assignor's judgment-debtor against the assignor, he purchases the decree subject to the right of the judgment-debtor to claim a set-off when he comes to execute his decree. 161 I.C. 45=8 R. Pesh. 154=1936 Pesh. 33. If there is an assignment pending proceedings in execution taken by decree-holder, there is nothing in the Code debarring Court from recognizing transferee as the person to go on with execution 26 C. at 253. *See also* 16 A. 133; 12 M.L.J. 348; 167 I.C. 575=1937 Pesh. 18. [1931 B. 423; 1930 C. 614; 1926 C. 957; 3 I.C. 324; 26 Cal. 250; 1932 M. 73 (F.B.); 1921 P. 180; 1924 P. 576 and 1930 Sind 283, Rel. on; 1927 All. 165 (F.B.), Diss.] Assignee of a preliminary mortgage-decree for sale cannot ask for execution, and for passing of the final decree under this rule. He must first get a final decree. 32 I.C. 981. Regarding assignment of preliminary decree in partition suit, *see* 24 L.W. 392=97 I.C. 754=1926 M. 1129. It is not necessary that transfer should be effected before the death of the judgment-debtor. If effected after his death, transferee can take out execution against his legal representatives. 11 B. 727. If the assignor is dead the assignee will be required to produce a succession certificate. 15 M. 419. But it may be produced at any time during the pendency of the proceedings. 19 C. 482. When a minor succeeds to an estate which, up to the



## NOTES.

date it fell into his hands, had been in possession of the executrix, there is a succession or transfer by operation of law. 16 C. 347 at 349; 11 B. 368. See 4 C.W.N. 785 and 21 M. 353 at 356. If a Hindu female such as a widow or daughter suing on behalf of an estate to recover property represents the ultimate male heirs entitled to the estate, they are bound by the litigation and they can take the benefit of it. But there is no principle which can avail the widow of the last male owner to enable her to execute the decree wrongly obtained by a person claiming to be the adopted son of the last male owner but whose adoption was subsequently found to be invalid. 1933 M. W. N. 1148. Assignee of a decree which has been attached can still execute it, but subject to the rights of the attaching creditor. 17 I.C. 323=13 M.L.T. 227. Assignment of decree is not affected by subsequent order of attachment. 26 S.L.R. 158=1932 S. 164; 26 S.L.R. 153. Till a transferee is brought on record he has no right to execute the decree. He cannot question attachment of the decretal amount deposited to the creditor of his assignor if before that his assignment had not been recognised. 4 R. 426=99 I. C. 309=1927 R. 55. Assignee can enter up satisfaction without an execution application. 17 I.C. 617=12 M.L.T. 592. He can execute the decree and his rights can be determined even though he himself has not filed the execution application. 4 Lab.L.J. 259=1922 L. 396. Assignment of rights prior to decree. 30 I.C. 831. Equities between decree-holder and judgment-debtor will be taken into consideration against transferee. Plea of partial failure of consideration for assignment, if can be raised by the assignor as well as by the judgment-debtor. 4 P. 120=1925 P. 449; 137 I.C. 715=1932 M. W. N. 326=1932 M. 327. Judgment-debtor cannot plead uncertified payment in application by transferee. 149 I.C. 218=1934 A.L.J. 763=1934 A. 445; 1934 S. 205. Judgment-debtor cannot question on assignment for inadequacy of consideration for assignment. 20 I.C. 685=18 C.W.N. 450. But he has got a right of appeal against an order recognising transfer of a decree. Order allowing execution by assignee-decree-holder is not appealable as an order but is appealable under S. 47. 1934 L. 328 (2); 26 I.C. 944=2 L.W. 109. In the absence of allegation of fraud, want of consideration is immaterial, if the transferor and transferee are agreed. 26 I.C. 685=18 C.W.N. 450, or unless the assignment is a sham transaction. 49 I.C. 141=1918 M.W.N. 507. See also 1932 M. 327=137 I.C. 715=1932 M.W.N. 326. When transferee applies under this rule judgment-debtors cannot contend that the decree was obtained by fraud. 15 B. 307; but can contend that transfer was fraudulent. 23 I.C. 951=1 L.W. 206. See also

28 C.W.N. 963=1925 C. 23. Where a decree is handed over to a trustee by the decree-holder and the trustee makes no application under R. 16, but a joint application for execution is made by the trustee and decree-holder, the joint application can be looked upon as two separate applications of two different sets of persons amalgamated for purposes of convenience and hence even though the trustee can be disallowed to execute the decree, the decree-holder can be allowed to do so. 146 I.C. 872=1933 L. 638. A Civil Court to which an award made by a Registrar of Co-operative Societies under the Co-operative Societies Act has been transmitted for execution has jurisdiction to recognise an assignment of the award under O. 21, R. 16. 50 L.W. 507= (1939) 2 M.L.J. 596.

TO WHAT COURT APPLICATION MADE.—Application can be made only to Court which passed the decree. 25 A. 443; 27 C. 448; 132 I.C. 183=1931 L. 499; 11 P. 94=137 I.C. 472=1932 P. 168; 1937 Oudh 111 (*noted infra*); 39 C.W.N. 961. But an order by a Court to which the decree is sent for execution is not void. 17 M.L.J. 300; 1934 L. 648 (2). The provision contained in R. 16 does not mean that the Court, which passed the decree and to which an application has to be made for execution by a transferee of the decree, ceases to be an execution Court. The application of the transferee must be an application for execution of the decree. 1934 A.L.J. 768=149 I.C. 218=1934 A. 445. The legal representatives of the decree-holder can be brought on record even in the Court to which a decree is transferred for execution. 71 I.C. 409=1923 N. 105; 1935 S. 26. So also the official liquidator of a bank under liquidation. 161 I.C. 662=1936 L. 152. The Court must enquire into the validity of an assignment if questioned. 23 I.C. 951=1 L.W. 206. See also 24 I.C. 766; 28 C.W.N. 963=84 I.C. 68=39 C.L.J. 590=1925 C. 23; but should not enquire into the bad faith of the transferee, while recognising the transfer. 33 I.C. 71 (*Doubting 19 M. 230*). Objection to execution by transferee of decree on the ground that transferee is merely *benamidar* for judgment-debtor, should be raised in the course of proceedings taken on the application under R. 16. Such an objection could not be entertained by the Court to which the decree is transferred for execution. 165 I.C. 891=1936 O.W.N. 1236=1937 Oudh 111. The decree-holder can always execute the decree if the transferee is not on record and has not applied for execution. 29 M.L.J. 698=31 I.C. 542; 34 I.C. 791=3 L.W. 521; 1933 S. 119=144 I.C. 50; 146 I.C. 872=1933 L. 638; 152 I.C. 443=1934 Pesh. 40; 1935 A.L.J. 1179=1935 A.W.R. 1108=1935 A. 1001; 1935 N. 230. Where the decree is satisfied the transferee decree-holder cannot thereafter apply to execute the decree over again. Whatever rights he may have are available



## NOTES.

only against the executing decree-holder and not against the judgment-debtor. 41 L.W. 295=1935 M. 383=68 M.L.J. 392. The executing Court cannot refuse to allow execution at the instance of the transferor till the transferee is formally recognized by the Court by substitution of his name for that of the original decree-holder. Whether such substitution is accomplished by an order of the Court passed upon a separate application made by the transferee under O. 22, R. 10 or upon an application by him for execution of the decree under O. 21, R. 16, C. P. Code, is immaterial. 1935 N. 230. It is also immaterial whether assignment is before filing or during pendency of execution petition. 37 Bom.L.R. 489=1935 B. 331. The judgment-debtor cannot object on the ground that the decree has been assigned. 18 I.C. 97=16 O.C. 70. Auction-purchaser, purchasing certain decrees of his judgment-debtor, is a transferee of those decrees. 22 M. L. J. 161=13 I.C. 324. Judgment-debtor cannot plead uncertified adjustment in opposition to application under R. 16, by the decree-holder. (47 B. 643, Not foll.) 55 M. 720=1932 M. 372=62 M. L.J. 562 (F.B.). But it can be pleaded when the adjustment is recited in the deed of transfer itself. In such cases, transferee cannot execute for whole amount ignoring uncertified payments. (1937) 1 M.L.J. 296.

NOTICE.—The notices to which reference is made in O. 21, R. 16, are merely for the benefit of the transferors and the judgment-debtors and it was apparently the intention of the Legislature to ensure that execution proceedings should not be continued unless the transferors and the judgment-debtors had had a suitable opportunity of coming forward to contest the validity of the assignment if they wished to do so. If, however, the persons directly interested waive their right, acknowledge the validity of the assignment and raise no objection so far as the execution proceedings are concerned, non-compliance with the technical requirements of O. 21, R. 16 would not render a sale a nullity, which had been held in the course of execution proceedings in which notices under O. 21, R. 16 had not been served. 43 C.W.N. 743=A.I.R. 1939 Cal. 419. The service of notice under O. 21, R. 16, is an essential pre-requisite to the assumption of jurisdiction by the Court in a proceeding to execute the decree, if the application for execution purports to have been made by one who is not the original decree-holder but describes himself as an assignee of the decree-holder. The non-service of such notice makes the sale held in execution of that decree void *ab initio*, although the purchaser is not the decree-holder himself but an absolute stranger. 178 I.C. 257=42 C. W. N. 949=A.I.R. 1938 Cal. 734. A transfer by operation of law is not an assignment and no notice is necessary under the proviso. 152 I.C. 776=1934 P. 627.

See also I.L.R. (1938) All. 425=1938 A.L.J. 308=1938 All. 256. A decree passed in favour of brothers was allotted to one of the brothers on partition. Execution application was filed by such brother for his own benefit and notice of application was sent only to judgment-debtor. *Held*, that the case came within R. 16 and not under R. 15, that notice to the other brothers was necessary under law, that failure to issue notice though it affected the validity of the execution proceedings, did not warrant the dismissal of the application and that notice should be sent to the other brothers. 145 I.C. 715=1933 L. 432. See also 1933 P. 658=147 I. C. 101. Where notice of assignment and warrant of attachment were issued, but the judgment-debtor objected, it was held that the attachment ought not to be allowed before hearing the objections. 12 I.C. 547=36 B. 58. The judgment-debtor cannot be said to have acquiesced in an order of attachment, when no notice of assignment is served on him. (*Ibid.*); 39 I.C. 952=118 P.L.R. 1917. Execution sale by transferee of mortgage-decree—Subsequent mortgagee not served—Sale binds mortgagor though not mortgagee. 1930 A. 627=52 A. 898. Failure to serve notice on the judgment-debtor or his representatives renders void the proceeding in which the failure occurred as well as subsequent proceedings. 1930 M.W.N. 1187=137 I.C. 171=1931 M. 192. But executing Court has to presume that due notice was given to the judgment-debtor. If there is any defect in the execution application the judgment-debtor should make his objection to the Court which passed the decree. Where he does not do so he cannot object that he had no notice of the transfer and that the executing Court was not competent to execute the decree. 30 S. L.R. 249=1936 Sind 191. Omission to object to a notice of assignment amounts to ratification. 83 I.C. 142=1925 A. 206 (2); 8 Pat.L.T. 163=101 I.C. 616=1927 P. 170. Where an assignee of a decree files an application for execution and sends notice to the assignor and judgment-debtor under O. 21, R. 22, but not under R. 16 and the judgment-debtor does not let in evidence challenging the assignment, the assignee is entitled to proceed with the execution without proving, in the first place, the assignment in his favour. 149 I.C. 1003=1934 P. 9. Substituted service of notice is good service. 28 I.C. 219=1 L.W. 351. The notice is not about the assignment but of the execution proceedings. 62 I.C. 30=6 P.L.J. 358. Therefore he can appeal against the order of recognition. 33 I. C. 71. When want of notice is not pleaded in prior execution proceedings, the judgment-debtor cannot do so in his application to set aside sale. 57 I.C. 707=5 Pat.L.J. 639. See also 43 C.W.N. 743=1939 Cal. 419. Sale held in execution of a decree by assignee without notice to assignor is nullity. 54 C. 624=105 I.C. 193=1927 C. 781; 117 I. C. 614=1929 A. 437. If a decree was



## NOTES.

transferred by assignment after the death of the judgment-debtor notice of the transfer may be served on his legal representatives. (*Ibid.*) See also 30 M. 541. The proper stage to object to a transfer is when the notice is served, and not when the transferee tries to execute the order. 87 I.C. 436=1925 A. 662; 30 S.L.R. 249=1936 Sind 191. Issue of a combined notice under O. 21, Rr. 22 and 16 upon the judgment-debtor is sufficient under the law to save limitation, 1933 P. 658. Under R. 16, if a person applied to the Court for his being recognised as an assignee decree-holder and for transmission of the decree from that Court to another, it is clearly a petition for execution. A transferee decree-holder must not only ask for his being brought on record but must in the same petition apply for execution of the decree. Where the Court makes an order recognising the assignment to a decree-holder after notice to judgment-debtor, but the decree-holder takes out another application within one year from the date of the last order against the party against whom execution is applied for, no notice is necessary owing to proviso to R. 22, O. 21. 145 I.C. 974 (1)=65 M.L.J. 682=1933 M. 797.

PROVISO (2).—The proviso refers to a decree for money personally due by two or more persons. It does not apply to a case in which nothing is due from the assignee of the decree personally. 11 C. at 396. See also 5 A. 27; 17 Pat. 206=1938 Pat. 462. Nor to a case where decree-holder by inheritance acquires an interest in the estate of one of the judgment-debtors. 54 A. 448=1932 A. 704=137 I.C. 50. "Decree for money against several persons" is not restricted to personal decrees for money. 19 N.L.R. 151=1924 N. 41. But a mortgage decree for sale is not a money decree. 12 I.C. 70=16 C.W.N. 132; 49 M. 508=1926 M. 623=51 M.L.J. 139; 70 C.L.J. 143=1939 Cal. 425. The proviso therefore does not apply to mortgage decrees as such, but it comes into operation only after the property is sold and a personal decree is passed. 1937 Sind 112. The proviso has no application to the converse case where the decree-holder acquires a share in the estate of one of the judgment-debtors. The decree-holder is, however, bound to give credit for a proportionate amount of the decree. 157 I.C. 651=1935 O. W. N. 887=1935 Oudh 449. An agreement between one of several judgment-debtors and an assignee of the decree that the decree should be executed against the remaining judgment-debtors is an agreement in contravention of the express provisions of O. 21, R. 16, second proviso and cannot be enforced or recognised by any Court. 54 L. W. 144=(1941) 2 M. L. J. 167. If the assignee is a joint judgment-debtor, he cannot execute it. 28 I. C. 906. See also 44 I. C. 269=27 C.L.J. 110; but can sue for contribu-

C. C. M.—122

tion. 20 I.C. 569=18 C.W.N. 113. But a transfer to the pleader for the judgment-debtor does not satisfy the decree though assigned to him in trust for his clients. If called upon he is bound to assign the decree to them, but upon equitable terms only. 22 C.W.N. 491=44 I.C. 13. Transfer brought about by death is not excluded from the operation of the proviso. 98 I.C. 26 (2)=1926 M. 1141=51 M.L.J. 443. Proviso is one of procedure only and does not create rights and liabilities. 1930 R. 308=128 I. C. 584. Where the Court recognises the original decree-holder on the record as entitled to execute the decree and allows him to proceed with the execution and the decree is satisfied thereby, the transferee decree-holder cannot thereafter apply to execute or be heard to say that he should execute the decree over again, when he has not taken any steps previously to get himself recognised as the transferee decree-holder. Whatever rights he may have are available only against the executing decree-holder and not against the judgment-debtor. 41 L.W. 295=68 M.L.J. 392=1935 M. 383.

A BENAMI ASSIGNEE can execute. 37 A. 414=29 I.C. 593; 20 I.C. 685=18 C.W.N. 450. See also 43 I.C. 801=7 L.W. 201; 62 I.C. 299; 21 M. 388. But where the transferee of a decree is found to be a benamidar for the judgment-debtor, the Court is bound to refuse execution. 32 I.C. 952=40 M. 296. Also 35 M. 659=12 I.C. 657. Whether transferee is benamidar for judgment-debtor must be decided by Court. 95 I.C. 706=1926 L. 666; 131 I.C. 229=1931 L. 545. This is so even though the assignee is benamidar for one of the judgment-debtors. (4 C.W.N. 334, Foll.) 43 M.L.J. 761=1922 M. 510. Also 35 I.C. 624=4 L.W. 534. An objection by a judgment-debtor under the second proviso to O. 21, R. 16, that the purchaser of the decree whose name has been ordered to be substituted is a benamidar for one of the judgment-debtors, is not barred by *res judicata* by his failure to raise that objection when notice of the application for substitution was served on him, if he was not aware of that fact at that time. 1938 O. W.N. 346=A.I.R. 1938 Oudh 106. An arrangement between decree-holder and some of the judgment-debtors that they must pay the entire decree amount to him and that he must execute the decree against the other judgment-debtors and realise the amount due and pay it to them is not prohibited by this rule. 99 I.C. 902=1927 M. 322=52 M.L.J. 59. A benamidar is competent to take out execution of a decree as the transferee thereof. 39 C.W.N. 1073. The real transferee owner of a decree cannot apply for execution on the ground that the transferee was his benamidar and his agent. Only the benamidar is entitled to execute. 48 M. 553=48 M.L.J. 419; 8 L. 35=100 I.C. 545 (1)=1927 L. 110; 119 I.C. 542. See also



17. (1) On receiving an application for the execution of a decree as provided by rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

#### NOTES.

17 Pat. 223=1938 Pat. 457. An alleged real owner cannot apply to the Court to recognize and allow him to execute the decree. The existence of a declaratory decree to the effect that a benami relationship exists between the two parties does not make any difference. 149 I.C. 122=1934 M.L.J. 471=67 M.L.J. 87. But where the ostensible decree-holder has executed a deed of relinquishment in favour of her husband alleging therein that the latter was the real decree-holder, the deed of relinquishment amounts to an assignment of the decree and the husband is entitled to apply under R. 16. (48 M. 553; 1927 P. 170, Dist.) 146 I.C. 626=1933 A.L.J. 248=1933 A. 188. Benamidar—Transferee—Application by—Maintainable, where the alleged real owners are parties to the application and assent to its being entertained. 1929 P. 1=7 P. 726. Transfer of a decree to a relative of a judgment-debtor does not amount to a transfer to a judgment-debtor. 1929 A. 792. The rejection of an application for substitution in the place of the decree-holder does not operate as *res judicata* to a subsequent application under this rule. 1925 O. 417=12 O.L.J. 538. No suit will lie to establish a right to execute a decree, when an order dismissing an application under this rule has been allowed to become final. 28 A. 613. But see 20 A. 539; 10 M.L.J. 27; 1 A.L.J. 61. See also 7 A. 457. In such a case the assignee can sue the assignor for recovery of the money paid. 16 M. 325; 20 A. 539. An appeal lies against an order refusing an application by assignee. 1 A.L.J. 61=25 A. 443; 25 M. 383. See also 12 C. 610; 16 A. 483 and 27 C. 670. No appeal lies against an order dismissing an application to be brought in as the legal representative of a deceased judgment-creditor. 16 M.L.J. 27.

O. 21, Rr. 16 and 18.—O. 21, R. 18, is not inapplicable to the case of an assignee of a decree and R. 16 is no bar to the application of R. 18. When a question of cross-decrees arises the provisions of R. 18, cannot be ignored. 1937 A.L.J. 1371=A.I.R. 1938 All. 130.

O. 21, R. 17.—Where an application for execution of decree which is presented within time is illegally returned by the Court

to the decree-holder for correction and the decree-holder files it some months after it had been returned, the application presented is not a fresh one but the original one itself and R. 17 has no application. 144 I.C. 288=1933 O. 288. See also 145 I.C. 891=1933 L. 473. 66 C.L.J. 57; 1937 Bom. 365=39 Bom. L.R. 540. Under R. 17, execution, Court has a discretion to allow amendments in an application for execution. 60 I.A. 83=60 C. 362=1933 P.C. 68=64 M.L.J. 421 (P.C.). If power to order amendment is defined by this section. 39 C.W.N. 1144. Under S. 245 of the old Code the Court was bound to reject an application not amended as per orders. Under the present rule time for amendment may be extended, or applicant can show that no amendment is necessary 17 N.L.R. 179=63 I.C. 971; 60 C. 662=60 I.A. 83=64 M.L.J. 421 (P.C.). Also 23 C. 217. For the case-law under the old Act, see 16 M. 152; 17 C. 631 (F.B.) and 26 M. at 103. "As nearly as may be." For the meaning of these words, see 16 B. at 114. As to defects which could or could not be cured by an amendment, see 49 I.C. 982=32 P.W.R. 1919. Also 118 P.R. 1912=18 I.C. 516. Under O. 21, R. 17, it is open to the Court at any time, up to and including the hearing, to make an amendment of an application for execution under the terms of the rule. Where an application for execution by attachment of immovable property, does not specify any property, an application to amend by giving the particulars of the property to be attached may be allowed at the hearing of the application. R. 17 gives express power to the Court to make amendments and the fact that limitation has expired is irrelevant. Even apart from O. 21, R. 17, the Court has a general jurisdiction to allow amendments. I.L.R. (1938) Bom. 708=40 Bom.L.R. 676=A.I.R. 1938 Bom. 405. Rowland, J.—The C. P. Code does not make provision for amendment of applications to execute a decree except for the purpose of removing formal defects by reason of which the applications fail to conform to the requirements of O. 21, Rr. 11 to 14, and the decree-holder applies to amend the application under R. 17. Otherwise there is nothing in the Code itself to warrant an execution proceeding being carried on in a different form from that in which it is started. 21 Pat.L.T. 407=A.I.R. 1940 Pat. 571. Under O. 21, R. 17, where an execution appli-



(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application :

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

#### NOTES.

Execution returned for satisfying any of the requirements of O. 21, Rr. 11 to 14, is re-presented, the effect is that the re-presentation dates back to the date of the original presentation. The mere fact that a list of the properties to be sold for realising the decree amount was not given in the original application would not deprive the decree-holder of the benefit of O. 21, R. 17 (2). 1940 M.W.N. 547=1940 Mad. 893. Court has power either to return for amendment or to reject an application not complying with Rr. 11 to 14 of this order. 1 P. 149=69 I.C. 200. Decree-holder is not bound to proceed against properties of judgment-debtors first. 1926 L. 110. An application to file a fresh list of properties against which execution is also prayed for, is not an amendment of the execution petition. 2 P. 787=74 I.C. 144. Where a vakil is duly authorized to present the application one not in accordance with the *vakalat* was not dated, does not make the application one not in accordance with law. 26 M. 197 (198). But see 34 L.W. 546=61 M.L.J. 516. Defects of form not affecting the merits should be allowed to be remedied. See 17 C. at 636. When an amendment is not made within the time allowed, the application does not stand rejected unless an order is made to that effect. 8 C. 479. A rejected application under this rule is not a step-in-aid of execution. 37 I.C. 916=21 C.W.N. 835; also 8 N. L.J. 91; 28 C.W.N. 988=84 I.C. 747=1925 C. 102. When permission is granted with no time fixed to file list of immovable property, if the list is filed after the period of limitation, the execution application is barred. 22 I.C. 337=18 C.L.J. 538. Amendment of execution petition by addition of a fresh list of properties—Objection not taken by judgment-debtor at the time—Subsequent objection that decree was barred at the time of amendment not entertained. 34 C.W.N. 139. A filing of a fresh list of properties sought to be attached and sold should be treated as a continuation of the original application. 22 C.W.N. 540=44 I.C. 553. If application is within twelve years but amendment is after 12 years, the application is not barred. 45 M.L.J. 651=1924 M. 367; the amendment will be deemed to have effect from the date of first presentation. 35 I.C. 876=31 M.L.J. 561. See also 40 Bom.L.R. 676=1938 Bom. 405. As to competency of application to amend execution petition after 12 years from date of decree, see 71 M.L.J. 256. Amendment of execution application—Principle governing—Substantive application barred—Amendment of the same whether permissible.

8 P. 462=1929 P. 407. Where application for execution though wrong has been admitted by Court not noticing the defect, and afterwards Court allows the application to be amended though period of limitation has been over, the amendment is effective from the date of the admission of the application; 152 I.C. 443=1934 Pesh. 40. So also where an execution application is filed within the time *bona fide* against a wrong representative and amendment is allowed bringing right person, but after 12 years period of limitation. 41 L.W. 173=1935 M. 161=68 M.L.J. 261. Execution application against only one of two executors—Subsequent amendment by addition of other executor is permissible. 11 P. 508=1932 P. 306=139 I.C. 840. So also amendment as to right to execute decree by survivorship instead of by succession. 59 C. 1266=36 C.W.N. 618=1932 C. 766. So also amendment of application for rateable distribution under S. 73 into execution application under this rule. 9 O.W.N. 1079=1933 O. 75. Permission to amend may be granted not only when application is presented but also at any subsequent date. 11 P. 546=13 P.L.T. 318=1932 P. 222. O. 21, R. 17 (1), requires a substantial compliance with Rr. 11 to 14, and if an application is defective, the Court can in its discretion allow the defect to be remedied either then and there or within a time to be fixed by it. It can allow an amendment under the rule, where the amendment is applied for after the expiry of the statutory period of limitation, provided the execution application has been made within time. An amendment of the application made after the period of limitation, should not be dismissed on that ground, but must be considered on its merits, having regard to all the circumstances of the case. The Court has a discretion which it must exercise with regard to all the circumstances. If the amendment will not prejudice the rights of the other parties existing at the time of the application for amendment, the Court can allow it; and the amendment, if allowed, relates back to the date of the application for execution which must have been made within time. I.L.R. (1937) Bom. 691=39 Bom.L.R. 540=A.I.R. 1937 Bom. 365. See also 66 C.L.J. 57. In execution of final mortgage decree for sale, if affidavit and encumbrance certificate is filed later, the Court should deal with him under this rule. 1932 A.L.J. 578=1932 A. 484=139 I.C. 201. Amendment of execution application—Final decree in mortgage suit—Execution—Subject to decision of appeal from preliminary decree—Necessity to amend final decree or for fresh final decree—Amendment may be



LOC. AMS.—[ALLAHABAD.] Between the words "been complied with" and "the Court may" insert the words "and if the decree-holder fails to remedy the defect within a time to be fixed by the Court."

[CALCUTTA.] O. 21, r. 17 (1) :—

Cancel the words "the Court may reject the application or may allow the defect to be remedied then and there, or within a time to be fixed by it" and substitute therefor the following words :—

"the Court shall allow the defect to be remedied then and there or within a time to be fixed by it. If the defect is not remedied within the time fixed the Court may reject the application."

[LAHORE.] For the words "and if they have not been . . . to be fixed by it" in sub-rule (1) of r. 17, substitute the following words :—

"and if they have not been complied with, the Court shall fix a time within which the defect shall be remedied, and if it is not remedied within such time, may reject the application."

[MADRAS.]<sup>1</sup> (a) Substitute the following for sub-rule (1) :—

"(1) On receiving an application for the execution of a decree as provided by r. 11, sub-r. (2), the Court shall ascertain whether such of the requirements of rr. 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application if the defect is not remedied within a time to be fixed by it."

(b) Add the following proviso at the end of the rule :—

"Provided that where an execution application is returned on account of inaccuracy in the particulars required under r. 11 (2) (g), the endorsement of return shall state what in the opinion of the returning officer is the correct amount."

[NAGPUR.] Rule 17.—In sub-rule (1) of r. 17 for the words "and, if they have not been complied with . . . within a time to be fixed by it" substitute the words "and if they have not been complied with, the Court may allow the defect to be remedied then and there, or may fix a time within which it should be remedied and, in case the decree-holder fails to remedy the defect within such time, the Court may reject the application."

[OUDH.] In Oudh for "and, if . . . fixed by it" substitute "and if they have not been complied with the Court may allow the defect to be remedied then and there or may fix a time within which it should be remedied; and, in case the decree-holder fails to remedy the defect within such time, the Court may reject the application."

[PATNA.] O. 21, r. 17. In r. 17 (1) substitute the following for the words "the Court may reject the application, etc." to the end of the sub-rule :—

"the Court shall allow the defect to be remedied then and there or within a time to be fixed by it, and, if the decree-holder fails to remedy the defect within such time, the Court may reject the application."

[RANGOON.] 17. (1) For the words "The Court may reject the application or may allow the defect to be remedied then and there or within a time to be fixed by it" the following shall be substituted, namely :— "The Court may reject the application if the defect is not remedied within a time to be fixed by it."

18. (1) Where applications are made to a Court for the execution of cross-

#### LEG. REG.

<sup>1</sup> Vide Fort St. George Gazette, dated 20-10-36, Part II, pp. 1394—1396.

#### NOTES.

allowed of execution petition in accordance with modification in appeal—Procedure. (1937) 1 M.L.J. 407=1937 Mad. 421=45 L. W. 278.

O. 21, R. 17 (4).—See 152 I.C. 1028; 153 I.C. 1024=1935 P. 143. Decree-holder applying for attachment of land as belonging to judgment-debtor—Mutation in favour of third person—Court, cannot decline to attach. 37 P.L.R. 33=152 I.C. 1028=1935 L. 114. Rent decree—Execution as money decree—Objection to decree-holder's valuation of properties—Power of Court to take evidence and to release part of the properties. 153 I.C. 1024 (1)=1935 P. 143.

O. 21, Rr. 18 and 19—SCOPE OF—IF EXHAUSTIVE.—The provisions of the Code regarding a set-off are contained in Rr. 18 and 19 of O. 21. It is clear that those rules have been specifically restricted in their application and unless a case can be brought strictly within the terms of those provisions, no set-off can be allowed. 173 I.C. 719=A.I.R. 1937

Pesh. 83. Rr. 18 and 19 of O. 21, are not exhaustive of the cases in which a set-off may be allowed in execution proceedings. The Court, apart from these rules; has inherent jurisdiction on equitable principles to allow a set-off of claims arising at different stages in the same suit or proceeding, and this even if the right to recover the claim sought to be set-off is barred by time. Costs payable to one party by another in an appeal from a final decree in a partition suit can be set-off against the amount payable by that party to the other under final decree, when the latter applies to execute the decree in his favour. 32 S.L.R. 162=A.I.R. 1938 Sind 31. See also 41 P.L.R. 385=1939 Lah. 85.

O. 21, Rr. 18—20: PRINCIPLE OF THE RULES.—If X has a decree against A and A and B have a decree against X, it is clear from illustration (b) to R. 18 as well as on principle, that X cannot insist on a set-off. But if B and A both ask for the set-off and it appears that A incurred the debt to X on behalf of himself and B, the set off need not necessarily be refused. It is true that under Rr. 18 to 20 of O. 21, C. P. Code, the set-off of decrees is not a discretionary matter depending upon equitable considerations such



Execution in case of cross-decrees. decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court, then—

(a) if the two sums are equal, satisfaction shall be entered upon both decrees; and

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction of the decree for the smaller sum.

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

(3) This rule shall not be deemed to apply unless—

(a) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suit; and

(b) the sums due under the decrees are definite.

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.

#### NOTES.

as may emerge from the circumstances that both decrees arise out of the same transaction. Whatever they arise from, circuity of proceedings thereunder can be avoided and should be avoided—this is the principle of the rules. 64 I.A. 67=16 P. 127=(1937) 1 M.L.J. 254 (P.C.). All that R. 20 lays down is that the provisions of Rr. 18 and 19 shall apply to cross-mortgage decrees, i.e., if two contending parties hold mortgage decrees against each other then they will be able to set-off decrees one against the other. There is nothing in the provisions of R. 20 which will warrant the Court in holding that a decree obtained on foot of a mortgage becomes a decree for payment of money and therefore it can be set-off against a simple money decree held by the opposite party. 1936 A.W.R. 405=1936 A.L.J. 562=1936 A. 639.

**O. 21, R. 18: CROSS-DECREE AND CROSS CLAIMS.**—O. 21, R. 18 is not affected by S. 73 (rule as to rateable distribution). 1937 A.L.J. 1371=1938 All 130. The provisions as to set-off contained in R. 18 are exhaustive and no set-off on grounds other than those mentioned in it is permissible. Nor can S. 151 be invoked for such purpose. 138 I.C. 285=1932 L. 537. The rule deals only with cross-decrees and has no application to cross claims under the same decree. 5 A. 272. To these R. 19 applies, and this rule and R. 19 apply only when a step in execution and a counter-claim have come into existence. 9 A. at 67. This rule applies only where both the decrees which are sought to be set-off against each other are before the Court for execution (i.e. there must be application for execution from the holders of the two decrees) and each of the decrees must be capable of execution at the same time by the Court (i.e., there is no attachment or other impediment). If either of those conditions is not fulfilled,

then the prayers to set-off cannot be granted. 156 I.C. 477=42 L.W. 767=1935 M. 587. See also 1935 L. 914. 16 W.R. 303; 24 A. 481; 21 I.C. 32=11 A.L.J. 763; 126 I.C. 516=1930 L. 508; 1933 M. 215=145 I.C. 767. The decrees must also be under execution at the same time. 7 W.R. 535. A decree to be adjusted by set-off must be capable of execution at the time when the adjustment is made. When a decree for maintenance is passed payable partially immediately and partially periodically in favour of a woman and another decree is passed against her in favour of those against whom decree for maintenance is passed, instalments of maintenance which are to become due subsequent to the date of adjustment cannot be adjusted by set-off. Only those instalments which are due and which can be executed on the date of adjustment can be adjusted by set-off. 1933 L. 372. A statute barred debt cannot be set-off against the claim of plaintiff. 40 I.C. 816=21 C.W.N. 1147. When the decrees themselves lead to the construction of a set-off, execution applications under both the decrees are not necessary. 52 I.C. 746=1919 Pat.H.C.C. 372. The parties should not fill distinct characters in the two cases. 38 A. 669=36 I.C. 948. In order to admit of a set-off, the parties must be the same, and the sum due under each decree must be definite. 5 W.R. (Mis.) 12. The moment that cross-decrees such as are mentioned in R. 18 of O. 21, C. P. Code, are in existence the decree-holders become entitled to the right of set-off. It is true that effect cannot be given to the set-off until applications are made to the Court for the execution of the two decrees. The right nevertheless is there, and this right of the holder of one decree cannot be defeated by an attachment in favour of a third party of the other decree made after the right of set-off has arisen. Whatever may be the true



*Illustrations.*

(a) *A* holds a decree against *B* for Rs. 1,000. *B* holds a decree against *A* for the payment of Rs. 1,000 in case *A* fails to deliver certain goods at a future day. *B* cannot treat his decree as a cross-decree under this rule.

(b) *A* and *B*, co-plaintiffs, obtain a decree for Rs. 1,000 against *C*, and *C* obtains a decree for Rs. 1,000 against *B*. *C* cannot treat his decree as a cross-decree under this rule.

(c) *A* obtains a decree against *B* for Rs. 1,000. *C*, who is a trustee for *B*, obtains a decree on behalf of *B* against *A* for Rs. 1,000. *B* cannot treat *C*'s decree as a cross-decree under this rule.

(d) *A*, *B*, *C*, *D* and *E* are jointly and severally liable for Rs. 1,000 under a decree obtained by *F*. *A* obtains a decree for Rs. 100 against *F* singly and applies for execution to the Court in which the joint-decree is being executed. *F* may treat his joint-decree as a cross-decree under this rule.

Execution in case of cross-claims under same decree.

19. Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then,—

## NOTES.

position in law of an attaching creditor, it is plain that he can have no higher rights in respect of an attached decree than were possessed by his judgment-debtor. If at the time of the attachment of a decree the decree-holder is liable to have his debt extinguished by being set-off against a cross-decree against him, the attaching creditor is subjected in respect of the decree to the same liability. The right to rateable distribution under S. 73, C. P. Code, is confined to assets held by the Court. Where one of the judgment-debtor's assets is a decree for the payment to him of a sum of money which is liable to be extinguished by being set-off against a cross-decree against him, no assets representing that decree will ever come into the possession of the Court if the right of set-off be exercised. Hence the rule laid down in O. 21, R. 18 must be first applied before any question can arise for rateable distribution under S. 73. 67 I.A. 350=52 L.W. 540=A.I.R. 1940 P.C. 173=(1940) 2 M.L.J. 677 (P.C.). A decree directing plaintiff to recover the decree amount by sale of properties, but not directing payment by defendant, is a decree for money, and the provisions of this rule apply to it. 29 M. 318; 13 I.A. 106=14 C. 18 (P.C.); 16 W.R. 303; 5 W.R. 52. See also 15 C. 557; 26 M. 428. A mortgage decree is not a decree "for the payment of sums of money" within the meaning of R. 18 and consequently the decree-holder cannot set-off the claim thereunder as against a personal decree obtained against him. 7 R. 505. See also 1936 A.L.J. 562=1936 A.W.R. 405=1936 A. 639. Decree-holder in a pre-emption suit can deduct his costs from the deposit made by him. 4 Lah.L.J. 354=2 L. 294. Judgment-debtor is entitled to set-off a decree obtained by him against decree-holder, although the latter is alleged to be a mere benamidar in respect of the decree obtained by him. 3 M.L.J. 220. When a pauper plaintiff obtains a decree for a portion of his claim, and defendant is allowed proportionate costs the right to set-off does not arise until the claim of Government is satisfied. 9 A. 64; 10 A. 188. As regards rights of assignee of decree to set-off, see 16 C. at 621; 7 M.L.J. 227; 26 M. 428. Where there are essentially cross-decrees, the decree for

the smaller sum becomes absorbed in the one for the larger sum and no order of attachment can have any operation, or affect the legality of the set-off. 2 A. 866. See also 46 C. 168=45 I.C. 241; 1937 A.L.J. 473=1937 All. 422. Also 22 I.C. 73=1 L.W. 3; 1929 A. 502=117 I.C. 103. The purchaser of a decree held by *A* against whom *B* holds a cross-decree, takes it subject to a set-off on account of *B*'s decree. 10 W.R. 32 (F.B.). See also 12 I.C. 205=4 Bur.L.T. 254; 1937 All. 422; 1937 A.L.J. 1371=1937 A. 130. Set-off allowed against an attaching decree-holder, for sums against the original decree-holder. 28 C.W.N. 988=1925 C. 102; 1937 All. 422. *Obiter*.—An attaching decree-holder cannot be treated as an assignee within the meaning of R. 18, C. P. Code. 156 I.C. 477=42 L.W. 767=1935 M. 587. There is no room for the application of R. 18 (2) unless the person claiming set-off has come on the scene in time. The assignee claiming set-off must have got the assignment before applications are made to execute the decree. 20 N.L.J. 70. See also 1937 A.L.J. 1371. A judgment-debtor may set-off against the amount of the decree against him, the amount of a decree which he has obtained against the decree-holder and other persons. 9 C. 479. See also 14 A. 339; 2 A. 91. A decree in favour of all the partners of a firm in their individual capacity and a decree by the defendant against the firm can be set-off. 29 Bom.L.R. 396=104 I.C. 319=1927 B. 255. If personal remedy against the mortgagor is barred, decree ceases to be a decree for payment of money and Rr. 18 and 19 of O. 21 will not apply. 143 I.C. 542=14 Pat.L.T. 189=1933 P. 210 (2). It is doubtful whether a mortgage decree is a joint and several decree, for the application of the rule of set-off. 39 I.C. 560=15 A.L.J. 327. See also 57 C. 855; 7 R. 505. An appeal lies against an order passed under this rule. 16 C. 619. For a case of set-off under agreement is not under the Code, see 36 Bom.L.R. 643=1934 B. 307. Application of rule—Conditions, 38 C.W.N. 1089=59 C.L.J. 500. See also 152 I.C. 889=1934 C. 820. As to whether this rule is inconsistent with S. 49 of the Code, see 1937 A. W.R. 191=1937 A. 351.

O. 21, R. 19.—Executing Court has inherent powers to give effect to a claim to set-off,



(a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and,

(b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree.

#### NOTES.

although the case does not come within the strict terms of R. 19. 60 C.L.J. 281=39 C.W.N. 106. See also 1936 C. 409. O. 21, R. 19 deals with a case in which only the two parties are entitled to recover sums of money from each other. As such it cannot cover a case in which the creditors of one of the parties are also concerned. 175 I.C. 169=1938 O.W.N. 722=A.I.R. 1938 Oudh 169. R. 19 only requires that the two parties must be held entitled to recover sums of money from each other. A decree to A against B for a sum of money to be recoverable from his property is as much a decree to recover the sum of money from B. The decree need not necessarily be a decree directing A to recover the sum of money from B personally. The section does not say or provide in what manner the decree is to be executed. The rule would apply even to the case of a decree for sale in enforcement of a mortgage or charge. (1938) 1 M.L.J. 417=47 L.W. 382=1938 Mad. 638. R. 19 applies even to a case of a claim by defendant against a plaintiff personally and a claim by the plaintiff against the defendant as legal representative of another deceased defendant. And the mere fact that there has to be some inquiry under S. 50 as to the extent of the property of the deceased in the hands of his legal representative or that the sum may be limited by the provisions of S. 50 does not take the case out of the scope of O. 21, R. 19. 1941 Sind 49. Where a decree provides for the decree of sums by two parties one against the other, if the holder of the larger decree seeks to execute his decree without deducting the amount due to the other party, the holder of the latter party can claim a set-off. The fact that in a prior application by the Government for execution in respect of Court-fee due from the holder of the larger, the holder of the smaller decree fails to prove a right to adjust his decree against larger decree, will not prevent him from putting forward his claim to adjust his decree against the holder of the larger decree when the latter claims to execute his decree at a later date. A. I. R. 1941 Mad. 662=(1941) 1 M. L. J. 641. Under O. 21, R. 19, where a decree provides for the recovery of sums by two parties one against the other, it is only the party to whom the larger amount is due who is entitled to execute the decree. Hence limitation cannot run against the person who is entitled to the lesser decree at a time when that decree is not executable having regard to R. 19. The fact that more than three years have elapsed cannot prevent the holder of the lesser decree to claim set-off when the holder of the larger decree seeks to execute his

decree. (1941) 1 M.L.J. 641. R. 19, does not debar the judgment-debtor liable to pay a larger sum than that to which he is entitled from paying the larger sum and then seeking execution of his smaller amount. Where in an execution taken out against another the latter claims to set costs due to him not individually but jointly with another, R. 19 has no application. Nor is such person entitled to relief on the principle of justice, equity and good conscience. 1941 A.W.R. (C.C.) 364=1941 O.A. 954. Decree for specific performance—Direction to plaintiff to deposit certain amount within specified time—Direction that on such deposit defendant was to execute and register deed of conveyance—Costs allowed to plaintiff—Plaintiff deducted costs and interest out of amount to be deposited, and deposited only the balance. Held, that the plaintiff was entitled to make the above deductions by way of equitable set-off and that the deposit made was proper; assuming that O. 21, R. 19, C. P. Code, was inapplicable to the case independent of that rule on general principles, and in the exercise of the Court's inherent powers such a claim to set-off could be given effect to. 44 L.W. 34=1936 M. 626=71 M.L.J. 506. Although ordinarily nothing can be set-off against a rent decree, still under O. 21, Rr. (2) (g) and 19, the decree should be executed in respect of only the difference between the amount of arrears of rent awarded to decree-holder and proportionate costs awarded in favour of judgment-debtor by the same decree. 13 L.R. 397 (Rev.)=17 R.D. 46. This rule applies only when a step in execution and a cross-claim have come into existence. 9 A. at 67. See also 1930 A. 726. Rule not limited to cross-claims of precisely same nature. Even costs may be set-off. 24 I.C. 376. In order to render this rule applicable, the parties entitled under the decree must hold the same character and possess identical rights for enforcing execution. 5 A. 272. Where in a suit on a mortgage some of the defendants who were impleaded as subsequent mortgagees were awarded costs against the plaintiff, the plaintiff cannot under R. 19, be allowed to deduct the amount of such costs from his decree amount because the subsequent mortgagees are under no obligation to satisfy the mortgage debt due to the plaintiff. 146 I.C. 525. If execution is taken out for the smaller sum this fact does not render subsequent proceedings void. 14 C. 18 (P.C.). Simultaneous execution against person and property should be encouraged. Refusal to grant both the reliefs should be an exception and not a rule. 6 L. 548=93 I.C. 54=1926 L. 110. Costs awarded to garnishee in original decree—Right to set-off. 152 I.C. 96=1934 A. 1056. As to applicability of R. 19 (2) to pre-emption decree. See 1939 A.L.J. 48.



Cross-decrees and cross-claims in mortgage-suits.

20. The provisions contained in rules 18 and 19, shall apply to decrees for sale in enforcement of a mortgage or charge.

21. The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor.

Notice to show cause against execution in certain cases.

22. (1) Where an application for execution is made—

#### NOTES.

**O. 21, R. 20.**—The words, “decrees for sale in enforcement of a mortgage or charge”, cannot be restricted to personal judgments such as may be given under O. 34, R. 6. 64 I.A. 67=16 P. 127=1937 P.C. 39=(1937) 1 M.L.J. 254 (P.C.). The application of R. 20, is not confined to cases where both decrees are mortgage decrees. A decree for sale in enforcement of a charge can, therefore, be set-off against a decree for mesne profits. 16 P. 127 (P.C.). Applicability of rule when one is a money decree and the other a mortgage decree. 140 I.C. 378=63 M.L.J. 722; 143 I.C. 542=14 P.L.T. 189=1933 P. 210 (2). The right of set-off of decree is a right created by law and must be enforced unless it is lost under the law. Right is not lost by merely asking the Court to notify the encumbrance of decree under O. 21, R. 66. 143 I.C. 542=14 P.L.T. 189=1933 P. 210 (2).

**O. 21, R. 21.**—Code gives decree-holder right to decide whether he should execute the decree in one way or the other or both. If Court considers he should not exercise the right in the manner he desires, it must give reasons. It is not enough to say that there is property against which he may proceed and therefore he must proceed against that first, for that is precisely what the Code states he need not do. 150 I.C. 95=1934 N. 140.

**O. 21, R. 22.**—The case of a transferee of a decree is not covered by provisions of this rule. 28 O.C. 330=2 O.W.N. 73=1925 O. 448. Provisions, if mandatory. 1928 C. 60=55 C. 96. *See also* 1935 R. 42. Notice under this rule presupposes the presentation of an application for execution and pendency of such application in a Court. 27 A. 557. R. 22 makes it obligatory on a decree-holder to serve notice of an application for execution on the legal representative of a party to the decree, or where the party to the decree has been declared insolvent, on the Official Receiver in insolvency. A sale held without notice required by O. 21, R. 22 is void. 53 L.W. 498=(1941) 1 M.L.J. 569. Under the amended R. 22, there is no power in a Court to restrict the option of the decree-holder and compel him to purchase property at any minimum price. 26 A.L.J. 1325=112 I.C. 620=1929 A. 85 (1). The decree contemplated in O. 21, R. 22 must be the decree to be executed, not only when it is an appellate decree dealt with in Cl. (2) but also when it is a decree which has been reviewed or amended, as dealt with in Cl. (3) and Cl. (4) of Art. 182, Limitation Act. Hence where a

decree is amended the period of one year is to be counted from the date of the amended decree and not the date of the original decree. 187 I.C. 79=A.I.R. 1940 Pat. 5. R. 22 does not apply in the case of summary procedure contained in S. 111, Madras Estates Land Act. 118 I.C. 818=1929 M. 517. Last order against party includes order which has been vacated. 9 P. 499. Order under—Judge omitting to record reasons is only an irregularity and does not render order of arrest illegal. 35 C.W.N. 228=58 C. 940. Applicability of rule to award creating mortgage for definite period and in case of failure to pay within certain period. 146 I.C. 681=1933 Pesh. 71. Once the Court has found that the legal conditions do not exist for proceeding with an execution, there is a lack of jurisdiction in the carrying on of that execution; and all the proceedings taken in the execution which was not properly constituted in the absence of proper notice under O. 21, R. 22 must fall to the ground. 21 P.L.T. 864=A.I.R. 1940 Pat. 62. As the absence of notice under R. 22 goes to the root of the jurisdiction of the executing Court, the objection can be taken at any time. 174 I.C. 463=A.I.R. 1938 Pat. 162.

**NOTICE.**—Object and scope of. 146 I.C. 1024=1933 L. 826. *See also* 1926 C. 86. Simultaneous issue of notice under this rule and order for arrest, is not illegal. 58 C. 940=35 C.W.N. 228=132 I.C. 244=1931 C. 443. But *see also* 11 P. 143; 1932 P. 315; 1932 A. 692. Provisions are mandatory and proceedings without notice are void. 105 I. C. 65=46 C.L.J. 579; 95 I.C. 711=1926 C. 539; 35 C.W.N. 220; 58 C. 825; 144 I.C. 14=1933 Pesh. 41; 1935 R. 42. But *see* 60 C.L.J. 584=39 C.W.N. 510. Where one of the judgment-debtors has died at the time of the execution of the decree, and one of his sons is substituted for him in the application for execution, but another son is left out, the sale must be held to be void for want of notice under R. 22, in so far as the share of the latter son is concerned. But as regards the shares of other judgment-debtors the sale cannot be held to be void. 187 I.C. 121=A.I.R. 1940 Cal. 23. When an application is made simply to transfer decree for execution to another Court, no notice appears to be necessary. 22 C. at 924. Reasons must be recorded if notice is dispensed with under Cl. (2). 40 I.C. 670=33 M.L.J. 539; 30 L.W. 230=1929 M. 718. But *see* 34 Bom.L.R. 987 (where it was held that omission to record reason does not invalidate proceedings). The notice must issue from the executing Court.



(a) more than one year after the date of the decree, or

(b) against the legal representative of a party to the decree <sup>1</sup>[or where an application is made for execution of a decree filed under the provisions of section 44-A]

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

#### LEG. REF.

<sup>1</sup> Added by S. 3 of Act VIII of 1937.

#### NOTES.

To decide whether a decree is capable of execution is a judicial act and cannot be delegated. 43 C. 903=20 C.W.N. 889 (F.B.). Irregular service has a different effect from that of non-service. 6 P.L.J. 319=61 I.C. 823. See also 149 I.C. 828=13 P. 467=15 P.L.T. 273=1934 P. 274; 60 C.L.J. 584=39 C.W.N. 510; 48 L.W. 586. In order to be valid notice must give sufficient time to enable judgment-debtor to come and oppose the application. 1928 M. 1052=116 I.C. 363. Case as to sufficiency of notice. 35 C.W.N. 332=134 I.C. 80=1931 C. 546. Objection to the sufficiency of notice should be taken at the earliest opportunity. 21 W.R. 148. As to waiver, objection for want of notice, see 1935 R. 42=155 I.C. 959. Where the judgment-debtor has put in appearance and repeatedly asked for adjournment of the sale, obviously with the knowledge of the sale, he cannot plead want of notice under R. 22 for setting aside the sale. 187 I.C. 121=A.I.R. 1940 Cal. 23. Ordinarily, the failure to issue a notice under R. 22, or to record reasons for not issuing such notice would be fatal, and a sale concluded in such circumstances would be void. But where notice of the execution proceedings and sale thereunder is issued under O. 21, R. 66 and the judgment-debtor appears and contests these proceedings, it is unnecessary to give the judgment-debtor notice of proceedings that he is already well aware of, and failure to give notice under R. 22 and the omission to record reasons dispensing with this notice is no more than an irregularity which does not take away the jurisdiction of the Court. I.L.R. (1940) Lah. 231=41 P. L.R. 632=A.I.R. 1939 Lah. 473. Objection may be raised even in the appellate Court for the first time. 9 I.C. 584=13 C. L.J. 162. The judgment-debtor will not be bound, where service of notice has not been in accordance with law and where he has not been aware of the execution proceedings.

C. C. M.—123

32. I.C. 744. The issue of a notice to a major judgment-debtor as if he were a minor is not necessarily fatal to further proceedings in execution, and a sale in execution cannot be held to be null and void on that ground. If no notice of any kind is issued to a judgment-debtor, there is a refusal to carry out the plain duty imposed upon the Court by O. 21, R. 22, and the Court has no jurisdiction to conduct the sale subsequently. But there is a very clear distinction between a case in which no notice is issued at all to a particular defendant and a case in which notice is issued to him as if here were still a minor. 48 L.W. 586=1938 M.W.N. 586. Where a defendant judgment-debtor is in fact a major but is described in the execution application as a minor represented by his guardian *ad litem* without any objection being raised by him, and notice under O. 21, R. 22, is sent not to him direct, but to his guardian *ad litem*, he cannot be heard to say that O. 21, R. 22, has not been complied with and therefore the execution sale held under such circumstances is a nullity. He himself having led the Court to believe that a notice directed to the guardian *ad litem* would be properly served, by holding himself out to be a minor, cannot turn round and challenge the sale on that ground. There is no non-compliance with O. 21, R. 22 in such a case. 19 Pat. 393=21 Pat.L.T. 223=A.I.R. 1940 Pat. 303. See also 21 Pat. L.T. 864=1940 Pat. 62. Non-service of notice will vitiate the sale. 28 I.C. 898=19 C.W.N. 152; 15 I.C. 506=40 C. 45. But if judgment-debtor appears and contests the execution application the objection of non-service of notice cannot be given effect to. 40 C. 59; 35 C.W.N. 9. One notice is sufficient. Once a notice is served, no fresh notice need be served for every execution application made more than one year after the last order. 2 P. 916=4 P.L.T.



LOC. AMS.—[ALLAHABAD, NAGPUR AND OUDH.] (1) *Substitute* the words "three years" for "one year" both in r. 22 (1) (a) and in the second line of the proviso to r. 22.

The following proviso is added to sub-rule (2):—"Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment debtor has sustained substantial injury by reason of such omission."

[BOMBAY AND N.-W.F.P.] In r. 22 of O. 21, the words "two years" shall be *substituted* for the words "one year" wherever they occur.

[CALCUTTA.] *Add* the following as sub-rule (3) to r. 22, O. 21:—

"(3) Omission to issue a notice in a case where notice is required under sub-rule (1), or to record reasons in a case where notice is dispensed with under sub-rule (2), shall not affect the jurisdiction of the Court in executing the decree."

[LAHORE.] In r. 22 the words "two years" shall be *substituted* for the words "one year" wherever they occur.

*Add* the following proviso at the end of the rule:—

"Failure to record such reasons shall be considered an irregularity not amounting to a defect in jurisdiction."

#### NOTES.

721. *Also* 74 I.C. 202; 1919 P.H.C.C. 386. Notice must issue in every subsequent execution application more than one year old unless the proviso makes it unnecessary. 6 Pat.L.T. 290=5 P. 1=87 I.C. 531 (F.B.). Under certain circumstances, notice issued is sufficient even though some of the judgment-debtors are minors, and no guardians are appointed for them. 64 I.C. 25=35 C.L.J. 9. *See also* 21 Pat.L.T. 864=1940 Pat. 62; 1940 Pat. 303=19 Pat. 393. Execution against surety for judgment-debtor—Death of surety pending sale—Notice to heirs of surety to show cause against continuance of execution is necessary. 1940 P. 142=18 Pat. 761. Notice served on an intermeddler, though sufficient for the time, will not bar the true legal representative from raising objections subsequently. 63 I.C. 248=45 B. 1186. Mere issue of notice is not sufficient under this section. It must be served. 64 I.C. 476=25 C.W.N. 972. Proof of service—Order sheet stating issue and service of notice—Not conclusive. 152 I.C. 467=15 Pat.L.T. 505=1934 P. 211. Service of notice by affixing it on the wall of the house in which defendant resides is sufficient. 5 M.H.C. R. 100. Service of notice—Failure of judgment-debtor to object—Effect of. 1933 P. 658. *See also* 151 I.C. 235=1934 Pesh. 64. Issuing of a notice under this rule gives a fresh starting point for limitation. 15 A. 84. Even if the application under which the notice was issued was defective or irregular. 34 I.C. 280=19 O.C. 17. Expression "against the party" means adverse to the party. Hence an order directing the execution proceedings to be struck off for the default of the decree-holder cannot be held to be an order made against the judgment-debtor within the meaning of the proviso to O. 21, R. 22. 174 I.C. 463=A.I.R. 1938 Pat. 162. The application for issue of notice is a step-in-aid of execution. 35 C.L.J. 82=1922 C. 44; 1925 C. 668. The date of issuing a notice is the date on which Court orders that it should issue and not the date on which the notice is drawn up and signed. 28 B. 416. But *see* 30 M. 30. Order for execution made after issue of notice has the effect of reviving a decree, within the

meaning of Art. 180, Limitation Act. 26 A. at 364; 30 C. 979. An order in execution against a dead person is invalid and also all subsequent proceedings are a nullity. 11 I.C. 869=247 P.L.R. 1911. But *see* 4 Pat. L.J. 645=52 I.C. 125. If judgment-debtor dies after order for attachment and sale, and if legal representatives are not brought on record, the sale is valid. 45 M.L.J. 413=47 M. 63. *See also* 1938 P.W.N. 259=1938 Pat. 372. As to the effect of non-compliance with the provisions of this rule, *see* 28 A. 193; 21 B. 424 (F.B.). *See also* 21 C. 19; 10 C.W.N. 306; 43 L.W. 238=1936 M. 205=70 M.L.J. 162 (F.B.). The mandatory character of the provision as it stands ~~only~~ applies when application is being first taken out. 30 L.W. 995=117 I.C. 705=1929 M. 275. Execution for arrest of judgment-debtor—Summons issued without notice to judgment-debtor—Legality—Objection not raised—Order whether appealable—Revision. 7 R. 110=1929 R. 161. Sale is void when no notice is issued. 46 I.C. 221=27 C.L.J. 528; 41 I.C. 853=22 C.W.N. 390; 44 C. 954=21 C.W.N. 776=38 I.C. 493; 42 C. 72=27 M.L.J. 150=41 I.A. 251 (P.C.); 64 I.C. 476=25 C.W.N. 862; 48 I.C. 39=5 O.L.J. 551. But *see* 159 I.C. 762=42 L.W. 943=69 M.L.J. 862 (absence of notice) and 60 C.L.J. 584=39 C.W.N. 510=1935 C. 356. (Non-service of notice) where it was held that the sale would be rendered only voidable and not void thereby. The mere fact that a notice under R. 66 has been issued and has not been complied with by the legal representative does not estop him from questioning the sale under R. 90. 146 I.C. 681=1933 Pesh. 71. Notice issued but suppressed—Sale set aside and fresh sale held to the knowledge of the judgment-debtor—Issue of fresh notice not necessary. 7 P. 790=1929 P. 79. Any order passed in the absence of any notice, is not binding on the judgment-debtor. 34 I.C. 144. There is no doubt that where no notice under O. 21, R. 22, has been issued or served, a sale in execution is wholly without jurisdiction. The mere issuing of a notice is not sufficient. The Court has to be satisfied that notice has been served on the person



[MADRAS.] (i) *Substitute* the following for sub-rule (1) :—

“(1) Where an application for execution is made—

(a) more than two years after the date of the decree, or

(b) against the legal representative of a party to the decree, or

(c) where the party to the decree has been declared insolvent, against the Assignee or Receiver in Insolvency the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than two years having elapsed between the date of the decree and the application for execution, if the application is made within two years from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(1-A) Where from the particulars mentioned in the application in compliance with r. 11 (2) (ff) *supra*, or otherwise, the Court has information that the original decree-holder has transferred any part of his interest in the decree, the Court shall issue notice of the application to all parties to such transfer, other than the petitioner, where he is a party to the transfer.”

(ii) *Add* the following proviso to sub-rule (2) of r. 22 :—

“Provided that no order for execution of a decree shall be invalid owing to the omission of the Court to record its reasons unless the judgment-debtor has sustained substantial injury as the result of such omission.”

[PATNA.] O. 21, r. 22. For sub-r. (1) of r. 22 *substitute* the following sub-rule :—

“Where an application for exception is made in writing under r. 11 (2) the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause on a date to be fixed, why the decree should not be executed against him.”

[RANGOON.] R. 22 (1). In clause (a) for the words “one year” *substitute* “three years.”

In the second line of the proviso to sub-rule (1) of r. 22 for the words “one year” *substitute* “three years.”

#### NOTES.

whom the Court regards as the proper recipient of the notice. If no notice is served at all, the sale is wholly ineffective. The failure to serve the notice is not a mere irregularity in the publication or conduct of the sale. A sale without notice is in the eye of the law a nullity. 194 I.C. 372=22 Pat.L.T. 520. Judgment-debtor dying during execution—Person already on record sufficiently representing the estate—Fresh notice under R. 22 is not necessary. 30 L.W. 995=117 I.C. 705. But *see contra* 11 I.C. 893=20 C.L.J. 337. Where it is said it is only voidable and not void. If the judgment-debtor had been given an opportunity to show cause why the decree should not be executed, absence of notice is not very material. 55 I.C. 816=5 Lah.L.J. 67. Where a decree is passed against father and son and son dies before institution of execution proceedings and execution is taken out against father not as heir of his son but against him personally, notice under R. 22 is not necessary. 162 I.C. 482=1936 P. 253. Non-service of notice on a defendant after attaining majority is a serious irregularity and will vitiate subsequent proceedings, until met by a valid defence. 63 I.C. 903=14 L.W. 638. Judgment-debtor's father and son—Son becoming major at execution though minor at trial of suit—Fact of majority not brought to Court's notice—Notice under R. 22 served on father but not on the son—There is no illegality and son is estopped from challenging sale. 117 I.C. 705=1929 M. 275. But *see* 152 I.C. 467=15 Pat.L.T. 505=1934 P.

211. As to proper form of notice to legal representative, *see* 11 P. 241. Sale without notice to the legal representative of a deceased judgment-debtor, is not valid as against other judgment-debtors. 45 I.C. 699; but *see also* 86 I.C. 745=1925 C. 1257. It is a serious irregularity to proceed in execution against the property of a deceased judgment-debtor or in the absence of his proper legal representative. The executing Court is not precluded from deciding that a person is not the proper legal representative by reason of the fact that the Court which passed the decree has already substituted that person as legal representative after notice to him but in his absence. When the proper legal representative is some other person, namely the widow of the judgment-debtor, the order substituting a wrong person cannot be taken to be a decision to the effect that the widow is not the legal representative of the judgment-debtor. 19 Pat. L. T. 193=A. I. R. 1938 Pat. 372. Where it appeared that the judgment-debtor or his agents were fully aware of the steps that had been taken in connection with the sale and further the parties had agreed that the sale should take place upon the terms of the consent order and the sale was held in pursuance of that agreement, *held*, that under the circumstances the sale could not be avoided by judgment-debtor for want of proper notice under R. 22, 11 R. 79=143 I.C. 299=1933 R. 52. Where an adult legal representative is already on the record and notice has gone to him under R. 22, it is not mandatory that notice should



23. (1) Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.
- Procedure after issue of notice.
- (2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

*Process for Execution.*

24. (1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.
- Process for execution.

NOTES.

also go to others. 30 L.W. 995=117 I.C. 705=1929 M. 275. Notice to wrong person as legal representative. Effect on real representative. 99 I.C. 211=13 O.L.J. 813; 3 O.W.N. 771=1926 O. 613. Legal representatives—Hindu father—Decree against—Execution against sons—Insolvency and death of father after attachment of joint family property—Sons—If liable to be proceeded against. 38 Bom.L.R. 977. Insolvency of judgment-debtor pending execution, Official Receiver should be substituted for judgment-debtor—Sale in his absence—Void. 1929 M.W.N. 168; 28 Nag.L.R. 317. Whether sale is void, where decree-holder is not aware of insolvency. 38 C.W.N. 424. Official Receiver or Official Assignee, if legal representative. See 68 M.L.J. 78. No notice need be served on a judgment-debtor who has no interest in the property against which execution is sought. 88 I.C. 1039. Sale held while attachment subsists but without notice is not without jurisdiction but is merely irregular and not liable to be set aside. 43 M. 57=37 M.L.J. 216. Where the legal representative of a deceased judgment-debtor makes an application to set aside an auction sale on the ground that he was not served with the requisite notice under R. 22, the sale is not invalid entirely but only to the extent of the applicant's share. 142 I.C. 658=1933 M. 224 (2). An attachment without notice is not invalid but is a mere irregularity. 26 O.C. 288=1924 O. 120. When a notice is issued to a person as guardian, it must be presumed that he was appointed guardian by implication, by the Court. 5 C.L.J. 434. Appeal lies from an order setting aside a sale without notice to the auction-purchaser, 3 Lah.L.J. 463; 9 I.C. 711=1926 C. 539. If no reasons were recorded for dispensing with notice it being only discretionary, the appellate Court may consider the executing Court's use of its discretion on the merits. 42 M. L. J. 422=45 M. 875. Notice must go when a revivor of a decree is sought on the analogy of this rule. 33 M.L.J. 533=40 M. 1127. An application by a decree-holder to continue the execution proceedings against the legal representative of the deceased judgment-debtor is expressly provided for by S. 50 and R. 22. Such an application need not necessarily be made by

a fresh application for execution but it may be made by an application in the pending execution against judgment-debtor. Such an application, if made, is not a "fresh application" within S. 48. 134 I.C. 730=33 Bom.R. 858=1931 B. 425 (2). See also 11 P. 241=138 I.C. 99=1932 P. 199. As to limitation for suit to set aside sale for want of notice, see 54 C.L.J. 591=137 I.C. 378=1932 C. 381, Decree not drawn on a non-judicial stamp—Execution—Objection that decree invalid and unexecutable—Subsequent validation by affixture of proper stamp—Execution after one year from the date of original decree—Notice—Not necessary. 38 C.W.N. 1118.

O. 21, R. 23.—See 22 C. 558 and 28 M. 466 (F.B.). Where there is more than one legal representative of the judgment-debtor and notice is not issued to one of them the sale is invalid only as against the person to whom no notice was given. 35 C.W.N. 220=58 C. 825. Application for substitution and execution by heirs of decree-holder—*Ex parte* order after notice to judgment-debtor—Execution case ultimately struck off—Fresh application—Plea by judgment-debtor that prior application was not in accordance with law—*Res judicata*. 1935 A.L.J. 642=1935 A. 727.

O. 21, R. 24.—The words "unless it sees cause to the contrary" do not confer any discretionary power on the Court. 10 C. 817. Seal of the Court is imperatively necessary. Without it the warrant is illegal, and resistance to it will be no offence. 3 Pat.L.J. 636=49 I.C. 171; 5 P. 216=93 I.C. 146=1926 P. 237. See also 1939 Rang.L.R. 445. As to the effect to be given to a warrant which is not signed by the Judge, see 7 A. 507; 22 C. at 604. A warrant not specifying period within which to be executed is not a good one. It should be executed only by the person authorised to execute it. It is not an offence to resist a bad warrant. 1 Pat.L.J. 550=36 I.C. 871. When the judgment-debtor is arrested and brought before the Court the warrant of arrest is executed, that is to say, the arrest has been carried out though it may not have been carried out in accordance with law and may have resulted in the discharge of the judgment-debtor. 1940 Rang.L.R. 253=41 Cr.L.J. 567=A.I.R. 1940 Rang. 112.



(2) Every such process shall bear date the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

(3) In every such process a day shall be specified on or before which it shall be executed.

LOC. AMS.—[ALLAHABAD, Oudh AND CALCUTTA.] *Add* at the end of sub-clause (3) of r. 24 after the words "be executed"—"and a day shall be specified on or before which it shall be returned to Court."

[BOMBAY AND SIND.] The following proviso shall be added to sub-rule (2) of r. 24 of O. 21, namely :—

"Provided that a First-class Subordinate Judge may, in his special jurisdiction, send a process to another Subordinate Court in the same district for execution by the proper officer in that Court."

[MADRAS.] *Substitute* the following for sub-rule (3) :—

"(3) In every such process a day shall be specified on or before which it shall be executed and a day shall be specified on or before which it shall be returned to Court."

[NAGPUR.] R. 24.—In sub-rule (3) of r. 24 *for* the word "executed" *substitute* the words "returned to the Court."

[RANGOON.] R. 24 (3).—*Add* "and a day shall also be specified on or before which it shall be returned to the Court."

25. (1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in which it was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result.

LOC. AMS.—[ALLAHABAD AND OUDH.] O. 21, r. 25 (2).—*Substitute* the following for paragraph (2) :—

"(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court may examine him personally or upon affidavit touching his alleged inability and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result."

[BOMBAY.] The following proviso shall be added to sub-rule (2) of r. 25 of O. 21 :

"Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this rule."

[MADRAS.] (1) *Amend* O. 21, r. 25 (2) as follows :—

*Insert* the words "or cause him to be examined by any other Court" *after* the words "examine him."

#### NOTES.

The bailiff has power to delegate the execution of the warrant to the process-server. But where the bailiff did not delegate his authority to arrest to the process-server but merely returned the warrant to him for endorsement and not for further execution and the process-server re-executed the warrant instead of endorsing it, the re-arrest is unlawful. But the process-server would be protected under S. 79, I.P. Code, if he made a genuine mistake of fact and thought that the process was returned to him for re-execution and was not actuated by malice. 1940 Rang.L.R. 253=A.I.R. 1940 Rang. 112. Ministerial acts can always be delegated

where such acts do not require the exercise of any discretion or judgment. A Nazir, can, therefore, delegate the execution of the process to his subordinates. 1940 Lah. 30=41 P.L.R. 838. *See also* 1932 All. 227=1932 A.L.J. 179. The warrant cannot be executed after the period specified therein has expired. 10 C. 18; 1933 A.L.J. 1=1933 A. 46. Where the process has a date fixed for its return, it cannot be executed after that date; and any person meddling with property so attached is not guilty under S. 424, I.P. Code. 55 A. 119=144 I.C. 32=1933 A. 46. The period fixed may be enlarged. *See* S. 148.



(2) *Add* the following proviso to r. 25 (2):—"Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause."

*Substitute* the following in the place of the present sub-rule (2):—

"(2) Where in the case of a decree for the payment of money the process is not executed owing to the decree having been satisfied, such officer shall also obtain an endorsement on the process to that effect signed by the decree-holder and attested by two respectable witnesses who can identify the decree-holder."

*Add* the following as sub-rule (3):—

"(3) Where the endorsement of *such officer* is to the effect that he is unable to execute the process, the Court shall examine him or cause him to be examined by any other Court touching his alleged inability, and may if it thinks fit, summon and examine witnesses as to such inability, and shall record the result:

Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause.

Where the inability to execute the process is stated to be due to the satisfaction of the decree and such satisfaction has been endorsed on the process as mentioned in sub-rule (2) above, the Court shall issue notice to the decree-holder to show cause on a day to be fixed by the Court, why such satisfaction should not be recorded as certified, the Court shall record the same accordingly.

A record of satisfaction under the provisions of this sub-rule shall have the same effect as one under the provisions of Order XXI, rule 2, sub-rule (2)."

### *Stay of Execution.*

26. (1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of

When Court may stay execution. such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

LOC. AMS.—[ALLAHABAD, NAGPUR, N.-W.F.P. AND OUDH.]—In Allahabad, Oudh and Nagpur for "may" in sub-rule (3) read "shall unless good cause to the contrary is shown."

[CALCUTTA.] O. 21, r. 26 (3). In sub-rule (3), r. 26, O. 21, *cancel* the words "the Court may require such security from, or impose such conditions upon the judgment-debtor as it thinks fit." and *substitute* therefor the following words:—

### NOTES.

O. 21, R. 26.—The Court which passes decree retains control of execution proceedings, and it can transfer the decree to two Courts at the same time for execution. 5 R. 397=104 I.C. 133=1927 R. 258 (2). Judgment-debtor is not obliged to furnish security; he may if he wants stay. 26 P.L. R. 634=1925 L. 552. Execution can be stayed only by the Court to which the decree is sent for execution, and that too only temporarily. 7 A. 330. Such Court may refer the objector to the Court which passed the decree. 9 C. 916; 4 M. 324; 5 C. 736; 7 B. 481. Surety under O. 21, R. 26—Liability of—Dismissal of execution

petition on ground of stay order is not an order of final disposal—Surety is not discharged. 46 L. W. 350=A. I. R. R. 1937 Mad. 721. For enforcement of liability of surety, see S. 145. Power to demand security. See 91 I.C. 772=1925 L. 552. Order requiring security must specify a day on or before which it is to be given. 12 M.L.J. 34. Duty of executing Court where decree sought to be executed has been modified in appeal. 4 R. 562. An appeal lies against an order requiring security. 12 C. 624. Order for stay cannot be made on application by decree-holder. 133 I.C. 643=1931 L. 690.



"the Court shall require security from the judgment-debtor unless sufficient cause is shown to the contrary."

[LAHORE.] For the words "the Court may" substitute the words "the Court shall, unless sufficient cause is shown to the contrary" in sub-rule (3).

[PATNA.] O. 21, r. 26. In sub-r. (3) of r. 26 substitute the words "shall, unless sufficient cause is shown to the contrary," for the word "may."

[RANGOON.] R. 26 (3). For the word "may" substitute "shall, unless sufficient cause is shown to the contrary."

27. No order of restitution or discharge under rule 26 shall prevent the property or person of a judgment-debtor from being re-taken in execution of the decree sent for execution.

Liability of judgment-debtor discharged.

28. Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.

Order of Court which passed decree or of appellate Court to be binding upon Court applied to.

29. Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

Stay of execution pending suit between decree-holder and judgment-debtor.

#### NOTES.

O. 21, R. 28.—An *ex parte* decree obtained at *L* was transferred to *P* for execution and certain property belonging to judgment-debtors was sold. Judgment-debtors put in objections before executing Court for setting aside the sale and at the same time applied in the Court at *L* for setting aside the *ex parte* decree. The Court at *L*, at the instance of the judgment-debtors issued a *robkar* to Court at *P* directing that proceedings with respect to the confirmation of the sale should be stayed, the words used being '*karwai i-manzuri multawi ki jawe*'. Executing Court ordered that confirmation of the sale was to be postponed but rejected the objections by judgment-debtors. The sale was confirmed by successor of the Judge. It was held, that the *robkar* clearly meant that all proceedings leading up to the confirmation of the sale were to be stayed and not merely postponement of confirmation of sale; that executing Court had no jurisdiction to consider the objections of judgment-debtor after it had received the *robkar* and its order dismissing the objections was *ultra vires* and the order of confirmation of sale was also without jurisdiction. The executing Court having assumed jurisdiction not vested in it, the orders were open to revision. 162 I.C. 416=1936 Pesh. 97.

O. 21, R. 29.—A stay under this rule is purely a matter of discretion; the appellate Court, as a rule, will not interfere with the discretion of the Judge who passed it. 159 I.C. 495=1935 R. 389. R. 29 is permissive. Thereunder the Court is given the discretion of staying the execution whereas R. 92 is imperative by enacting that in the absence of an application under R. 89, R. 90 or

R. 91 or where such application has been disallowed, the Court is bound to order confirmation of the sale. When these two rules are read together as they should be, the result is that the Court may in its discretion stay execution under R. 29 only before the operation of R. 92 takes place, i.e., before the sale of the property in question where the execution is by sale of the property attached. Hence an application for stay of execution after the sale of it but before confirmation is not maintainable. 13 R. 351=156 I.C. 521=1935 R. 151. Principles of the rule have no application to the granting of an injunction to postpone sale. 148 I.C. 727=1933 N. 153. Liability of a surety for satisfaction of a decree does not cease on a decree in a suit by the judgment-debtor to set aside the decree but he will be liable if the suit be dismissed in appeal unless there is a limitation as to his liability in the surety bond. 3 R. 496=105 I.C. 602=1927 R. 321. Conditional order for stay has effect from date of order, even though the condition is fulfilled only later. 25 L.W. 108=99 I.C. 632=1927 M. 391. The word 'decided' means finally decided. 32 C.W.N. 181. But see *contra* 58 C. 1113=35 C.W.N. 540=134 I.C. 939. The words "until the pending suit has been decided" mean after all rights of appeal have been exhausted and not merely until a decree has been passed by the Court. 32 C.W.N. 181. As to the meaning of the word "suit," see 32 C.W.N. 181. "Such Court," meaning of. 122 I.C. 182. Under Ss. 37 and 42 Court to which a decree is transferred has powers to stay execution of a decree under O. 21, R. 29. 60 C. 1119=37 C.W.N. 846=57 C. L.J. 444. Court has no power to stay exe-



LOC. AM.—[ALLAHABAD.] O. 21, r. 29.—Add “or any person whose interests are affected by the decree, or by any order made in execution thereof” after the words “was passed” and before the words “the Court may” in O. 21, r. 29.

### Mode of Execution.

30. Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property or by both.

31. (1) Where the decree is for any specific movable, or for any share in a

### NOTES.

cution if no suit was pending against decree-holder on the part of judgment-debtor. 75 I.C. 419=1923 L. 514. Court has power to stay execution when there is a suit by the judgment-debtor against the assignee-decree-holder for damages for breach of an agreement between them whereby the defendant agreed to receive in satisfaction of the assigned decree certain bonds and to get satisfaction entered up. 43 L.W. 493=1936 M. 102=70 M.L.J. 120. See also 40 Bom.L.R. 188. Execution cannot be stayed on the ground that a stranger to the decree impeaches it on the ground of fraud. 8 B. 532. Holder of mortgage decree has nothing to do with disputes between the representatives of his mortgagor. Suits respecting such disputes form no ground for stay. 7 C. 773. As to stay of execution of a decree on an award, see 35 B. 196. An appeal lies from an order refusing stay. 20 M. 366; 10 A. 389. But see 9 C. 214. Also from an order staying execution. 13 C. 111. Security for the full amount of the decree under R. 29, being within the discretion of the Court, High Court will not interfere in revision, unless the discretion was improperly used. 116 I.C. 101=1929 S. 110. As to quantum of security, see 132 I.C. 507=33 Bom.L.R. 370=1931 B. 247. Applicability of rule to execution proceedings pending before one Judge while suit is pending before another Judge of the same Court. (*Ibid.*)

O. 21, R. 30.—Decree-holder not bound to proceed against properties first. 1926 L. 110. See also 153 I.C. 422=1935 A. 179. See also 1939 Pat. 380. A regularly perfected attachment is an essential preliminary to sales in execution of simple money decrees. Where there has been no such attachment, any sale that may have taken place is not simply voidable but *de facto* void. 5 A. 86 (F.B.). See also 41 Bom.L.R. 463 (Power of Court to sell without attachment). The words “attachment and sale” must be taken together and not distributively. 8 W. R. 415. Attachment is necessary only when no specific immovable property is affected by the decree. 2 P. 768=73 I.C. 598. In the case of mortgage decrees no attachment is necessary. 4 B. 515. See R. 21. An order directing the refund of money paid as compensation under the Land Acquisition Act may be enforced under this rule. 32

C. 921. Where a judgment-debtor conceals himself, arrest and attachment of his property can simultaneously be made in execution of a decree against him even though he owns considerable property and is a *lambardar* and *kursinashin*. 145 I.C. 609=34 P.L.R. 856=1933 L. 307 (2). Where there is already sufficient security for the realisation of the decretal amount and the procedure of the decree-holder savours rather of harassment than a genuine desire to realise the decretal amount, the Court may in its discretion refuse the relief against the person of the judgment-debtor. 160 I.C. 685=1936 P. 28. Decree-holder made an application for execution of his simple money decree by attachment and sale of property. Judgment-debtor filed objection stating that he had hypothecated a certain house which had been attached in lieu of the amount due to the decree-holder by a security bond and that as long as the decree-holder did not file a suit in Court on the basis of the security bond and obtain a decree for sale and enforcement of the hypothecation lien, the said house could not be sold in execution of the decree for the amount according to law. Held, that although it was open to the decree-holder to proceed on the security, if he desired to do so, his rights under the simple money decree did not cease to exist by reason of the hypothecation lien. 153 I.C. 422=1935 A. 179.

O. 21, Rr. 30 and 21.—The discretion given to the Court by O. 21, R. 21, to refuse simultaneous execution against the person and the property does not extend to compelling the decree-holder to take either one of these methods. The executing Court should not disallow an application for the arrest of a defaulting judgment-debtor on the ground that the latter has sufficient properties against which the decree-holder might proceed in the first instance. A debtor who is able to pay but does not pay is in the position of a person in contempt of Court. The proper course for such a person is to purge his contempt by fulfilling the order of the Court and pay the decretal amount. 18 Pat. 366=1939 P.W.N. 604=A.I.R. 1939 Pat. 380.

O. 21, R. 31.—A decree for delivery of specific movable property which can be enforced by the stringent method prescribed by O. 21, R. 31, can be passed only in a



Decree for specific movable property. specific movable, it may be executed by the seizure if practicable, of the movable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment-debtor, or by the attachment of his property, or by both.

(2) Where any attachment under sub-rule (1) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of movable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance(if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

LOC. AMS.—[ALLAHABAD.] O. 21, r. 31.—In sub-rules (2) and (3), wherever the words "six months" occur substitute "three months or such extended time as the Court may, for good cause, direct."

[CALCUTTA.] O. 21, r. 31 (2) and (3). Substitute the words "three months" for the words "six months."

[LAHORE.] In sub-rule (2) for the word "six" substitute the word "three."

Add the following proviso after sub-rule (2) :—

"Provided that the Court may, in any special case, according to the special circumstances thereof, extend the period beyond three months; but it shall in no case exceed six months in all."

In sub-rule (3) for the words "six months" substitute the following words :—

"three months or such other period as may have been prescribed by the Court."

[MADRAS.] (a) Substitute the following for sub-rules (2) and (3) :—

"(2) Where any attachment under sub-rule (1) has remained in force for three months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of movable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any), to the judgment-debtor on his application.

"(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing it which he is bound to pay, or where, at the end of three months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease."

(b) Add the following as sub-rule (4) :—

"(4) The Court may on application extend the period of three months mentioned in sub-rules (2) and (3) to such period not exceeding six months on the whole as it may think fit."

[NAGPUR.] R. 31 :—In sub-rules (2) and (3) of R. 31 for the words "six months" wherever they occur, substitute the words "three months or such further time as the Court may, in any special case, for good cause shown, direct."

[N.-W.F.P. AND RANGOON.] In r. 31, sub-rules (2) and (3) for the words "six months" substitute "three months."

Add as sub-rule (4).—"The Court may, on application, extend the period of three months mentioned in sub-rules (2) and (3) to such period, not exceeding six months in (all) the whole as it may think fit."

#### NOTES.

suit where the plaintiff alleges and proves facts which give him a right to compel its delivery under the provision of S. 11 of the Specific Relief Act (39 M. 1 (F.B.), Rel. on. 42 C.W.N. 523=A.I.R. 1938 Cal. 471. The words "specific movable" in R. 31, do not include money (37 M. 381. Rel. on.) 42 C.W.N. 523=A.I.R. 1938 Cal. 471. Execution of money portion of decree in

terms of O. 20, R. 10. 31 C.W.N. 850. In a decree for movable property the money value is inserted under O. 20, R. 10, as an alternative if delivery cannot be had. The judgment-debtor is given no option either to surrender the property or pay the money. Money can be recovered only after delivery cannot be had. 13 M.L.J. 444; 39 M. 1 =29 M.L.J. 342 (F.B.).



[ODDH] In sub-rules (2) and (3), wherever the words "six months" occur *substitute* "three months or such further time as the Court may, in any special case, for good cause shown, direct."

[PATNA.] O. 21, r. 31.—In sub-rr. (2) and (3) of r. 31 *for* the words "six months" *substitute* "three months"; and *add* the following as sub-r. (4):—

"(4) The Court may, for sufficient cause, extend the period of three months mentioned in sub-rr. (2) and (3) to such period, not exceeding six months in the whole, as it may think fit."

32. (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced <sup>1</sup>[in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance

#### LEG. REF.

<sup>1</sup> Inserted by Act XXIX of 1923.

#### NOTES.

O. 21, R. 32.—Applicability to Scheme decree—Clause in decree directing payment by trustee—Executability. 71 M.L.J. 87. There is no provision of law which entitles holder of a decree for an injunction to apply to Court for the issue of a special order or notice embodying the terms of the decree and for having it served through Court on the defendant. It may be that Court has an inherent power to do so, but decree-holder has no right to ask Court to do so. Where it is not shown that defendant has done any act which can be construed as disobedience or failure to obey the decree of Court, no such application is maintainable, under R. 32, especially when it is admitted that the time for enforcing the injunction has not yet arrived. 44 L.W. 308=1936 M. 706=71 M.L.J. 286. It is futile to argue that the only remedy of a decree-holder is to bring a separate suit for damages, where the judgment-debtor deliberately chooses to disobey the injunction issued by the Court permanently prohibiting him from holding a fair on certain lands. R. 32 specifically provides for the execution of a decree for injunction. 154 I.C. 744=1935 A. W. R. 406=1935 A.L.J. 416=1935 A. 480. As to limitation for executing a decree for injunction, *see* 37 P.L.R. 576=1935 L. 702. Relief claimed must be consequential upon an infringement of a legal right. 44 I.C. 737=3 P.L.J. 106. Decree for specific performance on contract of sale—Omission in plaint and in decree as to delivery of possession—Executing Court not debarred from granting possession to plaintiff. 12 Pat.L. T. 636=131 I.C. 529=1931 P. 179. (38 M. 698, Diss.) Sub-rule (5) is new. It has been added to remedy a defect disclosed in practice. *See* 8 C. 174 and 18 W. R. 282. In executing a decree for injunction, the Court is not justified in ordering Police to interfere or in appointing a Commissioner to see that the decree-holder is not interfered with. 40 A. 648=48 I.C. 26. When a decree directs a wall to be demolished, a second wall built in its place, cannot be demolished by executing the same decree. Another suit must be filed. 59 I.C. 594=

20 P.W.R. 1921. The Court can enforce obedience by punishment but cannot order a security bond. 3 L.W. 261=32 I.C. 698. The rule applies to a compromise decree as well, and on breach of the decree execution must be taken and no separate suit for damages will lie. 45 I.C. 689=7 L. W. 563; 1930 M.W.N. 609. Where a Court dismisses a petition for execution on the ground that the petitioning decree-holders had not then afforded to the judgment-debtor, an opportunity of obeying the decree, a subsequent application made after such opportunity had been afforded is not barred. 21 C. 784 (P.C.); 7 Bom.H.C. (O.C.J.) 122. A decree for the restitution of conjugal rights between Mahomedans or Hindus, may be enforced under this rule. 1 B. 164; 9 Bom.H.C.R. 290; 11 M.I.A. 551. *See also* 1 A. 501; 11 M. 327. Under O. 21, R. 32, C. P. Code, if the judgment-debtor wilfully refused to obey the decree, the only remedy open to the decree-holder is to proceed to attach the property of the judgment-debtor. The Court cannot compel the wife against whom a decree for restitution of conjugal rights has been passed to go and live with her husband. 150 I.C. 307=35 P.L.R. 655. *See also* 41 P.L.R. (J. & K.) 80. An effective decree for restitution of conjugal rights, where the wife is a minor, can be made by ordering her parents to hand her over and in default Court can proceed against their person and property. 23 I.C. 828. If a person who has been directed to refrain from preventing his daughter returning to her husband's house, permits her to reside at his house, such conduct does not amount to interference. 1 A. 501. Art. 182, Limitation Act, does not apply to an application under this rule. 28 A. 300. The decree-holder is not bound to take action on every petty infringement. 29 M. 314. A valid subsisting attachment is a condition precedent to a sale under this section. *See* 1937 Rang. L. R. 164=169 I.C. 967=1937 Rang. 126.

O. 21, R. 32 (1).—Decree for injunction against father as manager of joint family may be executed against son as legal representative. 33 Bom.L.R. 1118=134 I. C. 968=1931 B. 482; 55 B. 709 (doubting 42 B. 504). *See also* 1931 B. 280.



of a contract or for an injunction] by his detention in the civil prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor, has not obeyed the decree and the decree holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

#### Illustration.

*A*, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to *B*. *A*, in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by *B* and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of *A*'s property would adequately compensate *B* for the depreciation in the value of his mansion. *B* may apply to the Court to remove the building and may recover the cost of such removal from *A* in the execution proceedings.

#### NOTES.

O. 21, R. 32 (2).—Object of rule explained. 56 C.L.J. 140.

O. 21, R. 32 (3).—Where property is sold under this rule, judgment-debtor has no *locus standi* to apply to set aside the sale under O. 21, R. 89. 56 C.L.J. 140.

O. 21, R. 32 (4).—A wife sued her husband for return of her jewels or their value and obtained decree in December, 1928. Prior to that the husband sued his wife for restitution of conjugal rights and obtained a decree therefor in March, 1929, and he also got an attachment of the wife's decree in March, 1929. In 1930, both parties applied to execute their respective decrees. Court while allowing the husband's prayer for attaching the wife's decree rejected the wife's prayer to allow execution against the person of her husband for money due to her under her decree, apparently on the ground that her decree was under attachment. The wife having appealed against both orders, *held*, that the attachment effected in March, 1929, by the husband had ceased under R. 32 (4) after one year and that the new attachment ordered in 1930, was not therefore bad; that the fact that her decree was under attachment was no bar to her executing that decree, so long as R. 53 (2) that the proceeds are to go in satisfaction of the decree against her is not disregarded. 41 L.W.

694=1935 M. 413=68 M.L.J. 461.

O. 21, R. 32 (5).—Rule applies to cases of mandatory injunctions and not to cases of simple prohibitory injunction. 38 C. W.N. 101=61 C. 148=1934 Cal. 402. *See also* 1935 A.L.J. 416=1938 A. 480=57 A. 858. The act required to be done as contemplated by O. 21, R. 32 (5) has reference only to a positive act such as is required to be done under a mandatory injunction. Hence, Cl. 5 of R. 32 of O. 21 does not apply to prohibitory injunctions. I.L.R. (1938) All. 673=1938 A.L.J. 558=A.I.R. 1938 All. 416. The injunction contemplated by O. 21, R. 32 (5) is a mandatory injunction and not a prohibitory injunction. 1938 P.W.N. 625=A.I.R. 1938 Pat. 522. Where a decree granting a prohibitory injunction is disobeyed by the defendant, the plaintiff is not bound to bring a fresh suit to convert the prohibitory injunction into a mandatory injunction so as to enable him to apply under O. 21, R. 32 (5). The relief to which the plaintiff is entitled is laid down by R. 32 itself, that is, detention of the defendant in the civil prison, or attachment of his property or both. The plaintiff can apply for any of those reliefs or for both, and the fact that he claims relief under O. 21, R. 32 (5) would not preclude him from claiming the proper relief by applying to the proper



LOC. AMS.—[ALLAHABAD AND OUDH.] O. 21, r. 32.—In sub-clause (3) of O. 21, r. 32 read "three months" for "one year" and at the end of sub-clause (3) add the following:—

"The Court may for good cause extend the time": in Oudh add "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year."

[CALCUTTA.] O. 21, r. 32 (3).

Substitute the words "three months" for the words "one year" in sub-rule (3), r. 32, O. 21.

[LAHORE.] In sub-rule (3) for the words "one year" substitute the words "three months," and add the following proviso to sub-rule (3):—

"Provided that the Court may for sufficient reasons, on the application of the judgment-debtor, extend the period beyond three months; but it shall in no case exceed one year in all."

In sub-rule (4) for the words "one year," substitute the words "three months or such other period as may have been prescribed by the Court."

[MADRAS.] Substitute the following for sub-rules (3) and (4):—

"(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for three months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application. The Court may on application extend the period of three months mentioned herein to such period not exceeding one year on the whole as it may think fit."

"(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing it which he is bound to pay, or where, at the end of three months from the date of the attachment or of such extended period which the Court may order under sub-rule (3), no application to have the property sold has been made, or if made has been refused, the attachment shall cease."

[NAGPUR.] In r. 32. (a) in sub-rule (3)—

(i) for the words "one year" substitute the words "three months";

(ii) after the word "application" insert the words "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year"; and

(b) in sub-rule (4) for the words "one year" substitute the words "three months, or such further time as may have been fixed by the Court under sub-rule (3)."

[N.-W.F.P.] In sub-rule (3) for the words "for one year," substitute the words "for three months or such further period not exceeding one year in the whole as may be fixed by the Court."

[OUDH.] Substitute "three months, or such further time as may have been fixed by the Court under the previous sub-rule" for "one year" in sub-rule (4) of r. 32 O. 21.

[PATNA.] O. 21, r. 32. In sub-r. (3) of r. 32 for the words "for one year" substitute the words "for three months or for such further periods not exceeding one year in the whole, as may, on sufficient cause shown, be fixed by the Court."

[RANGOON.] R. 32 (3).—For the words "for one year" the words "for three months or for such further period, not exceeding one year in the whole, as may be fixed by the Court on the application of the judgment-debtor" shall be substituted.

33. (1) Notwithstanding anything in rule 32, the Court, either at the time of passing a decree <sup>1</sup>[against a husband] for the restitution of conjugal rights or at any time afterwards, may order, that the decree <sup>2</sup>[shall be executed in the manner provided in this rule.]

Discretion of Court in executing decrees for restitution of conjugal rights.

#### LEG. REF.

<sup>1</sup> Inserted by S. 3, Act XXIX of 1923.

<sup>2</sup> Substituted for the words "shall not be executed by detention in prison," by Act XXIX of 1923.

#### NOTES.

Court. 1938 P.W.N. 625=A.I.R. 1938 Pat. 522.

O. 21, R. 33 (1).—For form of decree for restitution of conjugal rights, see 59 I.C. 887. When at the time of suit the husband is out of caste, the Court can pass a decree conditioned on plaintiff's obtaining restoration to caste. 8 A. 78. Ordinarily a decree for restitution of conjugal rights against a wife should direct that it should

not be executed by detention of the wife in prison. 44 B. 972=59 I.C. 361; 73 I.C. 716=1924 L. 244. Also 10 I.C. 177. But if she persists in leading an immoral life, she must be detained in jail. 75 I.C. 24=1923 L. 595 (2). A Hindu wife is justified in leaving her husband's protection if he habitually treats her with cruelty. 19 C. 84. As to what amounts to cruelty, see the judgment of Mookerjee, J., in 34 C. 971. In an action for specific performance of a contract to sell certain property with cultivating rights Court can compel defendant under Cl. (5) to prosecute the application before the Revenue Divisional Officer thus enabling the performance of the contract. 1926 N. 465.



(2) Where the Court has made an order under sub-rule (1) <sup>1</sup>[\* \* \*], it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive, the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.

34. (1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered.

#### LEG. REF.

<sup>1</sup> The words "and the decree-holder is the wife" omitted by Act XXIX of 1923.

#### NOTES.

O. 21, R. 34.—As to the procedure to be adopted in the case of failure on the part of a defendant to execute a document as directed in the decree, see 10 C.W.N. 345. A decree directing transfer of shares and registration in favour of the plaintiff can be executed on defendant's failure to obey the directions. 41 I.C. 77. A defendant can execute the decree in his favour. 24 Bom.L.R. 496=46 B. 990. As to the period of limitation within which an application should be made, see 10 B. 91. A compromise decree providing for the execution of document can be enforced under this rule and no suit is necessary. 61 I.C. 535=25 C.W.N. 68. Execution of compromise decree providing for execution of patta. 95 I.C. 179=1926 C. 975. The Registrar of High Court has authority, when so directed by an order of Court, to execute a conveyance on behalf of a party refusing to do so, so as to pass his estate, but has no authority to bind him by entering into any covenants on his behalf. 16 C.

330. Action taken by Court in execution of decree for specific performance of a contract of lease, is a proceeding in the suit and *lis pendens* does not cease. 48 I.C. 188=14 N.L.R. 176. Where a decree absolute for divorce directs the judgment-debtor to secure to his wife a certain amount and to execute a proper instrument securing that payment, and the judgment-debtor does not take any steps to comply with the direction, the Court can under O. 21, R. 34, execute a special power of attorney in favour of the wife authorising her on behalf of the judgment-debtor to withdraw the amount decreed out of the provident fund of the judgment-debtor in a railway company in which he was employed. The execution of such a special power of attorney does not contravene the provisions of S. 3 (1) of the Provident Funds Act. 13 Luck. 466=1938 O. 48. There is no foundation for the view that an order under O. 21, R. 34, can be made only when a decree for execution of a document is made in a suit for specific performance of contracts. The rule simply contemplates that there should be a decree for execution of a document. It may be passed in any suit 67 C.L.J. 235=A.I.R. 1938 Cal. 767.



(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely :—

“C.D., Judge of the Court of  
(or as the case may be), for A. B., in a suit by E. F., against A. B.”,  
and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

(6) The Court, or such officer as it may appoint in this behalf, shall pass the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration.

35. (1) Where a decree is for the delivery of any movable property, possession thereof shall be delivered to the party to whom it has been adjudged or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

#### NOTES.

O. 21, R. 35: SCOPE OF RULES.—“Any person bound by the decree” includes besides the judgment-debtor, any person who may be deemed to be bound under law, e.g., a sublessee in respect of a decree for ejection against the lessee. 35 C.W.N. 1132. Under O. 21, R. 35, a final decree for foreclosure and possession can only be executed against the person bound by the decree. When a person not bound by the decree is in possession of his share in the property, the decree for possession cannot be legally executed against such person. If the Police assist the decree-holder in removing that person from possession they exceed the powers given by O. 21, R. 35 (3). 1938 N.L.J. 45. Under R. 35 (1) formal delivery is actual delivery. It is symbolic when under R. 35 (2), 36 or 96. Scope—Co-sharer not in possession—Decree for possession in favour of, against another in possession—When can be given. 112 I.C. 143=51 A. 303=1928 A. 472 (F.B.). When possession under a decree for possession has not been obtained, subsequent suit for possession is barred. 3 Lah.L.J. 138=59 I.C. 770. But see 35 C.W.N. 12=131 I.C. 698=1931 C. 427. A decree-holder entitled to possession of land is entitled to the land and the standing crops thereon. 26 M. 438; 1939 Rang. 388. Where the decree-holder is put in possession of land such possession includes the standing crops. The judgment-debtor cannot re-enter in order to reap and dispose of the crops which he had cultivated upon the land. 1939 Rang.L.R. 157=A. I.R. 1939 Rang. 388. Also to any erections made thereon after suit. 18 W.R. 527. As to right of judgment-debtor's right to remove crops after delivery of possession, see 61 C.L.J. 586. When possession of a village is decreed, the decree-holder is entitled to possession of the account-books and other papers relating to the village. 11 B. 485. A decree may be executed partly

under this rule and partly under R. 36. 7 W.R. 376; 9 W.R. 454. See also 17 W.R. 80; 5 B. 554 and 10 C. 993. Delivery of possession to an agent without power of attorney is valid. 13 N.L.R. 87=40 I.C. 689. A reasonable degree of force can be used to remove persons bound by decree to vacate. 42 C. 313=28 I.C. 1000. Possession actually given is not the less effective by reason of an irregularity in taking it. 5 B. 387. Decree for symbolical possession—Non-compliance with requirements of R. 35 (2) and possession not delivered as required by law—Suit for possession by successor-in-interest of decree-holder—Limitation. 145 I.C. 345=34 P.L.R. 839=1933 L. 427. See also 1936 L. 749 (case of joint possession). An application for actual possession can again be put in after it has once been dismissed after delivery of formal possession. 45 I.C. 7. Decree for possession once satisfied by the plaintiffs being put in actual possession, cannot afterwards be re-executed on plaintiffs being dispossessed. 6 W.R. Mis. 108. Nor on the ground that he got only symbolical possession in the prior proceedings. 60 C.L.J. 286. See also 32 I.C. 44=29 M.L.J. 504. But where delivery of possession in execution of a final decree for partition, which entitled applicant to get actual possession, is not complete, owing to existence of some huts standing on a portion of the land, applicant can maintain a second application and Court acts within its jurisdiction in ordering a fresh delivery of possession by removing the huts. 152 I.C. 764=38 C.W.N. 832=1934 C. 793. When a stranger obstructs delivery, remedy is criminal proceedings or a suit for damages. 43 M.L.J. 179=1923 M. 25. Symbolic delivery by mistake where actual delivery ought to be given is as good as actual delivery, so far as regards persons bound by the decree. 71 I.C. 999=3 Pat.L.T. 628. See also 97 I.C. 705 (2). Symbolic delivery will interrupt judg-



(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

36. Where a decree is for the delivery of any immovable property in the

#### NOTES.

ment-debtor's adverse possession. 24 I.C. 850=10 N.L.R. 60. Also 43 I.C. 268=34 M.L.J. 97 (P.C.); 96 I.C. 481=1926 C. 1172; 1926 L. 35; 1936 A.W.R. 69=1936 A.L.J. 80=1936 A. 85. But the fact that the person in possession continues to be in enjoyment of the property just after the formality under R. 35 is over, does to all intents and purposes amount to an immediate dispossession of the decree-holder after he has been put in possession. The decree-holder must under Art. 142, Limitation Act, come within 12 years to recover possession again and if he does not, his suit is time barred. 160 I.C. 441=1936 Pesh. 7. Actual possession must be given if the judgment-debtor is in possession. Mere formal delivery will not prevent limitation running in favour of the judgment-debtor. 71 I.C. 885=1924 L. 301; 1925 M. 1140=49 M.L.J. 303. The sub-R. (2) merely lays down the manner of executing a decree for joint possession. 11 I.C. 87. See also 20 B. 351. A decree for joint possession can be executed only in the mode prescribed by O. 21, R. 35 (2). Such possession cannot be actual physical possession. Nor can such a decree entitle one to take actual physical possession to the ouster of the persons in actual possession of the plot in dispute. If such a decree-holder wishes to obtain actual physical possession he has to bring a suit for partition. 1939 A.L.J. 375. The prescribed procedure for symbolic delivery must be followed. When no actual or symbolic delivery has been obtained, no subsequent suit lies for fresh possession. 20 P.R. 1917=39 I.C. 753. Failure to affix warrant of delivery vitiates symbolic delivery. 1923 L. 693=74 I.C. 1; 55 I.C. 19=2 Lah.L.J. 202. But where with the approval and consent of the judgment-debtor, delivery of possession was proclaimed merely by beat of drum without affixing a copy of the warrant on the property as required by R. 35 (2), the delivery of possession must be deemed to be valid and effective as against the judgment-debtor. 166 I.C. 404=1937 O.W.N. 58=1937 Oudh 275. Joint possession of one co-sharer as against another in actual enjoyment can only be symbolical. 19 A.L.J. 783=63 I.C. 806. It is neither real possession nor equivalent to it. 36 B. 373=14 I.C. 447. Symbolical delivery of possession in favour of some co-sharers—Effect of—No right to eject other co-sharers in possession—Separate partition proceeding necessary. 14 L.R. 150 (Rev.)=17 R.D. 249. See also 67 C.

L.J. 39. Publicity of delivery is what sub-rule (2) requires. 68 I.C. 182=2 Lah. L.J. 564. A decree for joint possession is valid unless unreasonable. 34 A. 150=13 I.C. 79. A usufructuary mortgagee of father's share cannot have joint possession with the son. 25 I.C. 401=16 M.L.T. 229. Delivery of symbolical possession—Decree providing for *khas* possession—Remedy of decree-holder. 35 C.W.N. 12=131 I.C. 698=1931 C. 427. The conditions precedent for effecting delivery of possession under O. 21, R. 35 (2) are the affixing of the warrant to the property and the beat of drum. The omission to take any one of these two steps is fatal to the proceedings and there is no delivery in law. A.I.R. 1941 Pesh. 25. Presumption that formalities as to delivery have been complied with, see 31 P.L.R. 1001=132 I.C. 181. Where judgment-creditor fails to apply for removal of an obstruction under O. 21, R. 97 within 30 days he is not debarred from making an application under R. 35 to obtain a fresh warrant for possession. He need not file a suit for that purpose. Article 165 of the Limitation Act has nothing to do with such an application for warrant for possession but it will be applicable notwithstanding the fresh order for possession to a subsequent application in respect of the same obstruction. And if the obstruction is by the same person and in the same character, the mere fact that the decree-holder is applying under a fresh warrant for possession would not make the obstruction a fresh obstruction. 146 I.C. 112=35 Bom.L.R. 1033=1933 B. 457 (F.B.).

O. 21, Rr. 35 & 36.—The delivery of symbolical possession of land in execution of a decree for possession amounts to delivery of actual possession so far as the judgment-debtor and his representatives are concerned. It breaks the continuity of the adverse possession of the judgment-debtor in spite of the technical irregularities, if any, committed in the delivery of possession. A transferee of the land during the pendency of the suit, being a representative of the judgment-debtor, is under the rule of *lis pendens* as much bound by the symbolical possession delivered as the judgment-debtor himself. I.L.R. (1941) Lah. 428.

O. 21, R. 36.—Rule applies only to person holding exclusive possession of property and not bound by the decree. 97 I.C. 170=1926 L. 668. There is nothing in this rule to prevent the applicant from obtaining possession without the aid of the Court. 22 W. R. 406; 15 W.R. 99; 18 C. 520; 13 M.L.J. 375. No delivery is effected when the



Decree or delivery of immovable property when in occupancy of tenant.

occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

*Arrest and detention in the Civil Prison.*

37. (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money

Discretionary power to permit judgment-debtor to show cause against detention in prison.

by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court <sup>1</sup>[shall], instead of issuing a warrant for his arrest, issue a notice calling upon him

to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison :

<sup>2</sup>[Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court].

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

LEG. REF.

<sup>1</sup> Substituted for the word " may " by Act XXI of 1936.

<sup>2</sup> This proviso was added by Act XXI of 1936.

NOTES.

provisions of this rule are not complied with. 41 I.C. 752=52 P.W.R. 1917. Symbolic possession in case not contemplated under the Code is not effective. 46 B. 932=24 Bom.L.R. 499. Where there is obstruction to actual possession by one entitled to a right of residence, only symbolic delivery under this rule can be given. 20 I.C. 571. The present rule applies when the property is in the possession of a mortgagee. 52 I.C. 269=22 O.C. 278. Symbolical possession under the rule will give the purchaser a fresh starting point for limitation. 105 I.C. 781=1928 O. 8. As to whether symbolical possession irregularly delivered interrupts adverse possession, see 1935 L. 612. After formal possession is given under this rule the plaintiff is entitled to bring a fresh suit to eject the defendant. 11 C. 93. If there is a decree for partition and the lands are in possession of tenants, delivery can be given under this rule. 26 M. 76. No possession need again be claimed when a usufructuary mortgagee in possession gets a decree for pre-emption. 23 I.C. 876=12 A.L.J. 521. When the decree-holder asked for possession with the crops on the land, but possession of land only was given, he should again ask for whole possession and not for crops only. 97 I.C. 567=1927 M. 71.

O. 21, R. 37.—(N.B.—Note the amendment made in the rule by Act XXI of 1936, which lays down when notice is not obliga-

tory). An application for a warrant of arrest may be presumed when the warrant is issued in the presence of the decree-holder's pleader. 19 I.C. 394=15 Bom.L.R. 205. Arrest may be applied for only when means, other than by sale of land, fail. 73 P.L.R. 1915=29 I.C. 152. But see 7 Lah.L.J. 165=1925 L. 379. If a warrant is addressed to the bailiff authorising him to arrest a judgment-debtor at a place *A* and the judgment-debtor happens to be found at the place *B* within the jurisdiction of the Court, the bailiff is authorised to make the arrest at the place where the judgment-debtor is actually found. 42 P.L.R. 374. Where the whole of the property of the judgment-debtor is under attachment and it is not shown that he has other means of satisfying the decree, the order of the executing Court refusing to arrest the judgment-debtor is justified. It is open to the decree-holder to proceed with the execution of his decree by attachment and sale of the judgment-debtor's property. The order of High Court staying the sale of the property in execution of another decree is no bar to his proceeding against that property. 1934 L. 166. Grounds for belief of ill-health are sufficient to exercise discretion to issue notice in the first instance. 9 I.C. 746=14 O.C. 36. A warrant of arrest fixing date of return should be issued when applied for, even though the judgment-debtor resides outside the jurisdiction of the Court. Such warrant should be executed by Court having jurisdiction. 44 I.C. 296=3 Pat.L.J. 95. When notice has been served on individual members of a firm, even though the firm is insol-



38. Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the cost (if any) to which he is liable, be sooner paid.

Warrant for arrest to direct judgment-debtor to be brought up.

LOC. AMS.—[MADRAS.] *Substitute* the following for the present r. 38 :—

"38. Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid, or unless satisfaction of the decree be endorsed by the decree-holder on the warrant in the manner provided in r. 25 (2) above."

[RANGOON.] In O. 21, the following shall be *inserted* as r. 38-A :—

"38-A. The actual cost of conveyance of a civil prisoner shall be borne by the Court ordering his arrest or requiring his attendance at Court, as the case may be, and shall not be charged to the judgment-creditor."

39. (1) No judgment-debtor shall be arrested in execution of a decree unless  
Subsistence allowance. and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57, or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison.

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit:

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed.

LOC. AMS.—[ALLAHABAD, CALCUTTA, LAHORE AND OUDH.] In sub-rule (5) *delete* the words "in the civil prison" occurring in two places.

[BOMBAY.] For the existing sub-rules (4) and (5) of r. 39 of O. 21, the following shall be substituted :—

"(4) Such sum (if any) as the judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court-house to the civil prison and from the civil prison on his release, to his usual place of residence, together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer in charge of the civil prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and cost of conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit :

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed."

[MADRAS.] O. 21, r. 39.—*Delete* the present sub-rules (4) and (5) of r. 39 of O. 21, and *substitute* the following :—

#### NOTES.

vent, they may be proceeded against personally. 1925 L. 379. Execution by sale—Mortgage decree—Executing Court cannot direct arrest of judgment-debtor. 121 I.C. 293=1930 L. 103. Simultaneous issue of notice and warrant is illegal. 1932 A. 692; 11 P. 743=1932 P. 315=13 Pat.L.T. 502. But see also 58 C. 940=35 C.W.N. 228=C. C. M.—125

1931 C. 443.

O. 21, R. 38.—When a warrant directs a Nazir to arrest the judgment-debtor, the Nazir may authorise a deputy to execute the warrant, by endorsing his name on it. 6 A. 385. As for the liability of the Nazir for negligence in having allowed the debtor to escape, see 4 B. 65.



"(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and costs of conveyance of the judgment-debtor for his journey from the Court house to the civil prison and from the civil prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer in charge of the civil prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and cost of conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit."

[NAGPUR.] To sub-rule (1) of r. 39, the following words shall be *added*, viz., "and for the cost of conveyance of the judgment-debtor from the place of his arrest to the Court-house." For sub-rules (4) and (5) of r. 39, the following sub-rules shall be *substituted*, namely:—

"(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court-house to the civil prison and from the civil prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer in charge of the civil prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and the cost of the conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit."

[N.-W.F.P.] For sub-rule (4), *substitute* the following:—"All payments shall be made to the officer-in-charge of the civil prison." In sub-rule (5), *omit* the words "in the civil prison."

[PATNA.] O. 21, r. 39. In sub-r. (5) of r. 39, *delete* the words "in the civil prison" in the first place where they occur.

[RANGOON.] In r. 39 (5) the words "in the civil prison" shall be *deleted*. In O. 21, r. 39, the following shall be *inserted* as sub-r. (2-A):—

"(2-A) When a civil prisoner is kept in confinement at the instance of more than one decree-holder, he shall only receive the same allowance for his subsistence, as if he were detained in confinement upon the application of one decree-holder. Each decree-holder shall, however, pay the full allowance for the subsistence, and when the debtor is released, the balance shall be divided rateably among the decree-holders and paid to them."

<sup>1</sup> [40. (1) When a judgment-debtor appears before the Court in obedience

Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.

to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree-holder and take all such evidence

as may be produced by him in support of his application for execution, and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison.

(2) Pending the conclusion of the inquiry under sub-rule (1) the Court may, in its discretion, order the judgment-debtor to be detained in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required.

#### LEG. REF.

<sup>1</sup> Substituted by S. 4, Act XXI of 1936. (This supersedes all modifications of the rule made under S. 122 of the Code up to the 27th October, 1936).

#### NOTES.

O. 21, R. 40.—"Other sufficient cause" must be based on evidence. 54 I.C. 782. Security under Cl. (3) must be substantial and not illusory. (*Ibid.*). Court is not bound to enforce execution by arrest of the judgment-debtor in every case. Court, on the other hand, has a discretion under R. 40 to disallow application for arrest on any of the grounds specified in that rule, though the rule does not provide that recourse must first be had against the property of the debtor. 153 I.C. 506=1935 O.W.N. 17=1935 O. 57. As the normal limit under which a man cannot reasonably be expected to support himself and a family should be taken to be Rs. 40; because of S. 60 (1) (i), unless there is anything on the record from which it can be said to have been

proved that a judgment-debtor earns more than Rs. 40 a month, and fails to pay the excess to the decree-holder the Court should not order arrest of a judgment-debtor. A. I.R. 1938 Rang. 477. Judgment-debtor practising lawyer and owning properties—Difficulty in raising money—Ground for exemption from arrest and detention. Such circumstances constituted "sufficient cause" preventing the judgment-debtor from being able to pay the amount of the decree within the meaning of O. 21, R. 40, and that it was a proper case in which the Court should in the exercise of its discretion refuse to enforce execution by arrest. 153 I.C. 506=1935 O.W.N. 17=1935 O. 57. Where judgment-debtors who were arrested pleaded poverty and inability to pay and Court ordered pending inquiry into those facts the release of judgment-debtors on furnishing security and they put in a surety bond which stated that the surety would be liable if judgment-debtors failed to appear or pay the decretal amount and Court having ultimately rejected the plea of judgment-debtors



(3) Upon the conclusion of the inquiry under sub-rule (1) the Court may, subject to the provisions of section 51 and to the other provisions of this Code, make an order for the detention of the judgment-debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest :

Provided that in order to give the judgment-debtor an opportunity of satisfying the decree, the Court may, before making the order of detention, leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding fifteen days or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) When the Court does not make an order of detention under sub-rule (3), it shall disallow the application and, if the judgment-debtor is under arrest, direct his release.]

LOC. AMS.—[ALLAHABAD, AND OUDH.] [These have been omitted as the Act was amended in 1936, incorporating these amendments.]

[MADRAS].—“(6) During the temporary absence of the Judge who issued the warrant under rule 37 or 38, the warrant of committal may be signed by any other Judge of the same Court or by any Judicial Officer superior in rank who has jurisdiction over the same locality or, where the arrest is made on a warrant issued by the District Judge, the warrant of committal may be signed by any Subordinate Judge or District Munsiff, empowered in writing by the District Judge in this behalf.

(7) No judgment-debtor shall be committed to the civil prison or brought before the court from the custody to which he has been committed pending the consideration of any of the matters mentioned in sub-rule (1) unless and until the decree-holder pays into Court such sum as the Judge may think sufficient to meet the travelling and subsistence expenses of the judgment-debtor and the escort.

Sub-rule (5) of rule 39 shall apply to such payments.”

(These sub-rules are added in Madras by P. Dis. No. 689 of 1940.)

[NAGPUR.] In O. 21, r. 40, the following shall be inserted as sub-rules (6), (7) and (8) below sub-r. (5) namely :—

“(6) When a judgment-debtor is ordered to be detained in the custody of an officer of the Court under sub-r. (2) or the proviso to sub-r. (3) above, the Court may direct the decree-holder to deposit such amount as, having regard to the specified or probable length of detention, will provide—

(a) for the subsistence of the judgment-debtor at the rate to which he is entitled under the scales fixed under S. 57 ;

#### NOTES.

the decree-holder sought to enforce the security bond. *Held*, that Court had no jurisdiction to take the bond and that it could not be enforced. 35 P.L.R. 101=1934 L. 217. A surety under R. 40 (3) for production of the judgment-debtor cannot be rendered liable under S. 145 for the debt due. 18 R.D. 243=15 L.R. 285 (Rev.). The words “some part thereof” in sub-S. (2) (d) refer to payment of money generally and are not limited to instalment decrees only. 7 Bur.L.T. 242=23 I.C. 833. Grounds for refusal of the arrest of judgment-debtor. 94 I.C. 279 (1)=27 P.L.R. 229. If debtor can pay a substantial part of the decretal amount, or instalment, and does not do so, poverty is no plea for release. (*Ibid.*) When all the properties movable and immovable have been sold in execution by other creditors, it would be improper to order his imprisonment. 1922 L. 259; or when the judgment-debtor's property is vested in receiver on an application by another creditor for the judgment-debtor's adjudication in insolvency. 1931 L. 121=131 I. C. 208. The mere fact that the Insolvency Court has granted leave to execute a decree, does not take away the duty of the executing Court to satisfy itself as to whether all the circumstances exist which would justify

ordering arrest of the insolvent debtor. 13 Rang. 623=1935 Rang. 415. The lunacy of a judgment-debtor is a good cause for disallowing an application for his arrest. 22 B. 961. See 22 B. 731 under S. 55. Release of judgment-debtor—Matters to be considered by Court—Failure by Court to consider such matters—Procedure to be followed. 118 I.C. 312 (2)=1929 P. 728. Where a judgment-debtor against whom a warrant is issued applies to Court for an enquiry into his pauperism after the issue of a warrant against him without notice and before he is arrested, it is not necessary to invoke the provisions of S. 151, as it is still open to him to surrender himself in Court and then to move it to pass an order under R. 40 (3). 116 I.C. 101=1929 S. 110. The order under O. 21, R. 40 of the C. P. Code need not be in writing and when the Court acting under the proviso to R. 40 (5) directs the judgment-debtor, when arrested, to pay detention batta for two days, it means he is allowed two days to satisfy the decree but he is in the custody of the officer. If he escapes during that period, he is guilty of an offence under S. 225-B of the Penal Code. 142 I.C. 242 (1)=1933 M. 278.

APPEAL.—See 21 M. 29. See also 144 I. C. 255=14 Pat.L.T. 271=1933 P. 248 (1).



(b) for the payment to an officer of the Court in whose custody the judgment-debtor is placed of such fees (including lodging charges) in respect thereof as the Court may by order fix :

Provided (i) that the subsistence allowance and the fees payable to the officer of the Court shall not be recovered for more than one month at a time, and

(ii) that the Court may from time to time require the decree-holder to deposit such further sums as it deems necessary.

(7) If a decree-holder fails to deposit any sum as required under sub-r. (6) above, the Court may disallow the application and direct the release of the judgment-debtor.

(8) Sums disbursed by the decree-holder under sub-r. (6) shall be deemed to be costs in the suit : Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed."

### *Attachment of Property.*

41. Where a decree is for the payment of money the decree-holder may apply to the Court for an order that—

(a) the judgment-debtor, or

(b) in the case of a corporation, any officer thereof, or

(c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means

### NOTES.

**O. 21, R. 41.**—This rule applies to all the properties of judgment-debtor out of which decree can be satisfied either by delivery in obedience to decree or by sale. 17 B. 514. In a suit for recovery of money due on settled accounts, an application was filed for appointing a receiver and for an order directing defendant to produce certain books of account not connected with the suit in order that plaintiff, if he gets a decree, may be in a better position to realise his decree debt. *Held*, the Court cannot order the production. 57 M. 635=148 I. C. 79=1934 M. 199=66 M.L.J. 498. Court cannot prescribe to decree-holder what property he is to attach. 3 W.R. Miss. 16. Judgment-debtor can be examined at any stage of the execution proceedings. Order for such examination may be made *ex parte*. On proper cause being shown, such order may be set aside. It is not necessary that all usual methods of execution should be exhausted before applying this rule. 34 I.C. 287=43 C. 285.

**O. 21, R. 41 (c).**—Garnishee should deny or admit the debt in express words in the affidavit and in the event of admitting the debt, the extent of such debt. 1933 S. 350. Rule 41 of O. 21, is in effect a provision to obtain delivery in aid of the execution of the decree which the decree-holder has obtained. The expression "any other person" might include a garnishee, *i.e.*, a person who owes or is alleged to owe a debt to the judgment-debtor. The Court is empowered to summon any person including the garnishee whom it thinks necessary and may require the person summoned to produce any document in his possession or power. But this power should be cautiously exercised. The discretionary power vested in the Court under R. 41 of O. 21, to ex-

amine the garnishee must ordinarily be limited to cases where the garnishee admits the debt, and the Court may find out the exact amount of the debt before ordering the execution. But if the debt is totally denied, the Court ought not ordinarily to examine the garnishee or direct him to produce account books unless it is satisfied on the affidavits or on the examination of the judgment-debtor that in the interests of the decree-holder the garnishee should be examined and his books produced to better enable him to proceed with the execution and to prevent a possible fraud or collusion between the judgment-debtor and the garnishee. For that purpose the alleged garnishee may be examined with reference to the books or other documents which he may be directed to produce for finding out whether there were dealings between him and the judgment-debtor probalising a debt. The garnishee ought not to be subjected to any examination or cross-examination for the purpose of determining whether the liability subsists or not. Further only those books or documents, which would throw light on the question of debt should be ordered to be produced. Any order for further production would be oppressive. 48 L.W. 157=1938 M.W.N. 702=A.I.R. 1938 Mad. 771. There is no rule under which a copy of the petition by which a garnishee had denied the claim of judgment-debtor, could be required to be given by him to decree-holder. Even if there is such a rule, it is the duty of Court to investigate the claim and not to dispose of the matter summarily without hearing the garnishee. O. 17, R. 3, gives a discretion to Court in the matter and does not make it obligatory to proceed forthwith. 151 I.C. 679=1934 L. 560. A decree directing an inquiry as to damages is a decree for money within the meaning of O. 21, R. 42,



of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents.

Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined.

42. Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

43. Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Attachment of movable property, other than agricultural produce, in possession of judgment-debtor.

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

#### NOTES.

and a plaintiff who has obtained such a decree directing an inquiry as to damages is entitled to invoke the aid of O. 21, R. 41 and apply for an order for the examination of the judgment-debtor in order to enable him to effect an attachment in pursuance of the right given to him under O. 21, R. 42. The Court is vested with the discretion whether to give the relief under R. 41 or not, and it must exercise its discretion after considering the circumstances of the case. 49 L.W. 696=A.I.R. 1939 Mad. 699=(1939) 2 M.L.J. 80.

O. 21, R. 42.—The Court has no jurisdiction on an application under O. 21, R. 42 to enter into an investigation of claims and objections to the proposed attachment at the stage the application is made. The only question then before the Court is one between the decree-holder and the judgment-debtor, and if the property to be attached is specified by the decree-holder in his application as the property of the judgment-debtor, the Court is bound to make an order for attachment as if the attachment was being asked for in the ordinary course of execution of a decree for the payment of money, leaving it to the parties concerned to prefer such claims or objections after the attachment as were open to them under the provisions of O. 21, R. 58 or otherwise. The Court cannot apply to an application under O. 21, R. 42 the considerations which would govern an application for attachment before judgment. 45 C.W.N. 323. The rule does not apply to a suit for partnership accounts. 93 I.C. 306=1926 S. 178. The words "any other matter" in the rule cannot include a preliminary decree directing the taking of accounts in a partnership suit. 40 C.W.N. 1393. This rule covers also an enquiry into accounts in a scheme suit under S. 92. 41 I.C. 89. On this section, see also 19 C. 139; 45 C.W.N. 323.

O. 21, R. 43.—A person who attaches under a warrant must have the warrant with him. Else the taking of the property is not lawful. 27 A. 258. As to responsibility of attaching officer, see 1931 A. 567=134 I.C. 836=1931 A.L.J. 865 (F.B.) (Overruling 48 A. 510). "Seize," meaning of—Removal of articles with help of coolies—Amin present—Attachment deemed to be effected. 1930 M.W.N. 487. Attachment of cattle—Actual physical seizure not necessary. Where cattle have already been tied and secured, it is sufficient if the officer goes sufficiently near them to explain to others that he has come to attach the property and to intimate his intention to do so. 32 L.W. 23=1930 M. 670. Removal of property by attaching officer is illegal. 1928 C. 815=56 C. 460=48 C.L.J. 288. A warrant of attachment affixed to the outer door of a warehouse in which goods belonging to the judgment-debtor were stored, constitutes a good attachment although the door is not broken open and goods taken physical possession of. 27 M. 346. See also 11 B. at 454; 30 M. 207. The rule does not affect the liability of a surety for attached movables if he fails to produce them. 62 I.C. 719=19 A.L.J. 247. The watchmen appointed by the Commissioner to look after the attached property are not liable at the instance of the judgment-debtor for the value of missing articles, either as custodians or as sureties. The person responsible for the safe custody of the articles is the attaching officer himself. 144 I.C. 364=1933 A.L.J. 579=1933 A. 385. A *suparddar* of attached property must produce them when called upon, even though the execution application is dismissed for default, and the attachment ends. 51 I.C. 653=60 P.R. 1919. He is bound to hold the property till the *amin* asks for it or directs him to hand it over to the judgment-debtor. If the same property is re-attached pending the first attachment, it is not necessary that the fresh order of



LOC. AMS.—[CALCUTTA.] O. 21, r. 43 shall read as follows:—

43. Where the property to be attached is movable property other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and save as otherwise prescribed, the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Provided that, when the property seized does not, in the opinion of the attaching officer, exceed twenty rupees in value or is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

[LAHORE.] O. 21, r. 43. The Rule was numbered as sub-rule (1) and the following further proviso and sub-rules (2) and (3) were added:—

“and provided also, that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder, or of any person claiming to be interested in such property, leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the Form No. 15-A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for; or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided, and the remuneration of the officer for a period of fifteen days at such rate as may from time to time be fixed by the High Court be paid in advance; or

(c) in the charge of a village lambardar or such other respectable person as will undertake to keep such property, subject to the orders of the Court, if such person enters into a bond in Form No. 15-B of Appendix E with one or more sureties for its production.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in r. 55, or 60 of this Order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

(3) When property is made over to a custodian under sub-clause (a) or (c) of clause (1), the schedule of property annexed to the bond shall be drawn up by the attaching officer in triplicate, and dated and signed by—

- (a) the custodian and his sureties;
- (b) the officer of the Court who made the attachment;
- (c) the person whose property is attached and made over;
- (d) two respectable witnesses.

One copy will be transmitted to the Court by the attaching officer and placed on the record of the proceedings under which the attachment has been ordered, one copy will be made over to the person whose property is attached and one copy will be made over to the custodian.”

[Note:—Additional Forms Nos. 15-A and 15-B have been inserted. See App. E.]

Rules 43-A to 43-D—

“43-A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to r. 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the Court-house and delivered to the proper officer of the Court.

#### NOTES.

attachment should be communicated to *suparddar*. It is enough if the order is communicated to the *amin*. Consequently where the *suparddar* having no knowledge of the subsequent attachment of the property in his custody, makes over the property to judgment-debtor on satisfaction of the decree in which it was first attached, he cannot plead want of notice of the second attachment so as to escape his liability. 149 I.C. 950=1934 A.L.J. 1200=1934 A. 357. The proper execution procedure against a surety for attached property is to sue on the security bond first having it assigned in the decree-holder's name. 39 M.L.J. 472=60 I.C. 134. See also 47 I.C. 956=16 N.L.R. 178. Attachment of movables—Bond executed by attaching creditor on taking possession of goods—Subsequent sale—Order for production of goods—Non-compliance—Forfeiture of bond is illegal. 1927 M.W.N. 919. Mere application for attachment of “movable pro-

perty” is not sufficient to attach a debt due from third parties. 9 I.C. 240. A right to sue for breach of contract cannot be attached. 1925 S. 98. The attaching officer entrusting the attached property to a third person, without the permission of the Court must, if the property be lost, make good the loss himself. 95 I.C. 828=48 A. 510=1926 A. 406. See also 1934 A. 357; 1933 A. 385. Attachment removed—Suit for declaration by decree-holder that property belonged to judgment-debtor—Decree not by itself effective to restore attachment—Fresh seizure necessary. 1930 R. 247=8 R. 491. A roving commission for seizure of property belonging to the judgment-debtors wherever it may be found is not contemplated by the Code of Civil Procedure and is entirely illegal. Where such a warrant for attachment of movable property is resisted there is no offence committed under S. 353 read with S. 114, I. P. Code. 1941 Rang.L.R. 592.



(3) A custodian appointed under the second proviso to r. 43, may at any time terminate his responsibilities by giving notice to the Court of his desire to be relieved of his trust and delivering to the proper officer of the Court the property made over to him.

(4) When any property is taken back from a custodian, he shall be granted a receipt for the same.

43-B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the Court-house.

Nothing in this rule shall prevent the judgment-debtor, or any person claiming to be interested in such stock, from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

43-C. When an application is made for the attachment of live-stock or other movable property, the decree-holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for 15 days. If within three clear days, before the expiry of any such period of 15 days the amount of such costs for such further period as the Court may direct be not paid into Court, the Court on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

43-D. Any person who has undertaken to keep attached property under r. 43 (1) (c) shall be liable to be proceeded against as a surety under S. 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him."

[MADRAS.] For O. 21, r. 43, substitute the following rules, viz.:—

43. (1) Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once; and

Provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the Form No. 15-A of Appendix E, to this Schedule with one or more sufficient sureties for its production when called for; or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in r. 55 or r. 57 or r. 60 of this order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

43-A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court, and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to r. 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the Court-house and delivered to the proper officer of the Court.

43-B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is so retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the Court-house.

Nothing in this rule shall prevent the judgment-debtor, or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited under these rules be recovered as costs of the attachment from any party to the proceedings.

[Note.—An additional Form, being Form No. 15-A has been inserted in App. E.]

[N.-W.F.P.] Add the following further proviso :—

Provided further that when the attached property consists of live-stock or articles which cannot conveniently be removed, and the attaching officer does not act under the first proviso to this rule,



he may leave it in the village or place where it has been attached in the charge of a village lambardar or such other respectable person as will undertake to keep the property, subject to the orders of the Court, if such person enters into a written bond for its production.

Any person who has so undertaken to keep attached property may be proceeded against as a surety under S. 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him.

[PATNA.] *Substitute* the following for r. 43 of O. 21 :—

43. Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall be responsible for the due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

O. 21, r. 43-A. *Insert* the following as r. 43-A below r. 43 in O. 21 :—

43-A. (1) The attaching officer shall, in suitable cases, keep the attached property in the village or locality either—

(a) in his own custody in any suitable place provided by the judgment-debtor, or in his absence by any adult member of his family who is present, on his own premises or elsewhere ;

(b) in the case of live-stock, and provided the decree-holder furnishes the necessary funds, in the local pound, if a pound has been established in or near the village, in which case the pound-keeper will be responsible for the property to the attaching officer, and shall receive the same rate for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description, or such less rate as may be agreed upon ;

(c) in the custody of a respectable surety, provided the decree-holder furnishes the cost of maintenance and other costs, if any.

(2) If in the opinion of the attaching officer the attached property cannot be kept in the village or locality, through lack of a suitable place, or satisfactory surety, or through failure of the decree-holder to provide necessary funds, or for any other reason, the attaching officer shall remove the property to the Court at the decree-holder's expense. In the event of the decree-holder failing to provide the necessary funds, the attachment shall be withdrawn.

(3) Whenever attached property is kept in the village or locality as aforesaid, the officer shall forthwith report the fact to the Court, and shall with his report forward an accurate list of property seized, such that the Court may thereon at once issue the proclamation of sale prescribed by r. 66.

(4) If the debtor shall give his consent in writing to the sale of the property without awaiting the expiry of the term prescribed in r. 68, the officer shall receive the same and forward it without delay to the Court for its orders.

(5) When the property is removed to the Court it shall be kept by the Nazir on his own sole responsibility in such place as may be approved by the Court. If the property cannot, from its nature or bulk, be conveniently kept on the Court premises, or in the personal custody of the Nazir, he may, subject to the approval by the Court, make such arrangements for its safe custody under his own supervision as may be most convenient and economical, and the Court may fix the remuneration to be allowed to the persons, not being officers of the Court, in whose custody the property is kept.

(6) When the property remains in the village or locality where it is attached and any person other than the judgment-debtor shall claim the same, or any part of it, the attaching officer shall nevertheless, unless the decree-holder desires to withdraw the attachment of the property so claimed, maintain the attachment, and shall direct the claimant to prefer his claim to the Court.

(7) (a) If the decree-holder shall withdraw an attachment or it shall be withdrawn under sub-rule (2) or sub-rule (9) the attaching officer shall inform the debtor, or in his absence, any adult member of his family, that the property is at his disposal.

(b) In the absence of any person to take charge of it or in case the officer shall have had notice of claim by a person other than the judgment-debtor, the officer shall, if the property has been moved from the premises in which it was seized, replace it where it was found at the time of seizure.

(8) Whenever live-stock is kept in the village or locality where it has been attached, the judgment-debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer ; but the latter shall, if required by the decree-holder, and on his paying for the same at the rate to be fixed by the District Judge, and subject to the orders of the Court under whose orders the attachment is made, engage the services of as many persons as may be necessary, for the safe custody of it.

(9) In the event of the judgment-debtor failing to feed the attached live-stock in accordance with sub-rule (8), the officer shall call upon the decree-holder to pay forthwith, for feeding the same. In the event of his failure to do so, the officer shall proceed as provided in sub-rule (2), and shall report the matter to the Court without delay.

(10) When attached live-stock is brought to Court, the Nazir shall be responsible for the safe custody and proper feeding of it so long as the attachment continues.



(11) If a pound has been established in or near the place where the Court is held, the Nazir shall be at liberty to place in it such attached live-stock as can be properly kept, in which case the pound-keeper will be responsible for the property to the Nazir and shall receive the same rate for accommodation, and maintenance thereof as are paid in respect of impounded cattle of the same description or such less rate as may be agreed upon.

(12) If there be no pound available, or if, in the opinion of the Court it be inconvenient to lodge the attached live-stock in the pound, the Nazir may keep it in his own premises, or he may entrust it to any person selected by himself and approved by the Court. The Nazir will in all cases remain responsible for the custody of the property.

(13) Each Court shall, from time to time, fix the rates to be allowed for the custody and maintenance of the various descriptions of live-stock with reference to seasons and local circumstances. The District Judge may make any alteration he deems fit in the rates prescribed by Courts subordinate to him. Where there are two or more Courts in the same place, the rates shall be the same for each Court.

44. Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment—

(a) where such produce is a growing crop, on the land on which such crop has grown, or

(b) where such produce has been cut or gathered, on the threshing floor or place for treading out grain or the like or fodder-stack on or in which it is deposited, and another copy on the outer door or on some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the Court.

LOC. AM.—[BOMBAY.] After r. 44 of O. 21, the following shall be inserted, as r. 44-A, namely:—

44-A. Where the property to be attached is agricultural produce, a copy of the warrant or order of attachment shall be sent by post to the office of the Collector of the District in which the land is situate.

45. (1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of growing crop shall specify the time at which it is likely to be fit to be cut or gathered.

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it; and if the judgment-debtor fails to do all or any

#### NOTES.

O. 21, R. 44.—An attachment which is not in accordance with the provisions of R. 44, would no doubt, not operate to transfer possession of the property to the Court. But the presumption of law is that anything which is done by the officer of the Court is properly done until the contrary is shown. 162 I.C. 653=1936 A.L.J. 283=1936 A. 364; 1935 A.L.J. 390=1935 A. 436; 1935 A.L.J. 63=1935 A. 214; 156 I.C. 697=1935 R. 186. Where attachment of movable crops is made by beat of drum and the procedure prescribed by R. 44 is not followed, the produce cannot be deemed to have passed from the possession of the judgment-debtor into that of the Court. 129 I.C. 715=1931 A. 142. See also 145 I.C. 818=1933 R. 267; 1935 A. 218=153 I.C. 428. Where the bailiff executing the warrant of attachment does not affix a copy thereof on the residential house of the

judgment-debtor, there is no compliance with R. 44, and the attachment is not a legal or valid attachment. 29 S.L.R. 190.

O. 21, R. 45 (2).—A judgment-debtor is at liberty, notwithstanding the attachment, to cut and gather the produce and store the same in default of any conditions imposed or orders passed by the Civil Court, in view of O. 21, R. 45 (2). But he is not entitled to take the crops away as is shown by sub-R. (3) of O. 21, R. 45. If after attachment, and after the crops have passed into the custody of the Court peon, the judgment-debtor and his men not only cut and gather the produce but also take them away, they would be guilty of theft. If in the course of such removal they obstruct the Court peon in the discharge of his duty of holding the crop, they would be also liable under S. 186, I. P. Code. 1940 P.W.N. 980.



of such acts, the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion make a further order prohibiting the removal of the crop pending the execution of the order of attachment.

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.

LOC. AMS.—[BOMBAY.] The following words shall be added to sub-rule (1) of r. 45 of O. 21 after substituting a semicolon for the full stop :—“and the applicant shall deposit in Court at the time of the application such sum as the Court shall deem sufficient to defray the cost of watching and tending the crop till such time.”

[CALCUTTA.] O. 21, r. 45 (1). Add the following to sub-rule (1), r. 45, O. 21 :—  
“and the applicant shall deposit in Court such sum as the Court shall require in order to defray the cost of watching or tending the crop till such time.”

[LAHORE.] O. 21, r. 45. Add the following proviso to sub-r. (1) of r. 45 :—  
“and with every such application such charges as may be necessary for the custody of the crop up to the time at which it is likely to be fit to be cut or gathered shall be paid to Court.”

[MADRAS.] Substitute the following for sub-rule (1) :—  
“Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient, and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered ; and the applicant shall deposit in Court within a date to be fixed by Court, such sum as the Court may deem sufficient to defray the cost of watching and tending the crop till such time.”

[PATNA.] O. 21, r. 45. Add to sub-r. (1) of r. 45 after deleting the full stop at the end of the sub-rule :—

“and the applicant shall pay into Court such sums as he may from time to time be required by the Court to pay in order to defray the cost of such arrangements.”

[RANGOON.] After r. 45, O. 21, insert the following as rules 45-A and 45-B :—

45-A. (1) Before issuing a warrant for the attachment of movable property which it will be necessary to place in charge of one or more peons, permanent or temporary, the Court shall satisfy itself that the attaching decree-holder has produced a receipt in Form 15-A, Appendix E, from the Bailiff that he has paid in cash as process-fees under r. 17 (1) (e) (ii) (2) of the Process-Fees Rules not less than Rs. 10, for each person whom the Bailiff considers should be employed.

(2) In sending the warrant for execution to the Bailiff, the Court Clerk shall certify at the foot of the warrant that the receipt granted by the Bailiff for the necessary fees has been filed in the record. The Bailiff shall then endorse on the warrant the name of the process-server to whom it is issued for execution. If a temporary peon is employed for the custody of the attached property, the process-server shall state in his report of the attachment the name of the temporary peon employed and the date from which his duties commenced.

(3) At the time of granting the receipt in Form 15-A, for payments made by the decree-holder as required by sub-rule (1), the Bailiff shall state in the lower portion of the Form the date on which the fees paid will be exhausted, warning the decree-holder that the property will not be kept under attachment after the date, unless further fees are paid before that date.

If the further fees required are not paid, the attachment shall cease as soon as the period for which fees have already been paid expires. In such a case the amount paid prior to the cessation of the attachment shall not be allowed to the attaching decree-holder as costs.

(4) The payment of fees under sub-rule (1) shall be made in cash to the Bailiff and the amount shall be at once entered in Bailiff's Register in No. II. The Court Clerk shall on receipt of the Bailiff's acknowledgment. (Form 15-A) file it in the record and make an entry to that effect in the diary.

(5) Temporary peons employed for the custody of the attached property shall be remunerated at the rate provided for in r. 15 of the Rules regarding process-serving establishments, provided that the total remuneration disbursed shall in no case exceed the amount of the process-fees actually paid



under the foregoing sub-rules. Permanent peons shall be presumed to be remunerated at the same rate as temporary peons but if the services of the former are utilized, the fees paid shall be credited direct into the Treasury to "Process-servers' Fees"—"XVI-A, Law and Justice"—"Courts of Law"—"Court-fees realized in cash."

(6) The remuneration of temporary peons employed to take charge of attached property shall be paid direct by the Bailiff to them on the order of the Judge.

Before passing such order, the Judge must verify the name of the payee from the report of the attachment and must satisfy himself that the amount proposed to be paid does not exceed the amount of the fees deposited with the Bailiff, or, if any payments have already been made in the case of the unexpended balance of such deposits and that all amounts previously drawn have been disbursed to the proper persons.

(7) When the order has been signed by the Judge, the money shall be disbursed by the Bailiff at once to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register II. If, however, the amount has been transferred to Bailiff's Register I, the Bailiff shall draw the amount necessary for payment from the Treasury as if it were a re-payment of deposit and shall then disburse the amount due to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register I.

(8) When the attachment is brought to a close or has not been effected, if the Judge finds, at the time of calculating the amount paid in and properly chargeable for peons, that the total amount of the fees actually paid under sub-rr. (1) and (3) exceeds the total amount that is chargeable for peons including the amount of the last payment he shall direct that the excess be refunded to payer.

(9) The Judge shall, in all cases in which a refund is to be made, issue to the Bailiff an order, a copy of which shall be placed on the record, to make such refund. If a sufficient portion of the amount paid by the decree-holder to pay such refund is in the hands of the Bailiff, that officer shall make the refund in the ordinary way prescribed in his Register II for repayments. If the amount has been credited into the Treasury, he shall prepare a bill for the amount to be refunded in the prescribed Treasury form and shall lay it before the Judge for signature with the record of the case in the same way as a bill for the remuneration of temporary peons. Before signing the refund order, the Judge must satisfy himself that the amount is available for refund by examining Bailiff's Register I, and the record. The bill when signed by the Judge will be given to the payee, with instructions to present it for payment at the Treasury or sub-treasury.

45-B. (1) In addition to the fees payable before a warrant issues for the attachment of movable property under r. 45-A, the Bailiff shall require the attaching decree-holder to deposit a sum of money sufficient to cover the cost of attachment other than the pay of peons employed to take charge of it, for such period as the Bailiff may think fit.

*Explanation.*—The costs in question might be, for example, (a) rent of building in which to store attached furniture, (b) cost of conveying the attached property from the place of attachment to Court or to a secure place of custody, (c) cost of feeding and tending live-stock, (d) cost of proceeding to the place of attachment to sell perishable property.

(2) If the attaching decree-holder fails to comply with the Bailiff's requisition, the warrant shall not be issued.

(3) Sums thus deposited shall be entered in the Bailiff's Registers I and II and any repayments thereof shall be made according to existing orders. A receipt for such sums shall be granted by the Bailiff in Form 15-A, Appendix E.

(4) In the receipt given for the sums deposited, the Bailiff shall state the period for which such sums will last, and if the attaching decree-holder does not deposit a further sum before the expiry of such period, the attachment shall cease when the sum deposited is exhausted.

(5) The officer actually attaching the property shall, unless the Court otherwise directs, give the debtor, or, in his absence, any adult member of his family who may be present, the option of having the attached property kept on his premises or elsewhere, on condition that a suitable place for its safe custody is duly provided. The option so given may be subsequently withdrawn by order of the Court. Where the attached property consists of cattle, these may be employed, so far as is consistent with r. 43, in agricultural operations.

(6) If no such suitable place be provided, or if the Court directs that the property shall be removed, the officer shall remove the property to the Court unless the property attached is a growing crop, when r. 45 applies. Whenever live-stock is placed at the place where it has been attached, the judgment-debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer.

(7) Whenever property is attached, the officer shall forthwith report to the Court, and shall with his report forward an accurate list of the property seized.

(8) If the judgment-debtor shall give his consent in writing to the sale of property without awaiting the expiry of the term prescribed in rule 68, the officer shall receive the written consent and forward it without delay to the Court for its orders.

(9) When the property is removed to the Court it shall be kept by the Bailiff, on his own sole responsibility, in such place as may be approved by the Court. If the property cannot, from



its nature or bulk, be conveniently kept on the Court premises, or in the personal custody of the Bailiff, he may, subject to the approval of the Court, make such arrangement for its safe custody under his own supervision as may be most convenient and economical.

(10) If there be a cattle-pound maintained by Government or any local authority in or near the place where the Court is held, the Bailiff shall be at liberty to place in it such attached live-stock as can be properly there kept, in which case the pound-keeper will be responsible for the property to the Bailiff and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description.

(11) Whenever property is attached, and any person other than the judgment-debtor shall claim the same, or any part of it, the officer, shall nevertheless, unless the decree-holder desires to withdraw the attachment of the property so claimed, remain in possession and shall direct the claimant to prefer his claim to the Court.

(12) If the decree-holder shall withdraw an attachment or if it shall cease under sub-r. (2) or (4), the Bailiff's officer shall inform the debtor, or, in his absence an adult member of his family that the property is at his disposal.

(13) If any portion of the deposit made under sub-r. (1) or (4) remains unexpended, it shall be refunded to the decree-holder in the manner prescribed for such refunds in sub-r. (9) of r. 45-A. Any difference between the cost of attachment of movable property (other than the costs referred to in r. 45-A) and the sums deposited by the attaching decree-holder shall, unless the difference is due to the default of the Bailiff, be recovered from the sale proceeds of the attached property, if any, and if there are no sale-proceeds, from the attaching decree-holder on the application of the Bailiff. If there is still a deficiency, the amount shall be paid by Government.

Attachment of debt, share  
and other property not in pos-  
session of judgment-debtor.

46. (1) In the case of—

(a) a debt not secured by a negotiable instrument,

(b) a share in the capital of a corporation,

(c) other movable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court, the attachment shall be made by a written order prohibiting,—

#### NOTES.

**O. 21, R. 46:** SCOPE.—Effect of garnishee order in England and in India. 54 M. 727=132 I.C. 297=61 M.L.J. 774. Principal and agent—Debtor and creditor living in Indore—Debtor having branch office at Bombay—Separate accounts—Debt where payable. 60 I.A. 211=57 B. 474=1933 P.C. 150=65 M.L.J. 37 (P.C.). A prohibitory order to a person outside the Court's jurisdiction is illegal. 39 C. 104=16 C.W.N. 402; 1939 M.W.N. 573=1939 Mad. 811. But see 60 C. 782=143 I.C. 785=37 C.W.N. 439=1933 C. 379; 148 I.C. 176=30 N.L.R. 92=1933 N. 167. See also 177 P.L.R. 1915=30 I.C. 487; 107 I.C. 663 (1)=1929 L. 645; 118 I.C. 908 (2); 1934 S. 135=151 I.C. 879. So also attachment and sale of movable property outside Court's jurisdiction. 35 C.W.N. 1096; 1939 Rang.L.R. 694=1939 Rang. 34. A debt payable to the judgment-debtor outside the jurisdiction of the Court by a person not resident within its jurisdiction, cannot be attached under O. 21, R. 46. I.L.R. (1939) 1 Cal. 523=43 C.W.N. 512=A.I.R. 1939 Cal. 428. Where both the parties to a garnishee proceeding had known the appointment of a receiver to receive the payment but neither of them informed the Court and got an order passed by settlement the payment by the garnishee in pursuance of such order does not discharge him. I.L.R. (1941) 2 C. 221=1941 Cal. 579. An order to pay by the Court is a necessary ingredient of every garnishee order. Where the payment was a voluntary payment and was so expressed in the settlement between the parties, subject to an agreement to refund the money in the event of rejection of the claim, or any dis-

pute arising out of the claim. *Held*, that the payment did not discharge the garnishee. I.L.R. (1941) 2 C. 221=1941 Cal. 579. Annuity until it falls due is not a debt, nor money expected to reach a public officer until actual receipt. 14 C.L.J. 127=16 C.W.N. 14. Whether an attaching creditor who has attached a debt but not the decree on the debt, can execute the decree. See 92 I.C. 1021=1926 M. 371=50 M.L.J. 79. Mortgage debt can be validly attached under this rule. 144 I.C. 175; 143 I.C. 785; 20 C. 805; 26 B. 305; 37 M. 51; 46 A. 917=80 I.C. 890. A mortgage debt is movable property within the meaning of this rule. 26 B. 305; 39 M. 389=28 M.L.J. 338; 144 I.C. 175=1933 R. 61; 60 C. 782=37 C.W.N. 439=1933 C. 379; 26 I.C. 508=27 M.L.J. 239; 16 I.C. 816; 22 M.L.J. 105=37 M. 51; 50 I.C. 157=21 O.C. 400; 46 A. 917=1924 A. 796. See also 1912 M.W.N. 879=16 I.C. 438; 1930 O. 473. But see 125 P.L.R. 1913=18 I.C. 318. Court within which mortgagee resides and not Court within which mortgaged property is situated has jurisdiction to attach. 11 P. 473. But see 60 C. 782=143 I.C. 785=1933 C. 379. There is no debt in a purely usufructuary mortgage. The proper procedure is to attach his interest in the immovable property. 35 B. 288=10 I.C. 812. See also 1928 M. 648; 1931 P. 63. *Contra* 1929 M.W.N. 138. It is impossible to hold that the Controller of Patents is a "person in possession of the same" within the meaning of O. 21, R. 46. Therefore, the service of a prohibitory order upon the Controller of Patents is not an attachment of the patent within the meaning of S. 51. 42 C.W.N. 1086. The first defendant held an anomalous mortgage and



- (i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court ;
- (ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon ;
- (iii) in the case of the other movable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

## NOTES.

under its terms was in possession of the property. Plaintiff obtained a decree against him, attached his interest in the mortgage under R. 46, and purchased it in Court auction. In a suit by him, as purchaser of the mortgage interest, for possession and mesne profits it was contended by the lessee of the property that though under R. 46 the mortgage debt was validly attached there was so far as the right to possession was concerned no legal attachment. *Held*, that the security followed the debt and it was difficult to distinguish between one part of the security, i.e., the right of bringing the property to sale and the other part of it, namely, the right to possession. 39 L.W. 792=1934 M. 498=66 M.L.J. 695. Order for attachment under this rule is not an injunction or order staying a suit within the meaning of S. 15, Limitation Act. 13 A. 76. *See also* 14 A. 162. In attaching a debt, it is not the business of Court to determine whether debts are really due or not. 28 A. 262; 4 R. 100=97 I.C. 247 (2)=1926 R. 175. *See also* 1931 M. 570=61 M.L.J. 863. When garnishee denies debt, he can make application under O. 21, R. 58, and Court may pass order under R. 63. 1931 B. 288=133 I.C. 248=33 Bom.L.R. 396. But *see* 59 M. 966=1936 M. 152=70 M.L.J. 20. Where it was held that when an objection by the garnishee denying the debt is disallowed, the objection and the order of the executing Court disallowing the objection and ordering him to pay into Court do not come within the purview of O. 21, Rr. 58 to 63, so as to preclude him from denying the debt in a suit subsequently instituted against him by the decree-holder as receiver for realising the debts on the basis of the attachment. Where a garnishee denies the debt and objects to jurisdiction of Court to compel him to deposit the debt, but does not ask to have the matter investigated and there is no investigation or decision on the point raised by him, and Court orders sale of the debt for whatever it is worth, the garnishee can raise the matter in the subsequent suit by the purchaser. 1936 N. 218. Garnishee—No denial of debt—Plea of set-off as between himself and judgment-debtor can be gone into in execution. 1937 Mad. 848. The appointment of a receiver is not irregular. 27 I.C. 812. When there is an attachment before judgment, time for the consideration of the question whether the attached debt is due to judgment-debtor can be decided when the garnishee order is going to be enforced. 146 I.C. 457=1933 A. 481. The absence of attachment does not render a sale invalid. 36 I.C. 292. Attachment of debt when completed. 152 I.C. 795=1934 P. 619. When shares

in company are purchased, the proceedings come to an end. Nothing more is to be done by the Court. 42 M.L.J. 449=45 M. 537. Service of notice on the authorised attorney of the managing director sufficient. 5 R. 685. What is proper service of notice. 152 I.C. 795=1934 P. 619. No notice to the judgment-debtor is necessary in attaching his money in the hands of the decree-holder himself, if it is not secured by a negotiable instrument. 17 I.C. 420=15 O.C. 289.

WHAT CAN BE ATTACHED.—Payments to be made to a railway contractor for work done as well as the salary and the allowance of a servant of a railway company cannot be attached under R.46. 107 I.C. 663 (1). The unpaid portion of the loan does not constitute a debt due by the mortgagee to the mortgagor and as such cannot be attached. 147 I.C. 773 (2)=1934 A. 448; 1934 A.L.J. 713=1934 A. 449. Attachment of agricultural produce in the hands of a third person comes under this rule. 64 I.C. 1007=15 S.L.R. 128. An attachment of money in the hands of a receiver made without the previous permission or sanction of the Court is improper and irregular. 21 C. 85. Attachment of debt due when a prior order appointing a receiver has been made is invalid. 102 I.C. 413=29 Bom.L.R. 409. A dividend payable to a creditor in insolvency is not a debt liable to be attached under O. 21, R. 46; when no dividend has at all been declared, there is nothing to attach. 1939 M.W.N. 573=A.I.R. 1939 Mad. 811. Money deposited by a third person as due to the judgment-debtor can be attached under this rule. 43 A. 272=60 I.C. 881. As regards the attachment of money or other valuable securities deposited as security for the due performance of one's duty, *see* 9 M. 203 (206). Deposit by member of East India Cotton Association to the Association is not liable to attachment. I.L.R. (1939) Bom. 109=1939 Bom. 90=41 Bom.L.R. 19. So also salary of M.L.A. I.L.R. (1939) 1 Cal. 523=43 C.W.N. 512=1939 Cal. 428. If attachment is made after a cheque is delivered to the payee, the payment of the cheque cannot be stopped. 3 B. 49. And the attachment is of no avail. 12 I.C. 869=4 Bur.L.T. 148. Undivided share in ancestral joint family business cannot be attached when the decree is personal. 50 I.C. 157=21 O.C. 400. *See also* 1937 Lah. 313 (attachment of a share in a shop belonging to the judgment-debtor). Even if a share of a debt, i.e., a debt due to the judgment-debtor and other persons jointly, cannot be attached under R. 46, or under any other rule prescribed, a prohibitory order similar to one under R. 46 can be made under the inherent powers of Court where Court finds



(2) A copy of such order shall be affixed on some conspicuous part of the Court-house and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other movable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

#### NOTES.

it necessary for the ends of justice. 41 C. W.N. 410=1937 C. 199. *See also* 41 C.W.N. 1074=I.L.R. (1937) 2 Cal. 440. After attachment of share in a company, company cannot by resolution appropriate share towards debts due to it. 105 I.C. 246. *See also* 1937 Lah. 313. Debt—Life Insurance Policy—Amount payable under, to representatives of assured, on proof of death of assured—If a “debt” before such proof is given. 56 M.L.J. 299. A deposit with an association which is re-payable as per rules only when membership ceases can be attached but judgment-debtor cannot be compelled to resign. 29 Bom.L.R. 416=102 I.C. 418 (1)=1927 B. 365; 41 Bom. L.R. 19=I.L.R. (1939) Bom. 109. When after Court sale and before its confirmation judgment-debtor leases the property and realised portion of rent, the purchaser can obtain prohibitory order under S. 151 though not under this rule or S. 47. 136 I.C. 4=1932 L. 295. Attaching officer has no power to seal up premises other than that used by judgment-debtor. 11 P. 493=139 I.C. 834=1932 P. 279.

**O. 21, R. 46 (2).**—Attachment of a mortgage-debt without copy of attachment order being fixed to the Court-house is ineffectual. 9 C.W.N. 693; 27 A. 378; 29 A. 259; 30 M. 207; 17 M.L.J. 488. Where procedure prescribed is not followed, the attachment is not legal 1928 R. 285=30 Cr.L.J. 748.

**O. 21, R. 46 (3).**—In case the debtor admits the debt, Court should order debtor to pay the debt to the decree-holder. 97 I.C. 467. A debtor can always get a valid discharge by payment into Court if any dispute exists as to persons entitled to the money. 112 P.L.R. 1913=18 I.C. 205. Payment contemplated in R. 46 (3) is payment into the attaching Court so as to be available for the attaching decree-holder and not payment into the particular Court even when the payment is earmarked for some other purpose. If a debtor pays the amount not in attaching Court but in another Court not under compulsion on behalf of the judgment-debtor, such payment is not sufficient to discharge him from his liability to the attaching creditor. 43 L.W. 713=1936 M. 251=71 M. L.J. 243. If decree-holder was not entitled to recover his debt, the debtor of judgment-debtor must contest his liability and will not be absolved from the liability if he pays the amount. 28 I.C. 317=50 P.L.R. 1915. The debtor can plead that one claimant and not another is entitled to the debt. 15 I.C. 193. In a garnishee proceeding, the attaching creditor stands in the shoes of the judgment-

debtor. No attachment could be made, when there is no existing debt due by the garnishee to the judgment-debtor, and if the judgment-debtor has already parted with his interest in the debt by assignment or created an equitable charge in respect of the same in favour of another person, the attaching creditor acquires no larger rights than his debtor. An agreement between a debtor and a creditor that a fund should be applied in a particular way will not create a valid equitable charge upon the fund. It is further necessary that an obligation should be imposed in favour of the creditor to pay the debt out of the fund. The test really is whether there was an intention to assign or create a charge, which will give the assignee an equitable interest in the fund itself. An assignment by way of charge on future property is a perfectly valid assignment in equity, which will attach to the property, when it comes into existence. 68 C.L.J. 97=42 C.W.N. 971=A.I.R. 1938 Cal. 606.

**RIGHT OF SUIT.**—A judgment-debtor whose debt has been attached can sue for his debt though he cannot recover it until the decree against him is satisfied. 10 I.C. 569; *also* 49 I.C. 88=5 O.L.J. 766. When a debt due from a third party to judgment-debtor is attached but the liability is denied, a receiver with power to sue may be appointed or the debt may be sold. 35 I.C. 469=10 Bur.L.T. 6; 1927 A. 41=97 I.C. 467. *Vide* 84 I.C. 1022=1924 C. 1068. A suit by an alleged assignee of a debt when it has been realised by a decree-holder is governed by Art. 62 or 120 of the Limitation Act and time begins to run from the date of receipt of money from Court. 38 M. 972=26 M.L.J. 166. In a suit on bond debts purchased, evidence to identify debt can be let in when it has been wrongly described in execution. 6 L.W. 712=42 I.C. 609. In the suit garnishee can show that no debt was due. 1926 M. 1011=97 I.C. 780.

**O. 21, Rr. 46-47.**—R. 46 must be read with Rr. 43 and 47. R. 46 applies even if the ownership of the judgment-debtor is fractional instead of being integral. Consequently, where the judgment-debtor owns a share or interest in some property which is in the possession of a stranger, R. 46 as well as R. 47 must come into operation so as to necessitate prohibitory orders being issued not only to the judgment-debtor but also to the stranger who is in possession of the property the judgment-debtor's share in which is intended to be attached. A.I.R. 1941 Nag. 157.



LOC. AMS.—[RANGOON.] *Delete* r. 46 (3).

[CALCUTTA.] *Add* the following after r. 46, O. 21 :—

46-A. The Court may in case of a debt, other than a debt, secured by a mortgage or a charge or by a negotiable instrument, which has been attached under r. 46 or 51 of this Order, upon the application of the attaching creditor, issue notice to the garnishee liable to pay such debt calling upon him either to pay into Court the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so :

Provided that, if the debt in respect of which the application aforesaid is made is in respect of a sum of money beyond the pecuniary jurisdiction of the Court, the Court shall send the execution case to the Court of the District Judge to which the said Court is subordinate, and thereupon the Court of the District Judge or any other competent Court to which it may be transferred by the District Judge will deal with it in the same manner as if the case has been originally instituted in that Court.

Such application shall be made on affidavit verifying the facts alleged and stating that in the belief of the deponent the garnishee is indebted to the judgment-debtor.

46-B. Where the garnishee does not forthwith pay into Court the amount due from him to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the costs of execution or does not appear and show cause in answer to the notice, the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

46-C. Where the garnishee disputes liability, the Court may order that any issue or question necessary for the determination of liability shall be tried as if it were an issue in a suit, and upon the determination of such issue shall make such order or orders upon the parties as may seem just.

46-D. Where it is suggested or appears to be probable that the debt belongs to some third person, or that any third person has a lien or charge on, or other interest in, such debt, the Court may order such third person to appear and state the nature and particulars of his claim (if any) to such debt and prove the same.

46-E. After hearing such third person and any other person or persons who may subsequently be ordered to appear, or where such third or other person or persons do not appear when so ordered, the Court may make such order as is hereinbefore provided, or such other order or orders upon such terms, if any, with respect to the lien, charge or interest, if any, of such third or other persons as may seem fit and proper.

46-F. Payment made by the garnishee on a notice under r. 46-A or under any such order as aforesaid shall be valid discharge to him as against the judgment-debtor and any other person ordered to appear as aforesaid for the amount paid or levied although such judgment may be set aside or reversed.

46-G. The costs of any application made under r. 46-A and of any proceeding arising therefrom or incidental thereto, shall be in the discretion of the Court.

46-H. An order made under rr. 46-B or 46-E, shall be appealable as a decree.

47. Where the property to be attached consists of the share or interest of the judgment-debtor in movable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.

#### NOTES.

O. 21, Rr. 46-A and 49.—Garnishee proceedings cannot be taken under O. 21, R. 46-A, C. P. Code, in respect of a debt which cannot be attached under R. 46. A debt due to a firm from a customer is the property of the firm within the meaning of R. 49 and it cannot be attached in execution of a decree obtained not against the firm or the partners *as such* but against one or some of them in his or their individual capacities. A garnishee order in respect of that debt made in execution of such a decree is, therefore, illegal. 45 C.W.N. 333=LL.R. (1941) 1 Cal. 389=1941 Cal. 364.

O. 21, R. 46 and S. 64.—After attachment and before its purchase in Court-auction by the decree-holder of certain mortgagee rights, the mortgagor applied for liquidation of his debts under C. P. Debt Conciliation Act. As

the mortgagee did not appear, though noticed, the debt was discharged. In a suit on the mortgage by the auction-purchaser of the mortgagee rights ignoring the discharge of the debt as not binding inasmuch as it was made during the subsistence of the attachment—it was held that O. 21, R. 46 did not vest the attaching creditor with any right, title or interest in the debt except the negative right to see that it was not paid (except into Court) without an order of the Court and that the attachment could not prevent a conciliation of the debt between the creditor and the debtor before the Board. It was further held that both S. 64 and O. 21, R. 64 were limited so far as the debt was concerned, to its payment and not to its settlement, and that the statutory extinction of the debt in the interval could not be prevented. 1941 N.L.J. 593.

O. 21, R. 47.—See 1940 N.L.J. 56; 1938



48. (1) Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section

Attachment of salary or allowances of public officer or servant of railway company or local authority.

60, be withheld from such salary or allowances either in one payment or by monthly

#### NOTES.

Lah. 65. Mode of recovery of fine levied on a Hindu coparcener is that prescribed by this rule, by issuing a prohibitory order or appointment of receiver, and there cannot be attachment of moveables by way of seizure. 55 M. 1041=63 M.L.J. 142=1932 M. 538. See also 1938 Lah. 65 (interest of partner in partnership assets is to be treated as movable property). Where on objection under O. 21, R. 58 Courts finds that claimant has half-share in moveable property attached, it would be the better course to release the entire property and to proceed by way of attachment under this rule. 59 C. 808=1932 C. 408=137 I.C. 672. *Quære*.—Whether R. 47 applies to the members of a Hindu coparcenary, one of whom happens to be a judgment-debtor? 43 L.W. 760=1936 M. 560=70 M.L.J. 717. O. 21 deals separately with different kinds of property and lays down different modes of attachment in respect of each. In view of the special provisions, decrees cannot be dealt with as 'movable property' and are not so treated for the purpose of the special provisions which relate to attachment. Again, R. 47 which contemplates two or more 'co-owners' in the property sought to be attached, can have no application where according to the special rules obtaining in the C. P. Tenancy Act the lambardar alone is the decree-holder. 1940 N. L.J. 56=A.I.R. 1940 Nag. 270.

O. 21, R. 48.—This rule is new and supercedes the rulings in 2 B. 44; 29 B. 405; 28 B. 198 and 30 C. 713. Prohibitory order on an Auditor of a Railway Company not to pay out security deposited will bind the company subject to its lien if any. 7 Bur.L.T. 238=24 I.C. 725. No order under sub-r. (3) can be made against Government without bringing the Government on record as a party. 93 P.R. 1912=14 I.C. 737. As soon as the notice of the order issued by the Court under O. 21, R. 48 is served on the disbursing officer and accepted by him, the attachment becomes complete and effective. His postponement of the remission of the salary to the Court, to a later date, cannot mean that there was no effective attachment till then. A.I.R. 1941 O. 277=1941 O.W.N. 115. Attachment—Power of Court to which decree is transferred. See 1 Luck. 46=1937 O. 112=91 I.C. 1043. R. 48 has no application in the case of persons who are in private service. 1929 N. 333=120 I.C. 209. Salary of M.L.A. is not liable to attachment. I.L.R. (1939) 1 Cal. 523=43 C.W.N. 512=1939 Cal. 428. Pay or pension for month is due on last day of month and can be attached on last day. 1930 R. 161 (1). Order refusing attachment

of pay is one under S. 47 and hence appeal lies thereon, and no revision. 144 I.C. 897=35 Bom.L.R. 360=1933 B. 185. A Court acting under O. 21, R. 48 must follow the Code. Sub-R. (2) of R. 48 speaks of the attachable portion of the salary. It would be better for the Court, in the interests of all concerned, to obtain on the application of a decree-holder, the relevant materials from the disbursing officer in order to work out the figures itself and then issue an attachment for a definite, specified amount so that the parties and the disbursing officer may be under no misapprehension, especially when there is more than one execution case pending against the same judgment-debtor. 1941 Pat. 157=21 Pat.L.T. 776. Order attaching pay of Government servant in spite of objection raised by Secretary of State that the pay was not attachable, is not subject to revision, whether it is treated as an order under O. 21, R. 58 or as under S. 47. 1936 L. 761.

O. 21, R. 48 and S. 60.—A public officer whose salary is exempt from attachment under S. 60 (i) cannot contract himself out of this statutory provision. This exemption cannot be waived, because there is a question of public interest and policy involved. The privilege being one conferred for reasons of public policy, it cannot be waived. If the public officer whose salary is attached in contravention of S. 60 (i), submits to the attachment or agrees to a deduction of a part of the salary which is below the minimum prescribed by S. 60 (i), the disbursing officer can object to the attachment and apply to the Court to vacate the order of attachment, and the Court can give effect to the objection. Every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties. Where an order is made against Government or a public body, and when the law imposes liability in case the order is not obeyed, it would be unreasonable and unjust to hold that it is not open to Government or to the public body, as the case may be, to move the Court and contend that the order is not justified by the law, and there must be inherent power in the Court to consider such an application. 43 Bom.L.R. 758.

O. 21, R. 48 and Ss. 73 and 151.—Where on the application of one of the decree-holders a prohibitory order under O. 21, R. 48 attaching a portion of the salary of the judgment-debtor has been issued, that decree-holder is lawfully entitled to receive the whole amount deducted from the judgment-debtor's salary under the prohibitory order, save and in so far as a proper order under S. 73, C. P.



instalments as the Court may direct; and, upon notice of the order to such officer as <sup>1</sup>[the Central Government or the Provincial Government may by notification in their official Gazette] appoint <sup>2</sup>[in this behalf,—

(a) where such salary or allowances are to be disbursed within the local limits to which this Code for the time being extends, the officer or other person whose duty it is to disburse the same shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be;

(b) where such salary or allowances are to be disbursed beyond the said limits, the officer or other person within those limits whose duty it is to instruct the disbursing authority regarding the amount of the salary or allowances to be disbursed shall remit to the Court the amount due under the order, or the monthly instalments, as the case may be, and shall direct the disbursing authority to reduce the aggregate of the amounts from time to time to be disbursed by the aggregate of the amounts from time to time remitted to the Court.]

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by the <sup>3</sup>[Central Government or the Provincial Government as the case may be] in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall without further notice or other process, bind <sup>3</sup>[the Central Government or the Provincial Government] or the railway company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India; and <sup>4</sup>[the Central Government or the Provincial Government] or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule.

LOC. AM.—[MADRAS.] *Substitute* a comma for the period at the end of the last sentence of sub-rule (1) and *add* the following at the end of sub-rule (1):—

“such amount or instalment being calculated to the nearest anna by fractions of an anna, or six pies and over being considered as one anna and omitting amounts less than six pies.”

49. (1) Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

Attachment of partnership property.

#### LEG. REF.

<sup>1</sup> These words were substituted for the original words by para 3 and Sch. I of the Government of India (Adaptation of Indian Laws) Order, 1937.

<sup>2</sup> These words were substituted for the original words by S. 2 of the Code of Civil Procedure (Amendment) Act, 1939 (XXVI of 1939.)

<sup>3</sup> These words were substituted for the words “the Government” by the Government of India (Adaptation of Indian Laws) Order, 1937.

<sup>4</sup> These words were substituted for the words “the Government” by para. 3 and Sch. I of the Government of India (Adaptation of Indian Laws) Order, 1937.

#### NOTES.

Code, if any, that might have been passed. In the absence of any such order the Judge

C. C. M.—127

has no jurisdiction to cancel the prohibitory order at the instance of the judgment-debtor and direct that a sum fixed to be deposited by the judgment-debtor should be *pro rata* distributed amongst all the decree-holders, when no one of them has asked for it. The inherent powers of the Court cannot be used for the purpose of overriding the rights of one party for the benefit of the other. 1940 Rang.L.R. 421=A.I.R. 1940 Rang. 201 (S.B.).

O. 21, R. 49.—The provisions of R. 49, are imperative. A sale of partnership property in execution of a decree, which is not passed against the firm or the partners thereof, is therefore invalid and inoperative. 60 C.L.J. 464; 155 I.C. 842 (2)=1935 C. 275. A decree can be passed against an individual partner. 23 C.W.N. 500=51 I.C. 597. An interest of a partner in partnership assets is intended to



(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged, or, in the case of a sale being directed, to purchase the same.

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within British India.

(5) Every application made by any partner of the judgment debtor under sub-rule (3) shall be served on the decree-holder and on the judgment-debtor, and on such of the other partners as do not join in the application and as are within British India.

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served.

Execution of decree against firm.

50. (1) Where a decree has been passed against a firm, execution may be granted—

#### NOTES.

be treated as movable property under R. 49 of O. 21. 177 I.C. 116=A.I.R. 1938 Lah. 65. An assignee of a share in partnership who has also obtained a decree against a partner cannot (except to the limited extent provided in R. 49) force the other partners to account by securing the appointment of a receiver especially when the partnership is still subsisting and the partnership has not been dissolved. 10 P. 792=133 I.C. 40=12 Pat.L.T. 361. As to partnership property, it is only the interest of the partner who is the judgment-debtor which vests in the receiver, and not the entire partnership. 1932 A.L.J. 516=1932 A. 468=141 I.C. 128. Unless the questions whether the judgment-debtor was a partner of the partnership and whether any money was due to him from it, are decided, no receiver could be appointed. Further any order passed would be unsupportable, if notice of the application had not been served as required by R. 49 (4). 1940 A.L.J. 120=A.I.R. 1940 All. 250. O. 21, R. 49 (2) charges the interest of the partner in the partnership property and profits. The partner's interest is his right to participate in the net assets of the firm, that is, in the value or proceeds of the assets less the liabilities to third parties and not less any liability to himself; for any liability to himself only increase his interest in the property at the expense of other partners. An advance is but an item in the partnership account. The Court charges and orders the sale of whatever the partner is entitled to from the partnership business as between that partner and the other partners, as if on dissolution of the firm 189 I.C. 446=A.I.R. 1940 Rang. 153. Where the interest

of a partner extends only to the profits and has nothing to do with the assets and such partner overdraws his share of the profits, then the remaining partners are entitled to reimburse themselves from the overdrawn partner's share of the profits before handing over any part of such share to the overdrawn partner. A judgment-creditor of such a partner can have no higher rights than his judgment-debtor and hence the remaining partners will get priority over the overdrawn partner's judgment-creditor or assignee. A receiver appointed under O. 21, R. 49 (2) in respect of such a partner's share in the profits though in no better position, has a right to accounts and can insist that nothing be paid over to the judgment-debtor partner for his private and personal purposes as distinct from payments made for business purposes. 1941 Nag. 63=1940 N.L.J. 596.

O. 21, R. 50 (1).—This rule applies to a joint Hindu family firm. 184 I.C. 701=1940 Pat. 149=21 Pat.L.T. 618. No order under this rule could be passed making the shareholders liable when the decree is against a limited liability company. Such an order must be deemed to be a nullity and must be ignored by the executing Court. 164 I.C. 513 (Lah.). R. 50 does not require the holder of a decree against a firm to first exhaust his remedy provided in cl. (a) of the rule and then proceed under cl. (b), and failing satisfaction under those two clauses, proceed under cl. (c). Under the rule he has three courses open to him, any of which he may pursue regardless of the order in which they are set out. 141 I.C. 453=34 P.L.R. 190=1933 L. 472. An award against a firm having the force of a decree under S. 15 of



- (a) against any property of the partnership ;
- (b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner ;
- (c) against any person who has been individually served as a partner with a summons and has failed to appear :

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c) as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

#### NOTES.

the Indian Arbitration Act is not sufficient to have recourse to the provisions of this rule. 29 Bom.L.R. 660=104 I.C. 94=1927 B. 428. *Contra* 1929 S. 28; 1931 S. 82=131 I.C. 712; 13 Lah. 327=1931 L. 736; 62 C. 833=61 C. L.J. 515; 30 S.L.R. 6=165 I.C. 826=1936 S. 211. This rule is limited in its operation to the case of a partner who was living at the time of the decree. 87 I.C. 992=1925 S. 298. Under sub-r. (1) and under English Law, partners not served and who have not appeared are not liable. 36 M. 414=22 M.L.J. 109. *Also see* 30 C.W.N. 11. Where summons were affixed on refusal to accept, and the party did not appear, execution could proceed against him personally as partner under sub-r. (1) (c). 26 I.C. 866=19 C.W.N. 1008. Appearance under protest—Remedy of party in execution. 31 C.W.N. 1004; 41 C. W.N. 566. But if he once pleads his non-liability and asks the Court to frame an issue on the point, he cannot then be allowed to turn round after the issue is decided against him and urge that all proceedings in the trial Court *qua* this matter subsequent to his appearance under protest were without jurisdiction and that he was still entitled to claim the benefit of sub-r. (2), R. 50. 157 I.C. 1025=1935 L. 520. A partner against whom execution is levied in respect of decree against firm, cannot plead alternatively, denying his partnership, and the authority of the others to enter into the transaction which gave rise to the liability. 34 Bom.L.R. 617=1932 B. 334=138 I.C. 314. Where a decree is obtained against a firm by serving summons in the suit upon two persons as partners of that firm, the mere fact that three other persons are stated to be the remaining partners of the firm in the petition for execution of the decree cannot make the execution invalid. These other persons do not come under O. 21, R. 50 (1) (b) and (c). The decree-holder cannot execute the decree against them unless he has obtained leave from the Court which has passed the decree. If this leave has not been obtained, he is entitled to proceed against the other two judgment-debtors, and the execu-

tion petition is valid so far as they are concerned. 42 C.W.N. 310=A.I.R. 1938 Cal. 316.

O. 21, R. 50 (2).—As to the nature of application under this rule, and limitation for the same, *see* 34 Bom.L.R. 1112=140 I.C. 519=1932 B. 516; 1935 M. 926. O. 21, R. 50 (2) is not limited to a finding of fact as to whether a person is or is not a partner. A Court has under O. 21, R. 50 jurisdiction to inquire and decide whether a party to the suit under O. 30 is liable as a partner within the meaning of O. 21, R. 50 (2) because he held himself out to the plaintiff as such. A. I.R. 1941 Sind 8. O. 21, R. 50 (2), is sufficiently wide to permit a person desiring to dispute his liability as a partner to do so not only on the ground that he is not a partner, but on other grounds as well. He can dispute his liability by establishing that a contract of sale was beyond the scope of the partnership. He can also contend that the individual partners had no authority on behalf of the partnership to refer disputes between the firm and persons with whom the firm had dealings, to arbitration. I.L.R. (1939) 2 Cal. 312=1940 Cal. 362. The Court which passed the decree is competent and has jurisdiction to grant leave to the decree-holder under O. 21, R. 50 (2), even after the decree has been transferred for execution to another Court. Merely because the decree is transferred for execution by it to another Court, it does not cease to have jurisdiction to grant such leave. I. L.R. (1937) All. 946=1937 A.L.J. 1165=A. I.R. 1937 All. 758. There is no warrant for holding that an application under O. 21, R. 50 (2), for leave to execute a decree obtained against a firm as against some partner or partners cannot be made unless in the first instance a regular *darkhast* has been filed under O. 21, R. 11. The logical course is to apply for leave first and then to execute the decree afterwards. I.L.R. (1940) Bom. 562=42 Bom.L.R. 564=A.I.R. 1940 Bom. 330. *Ex parte* decree obtained against firm mentioning individuals constituting it—Application to set aside *ex parte* decree dismissed on foot-



(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise, as if it were a decree.

### NOTES.

ing that decree was against firm—Sale of personal properties of partners without leave of Court not valid—Decree-holder cannot contend that decree was against individuals composing firm. 163 I.C. 34=1936 P. 496. An application under R. 50 (2) may be filed at any time so long as the decree sought to be executed is alive. 1935 S. 12=154 I.C. 339. Person admitting that he is partner cannot dispute the decree. If he wants to dispute the decree, he should take proceedings in the suit and cannot contest it in execution. 151 I.C. 749 (1)=1934 S. 135 (2). Decree against firm—Partners disputing liability—Remedy of decree-holder. As to scope of inquiry under this rule. 1934 S. 135 (2). The provisions of O. 30 do not in any way militate against sub-r. (2). The Court which passed the decree as well as the Court to which it is sent for execution can enquire into as to who constitute the firm. 86 I.C. 1013=1925 S. 293. *See also* 108 I.C. 528; 1929 L. 228=115 I.C. 536; 1937 Pesh. 96; 134 I.C. 1026=1931 L. 736; 34 Bom.L.R. 737; 26 S.L.R. 228=1932 S. 199. As to whether executing Court can go behind the order of trial Court, *see* 156 I.C. 930 (P.). The presumption arising under S. 264, Contract Act, that the objectors were partners of the firm as no public notice of the dissolution had been given does not avail the creditor if he is a customer of the firm after its dissolution. For the expression "persons dealing with a firm" occurring in this section does not cover persons dealing with a firm for the first time after dissolution. 146 I.C. 847=34 P.L.R. 1032=1933 L. 591. Where in a suit by a firm a counter-claim was set up and a decree was passed and the solicitors of the firm closed the names of the partners, the fact of their being partners could be agitated in execution. 51 B. 794=103 I.C. 256=1927 B. 447. Application for leave to execute is one in execution and not in suit. 1931 L. 736. The application falls under Art. 182 and not Art. 181 of the Limitation Act. The application can be made at any time during which the decree remains capable of being executed; and a decree-holder can apply for execution against an individual partner, obtaining leave, if necessary, even if more than three years have elapsed since the passing of the decree, provided the execution is not barred in any other way. 30 S.L.R. 88=1936 S. 138. Court to which decree is transferred has power to grant leave. 1931 L. 507=131 I.C. 376. *Contra* 1931 S. 82=131 I.C. 712=30 S.L.R. 290=161 I.C. 524=1936 S. 11. No special leave is necessary as regards a person who has appeared in his own name under O. 30, R. 6 or who had admitted in pleadings that he is a partner, or who has been served with summons. 89 I.C. 401. Sub-r. (2) applies only in the absence of the conditions of sub-

R. (1). 26 I.C. 866=19 C.W.N. 1008. *Also* 28 I.C. 260=1915 M.W.N. 180. The term "partner" in R. 50 (2), includes his legal representative; and the question of the liability of the legal representative of a deceased partner of a firm can therefore be raised and decided in execution proceedings. 30 S.L.R. 6=1936 S. 211. *Contra* 41 C.W.N. 566. The sub-rule covers also the case of a deceased partner. 24 Bom.L.R. 1037=1923 B. 66. A decree against a firm after death of a partner can be executed against his legal representative. 100 I.C. 204=1927 S. 130 (F.B.); 1927 S. 247. *See also* 29 Bom.L.R. 1296. Partnership—Decree against, in its firm name—Execution of—Partner who had died before institution of suit—Legal representatives of—Execution of decree against; *held*, that execution could not issue against legal representatives. R. 50 (2) would apply only when the decree is sought to be executed against any person as being a partner in the firm. O. 30, R. 4 only gives legal representatives a right to apply to be made party to suits in the name of the firms. But it does not enable a decree-holder to claim the right claimed in the present case. 119 I.C. 603=57 M.L.J. 344 (F.B.). *See also* 1935 S. 12. If the decree is against a firm and personally against some specified partners, unnamed partners can be made liable under this rule. 18 S.L.R. 146=1925 S. 317. For the purpose of sub-R. (2) "Court which passed the decree" is the Court of transfer. 43 A. 394=19 A.L.J. 187. But *contra* 11 P. 580=13 Pat.L.T. 751=1932 P. 323. The provisions of this rule apply to proceedings to enforce an award against a firm. 35 Bom.L.R. 941=1933 B. 433. The question whether all or any of the persons served with notices of an award or of its filing in Court are partners in a firm can only be litigated when an application under R. 50 is made against persons alleged to be partners and permission is sought to enforce the award against them. Such a question cannot be gone into in proceedings for filing the award and the hearing of objections directed against it. 29 S.L.R. 292=1936 S. 121. Difference between an order under O. 21, R. 50 (2) and an order under S. 47 is that an order under S. 47 may be passed by the Court executing the decree whereas an order under O. 21, R. 50 (2) may be passed only by the Court which passed the decree. I.L.R. (1939) Kar. 589=1939 Sind 161 (F.B.).

O. 21, R. 50 (3).—The exact meaning of the words "conditions as to appeal or otherwise as if it were a decree" is "the conditions whether as to appeal or in other respects as if it were decree". They consequently include conditions imposed by orders or rules outside of the Civil Procedure Code. *Held*, that an appeal from an order made under R. 50 (2) is an appeal from an original decree and is as such liable to *ad valorem* Court-fee. 37 C.W.N. 227=60 C. 530=146



(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

LOC. AM.—[PATNA.] Order XXI, r. 50. In sub-rule (2) of r. 50 add the words "or to the court to which it is sent for execution" after the words "passed the decree" and before the words "for leave."

51. Where the property is a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court.

52. Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued :

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

#### NOTES.

I.C. 123=1933 C. 546. Deputy Registrar empowered to grant leave under this rule cannot determine liability of a contesting party. 1925 R. 317. *Ex parte* order granting leave to apply for execution does not have the force of decree. 27 A.L.J. 553=115 I.C. 865=1929 A. 390. See also 31 Bom.L.R. 995.

O. 21, R. 50 (4) does not affect sub-R. (2). 68 I.C. 627=1923 B. 66. Even though the firm is insolvent execution can proceed against partners personally when they have been served with notice. 7 Lah.L.J. 165=1925 L. 379. Sub-R. (4) does not mean that a person sought to be made liable ought to be served with summons in the suit itself. 30 C.W.N. 11=53 C. 214.

O. 21, R. 50 and O. 30, R. 10—APPLICABILITY—JOINT HINDU FAMILY FIRM.—O. 21, R. 50 and O. 30, R. 10, are applicable to a joint Hindu family business or trading firm also. 7 Cut.L.T. 21.

O. 21, R. 51.—Negotiable instrument not in custody of Court or public officer—Attachment of—Notice to debtor restraining him from paying to debtor—If effective against him. 56 M.L.J. 73.

O. 21, R. 52.—The order under this rule is judicial, not administrative. 1925 C. 354. There is no warrant in the Code for the practice prevailing in Bombay regarding charging orders. 29 Bom.L.R. 689=1927 B. 405.

SCOPE.—R. 52 deals not only with money deposited in Court in pursuance of a decree but also with money which comes into the hands of an officer of the Court in various ways. 1935 S. 214. Court having custody of money has jurisdiction until money is transferred to attaching Court. 35 C.W.N. 517. The rule does not allow of an anticipatory attachment of money expected to reach the hands of a public officer, but applies only to money actually in his hands. 22 B. 39. Also 44 C. 1072=25 C.L.J. 595; 24 I.C. 617=

26 M.L.J. 364. O. 21, R. 52, deals with the position where property is in the custody of the Court and says how it shall be attached. Where no dividend in the Official Assignee's hands to which judgment-debtor is entitled is declared until a particular date, the creditors of the judgment-debtor are entitled to nothing prior to that date since there is nothing in the Official Assignee's hands to which they can lay claim. A.I.R. 1937 Rang. 538. The Court has no power to refuse an application for attachment under this rule. 8 C.L.R. 7. Attachment of money in another Court, in another district is illegal. Proper procedure is to have the decree transferred to that Court. 26 I.C. 941=7 Bur.L.T. 277. Attachment of money in another Court made without notice to that Court is irregular. 11 I.C. 859=4 Bur.L.T. 192. Attachment before judgment in force—Another decree-holder without giving notice to Court putting to sale property in execution of his decree and purchasing it—Property again sold in execution of decree, in which it was attached before judgment—Right of decree-holder previously purchasing property to damages. 1936 C. 112. The proviso is intended to prevent an unseemly conflict between two Courts. 19 B. 710. As to construction and scope of proviso, see 19 N.L.J. 287. Regarding mode of distribution when the fund is attached by different Courts, see 29 Bom.L.R. 689=1927 B. 405. Property in the custody of the attaching Court—Attachment of—Issue of precept unnecessary. 108 I.C. 173=1928 L. 593. Property in custody of Court—Precept received for attachment—Attachment, when takes effect. 1935 L. 914.

MEANING OF WORDS.—"Any Court" includes also the executing Court. A subsequent formal attachment does not render infructuous a prior subsisting one. 28 I.C. 123=20 C.W.N. 412. Leave of Court is necessary before attachment of property in hands of a receiver appointed by Court. 130



LOC. AM.—[MADRAS.] Add the following as proviso (ii) and re-number the existing proviso as (i) :—

“(ii) Provided further that, where the Court whose attachment is determined to be prior receives or realizes such property, the receipt or realization shall be deemed to be on behalf of all the Courts in which there have been attachments of such property in execution of money decrees prior to the receipt of such assets.

*Explanation.*—Priority of attachment in the case of attachment of property in the custody of Court shall be determined on the same principles as in the case of attachment of property not in the custody of Court.” (See *Fort St. George Gazette*, dated 6-8-35, p. 933.)

53. (1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made,—

#### NOTES.

I.C. 836=12 Pat.L.T. 318=1931 P. 204. But see 149 I.C. 774=1934 R. 174 (as to receiver appointed in a suit for dissolution of partnership). Money with receiver is supposed to be in Court's custody. 35 I.C. 589=1 Pat.L.J. 449. So also money with Official Assignee. 49 B. 638=1925 B. 344. The Court of a Deputy Collector is a “Court” within the meaning of this rule. 10 W.R. 43. See also 21 A. 405. The Official Trustee is a “Public Officer”. 12 M. 250. *Suparddar* with whom Amin leaves custody of attached properties is not a “Public Officer”. 149 I.C. 950=1934 A. 357. The interest which a judgment-debtor has, in property held by the Official Trustee, is not validly attached by a notice given to the Official Trustee under this rule. 12 M. 250. “Interest or dividend,” meaning of. See 39 B. 88=17 Bom.L.R. 133. See also 1937 Rang. 538; 1937 Nag. 391 (Surplus sale proceeds in Court). Two or more judgment-creditors can attach same property—Property in custody of Court—Attachability. 1930 M. 4. The expression “further orders of the Court” in the rule is wide enough to cover any order that the Court may make. 156 I.C. 409=1935 Pat. 201 (2).

**PRIORITY.**—When certain property belonging to judgment-debtor was in the hands of the Tahsildar, two creditors obtained decrees against him, one of them in a Munsiff's Court and the other in a sub-Court, within the same district. The former obtained an order for attachment earlier in date than the latter but before the money could be received from the Tahsildar, the latter also applied for attachment. *Held*, that (i) the words “in the custody of the Court” in R. 52 imply actual custody; (ii) the property could not be deemed to be “assets held by a Court” on the date when the attachment order was issued by the Munsif to the Tahsildar or even when it was received by the Tahsildar; (iii) therefore the decree-holder in the Munsif's Court was not entitled to priority merely on the ground of his being the first attaching decree-holder. 1933 M. 342 (2)=65 M.L.J. 347. A custody Court has no authority to make any rateable distribution unless it be the attaching Court as well. Under R. 52 it can only determine the question of priority and thereafter act under the instructions of the attaching Court. 146 I.C. 791 (1)=37 C.W.N. 820=1933 C. 814. Priority of payment is in favour of those applying for execution by attachment of a

fund, see 44 M. 100=39 M.L.J. 608 (F.B.); 42 M. 692=50 I.C. 925; also 29 I.C. 239=38 M. 221. A decree-holder attaching is entitled to complete payment, even though a prior attachment before judgment subsists in favour of a suitor. 37 A. 578=29 I.C. 622. Attachment of a decree debt when a prior order appointing a receiver has been made is invalid. 102 I.C. 413=29 Bom.L.R. 409. Notice attaching money in the hands of the receiver in a pending administration suit—Priority conferred by—Question arises only if estate proves insolvent. 32 Bom.L.R. 1315.

**APPLICATION OF THE RULE.**—An execution application and notice to judgment-debtor are necessary to effect an attachment. 1926 M. 1104=51 M.L.J. 436. When the money of a judgment-debtor who has not yet been declared insolvent is in Court, it should be made available to an attaching decree-holder. 33 I.C. 723=14 A.L.J. 236. A letter containing currency notes sent by a third person to a judgment-debtor can be attached under this rule while it is still in the Post Office. 13 M. 242; 21 C. 85. Creditors of a partnership can attach partnership assets even before account is settled among the partners. 29 Bom.L.R. 689=1927 B. 405. Rule not intended to apply to a case where Court appoints a receiver of rents of immovable property. 60 C. 345=1933 C. 417=144 I.C. 142. See also 1936 R. 83.

**RIGHT OF SUIT.**—A regular suit will lie for setting aside an order contemplated by the proviso. The mode of investigation and the nature of the order to be made is provided for in Rr. 58 to 63. 19 C. 286; 7 C. 553; 19 B. 710. Any decision in a proceeding under O. 21, R. 52, proviso, between the decree-holder and third person would not be a decision under S. 47, and therefore a regular suit would not be barred. 69 C.L.J. 108=1939 Cal. 413.

**APPEAL.**—Where the order of payment is made by a Sub-Court, an appeal lies to the District Court from that order. If presented in a wrong Court, it ought not to be dismissed but returned for presentation to the proper Court. 38 I.C. 772=5 L.W. 264.

**O. 21, R. 53: SCOPE.**—See 58 C. 934=133 I.C. 181. Under R. 53 it is open to execute the decree. An attachment obtained by the judgment-debtor does not prevent the holder of decree from proceeding with execution after allowing the decree of the judgment-debtor to be set-off. 58



(a) if the decrees were passed by the same Court, then by order of such Court, and

(b) if the decree sought to be attached was passed by another Court, then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution of its decree unless and until—

(i) the Court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree.

#### NOTES.

C.L.J. 150=38 C.W.N. 67. Where a decree in favour of a judgment-debtor is attached in execution of a decree against him it is open to the judgment-debtor as judgment-creditor of his decree to execute that decree even during the pendency of the attachment, subject to the condition that the amount realized by him by the execution of that decree would not be paid to him but would have to be deposited in Court for the benefit of his judgment-creditor. 159 I.C. 170=37 Bom.L.R. 747=1935 B. 416. This rule does not apply to a case where creditor of mortgagee attaches deposit made in Court by mortgagor to redeem before sale in execution. 59 C. 1464=36 C. W. N. 955. Money decree cannot be sold, and procedure laid in this rule should be followed. 13 P. L.T. 612=1932 P. 349. The rule does not render the decree attached under it permanently incapable of execution. It merely operates as a stay of execution. 13 M.L.J. 265. The rule applies only to cases where the right attached is a right expressly settled by the decree, and not a right arising from the decree by way of restitution. 24 M. 341. It applies where a decree for redemption has to be attached. 10 B. 444. Also to a mortgage decree. 12 I.C. 924=8 A.L.J. 1327. The decree of a Revenue Court cannot be attached under this rule. 21 A. 405. The procedure laid down in this rule must be followed where a decree-holder desires to render a decree obtained by his judgment-debtor available for the satisfaction of his own decree. 6 M. 418. Where the plaintiff's adoptive grandmother had during her management of the estate obtained a money decree against a certain person and the plaintiff having subsequently established his right to the estate as against the grandmother sought to enforce the decree obtained by her. *Held*, that the execution proceeding was not legally sustainable and that all that he could do was to apply for the appointment of a receiver or follow the procedure laid down in R. 53. 57 B. 513=35 Bom.L.R. 795=1933 B. 367. A proceeding in execution and subsequent sale are not invalid, merely because Court treated the decree as not being covered by this rule when really this rule applies. 85 I.C. 660=1925 A. 264. The order of attachment can be made by executing Court as well as by the Court which passed the de-

creed. 17 I.C. 323. A decree for unascertained mesne profits is a decree for money. 2 M.L.J. 288. A preliminary decree for accounts in a suit for dissolution of partnership is not a decree for the payment of money within the meaning of R. 53, and is therefore not attachable and saleable in execution. 40 C.W.N. 1393. A certificate under O. 21, R. 71 is attachable as a decree for payment of money. 95 I.C. 1033=24 A.L.J. 385=1926 A. 379. *See also* 68 M. L.J. 461. Attachment of same decree by several decree-holders—Right to rateable distribution—Decree-holder starting execution first—If entitled to benefit of entire deposit. 40 C.W.N. 1249.

O. 21, R. 53 (1) (b).—The provisions of O. 21, R. 53 (1) (b) are mandatory. The only manner in which a decree is to be attached is by issuing a notice by the Court which passed the decree sought to be executed to the Court, which passed the decree sought to be attached and further if the latter decree had been transferred for execution to another Court, by a further notice to that Court. If such notices are not issued, there is no legal attachment, and the holder of the decree sought to be executed does not become the representative of the holder of the decree sought to be attached and he cannot therefore, execute the same. 43 C.W.N. 374. The dismissal for default of an application to execute an attached decree does not put an end to the attachment of the decree itself, the attachment having been made by order of Court which passed the decree in favour of the attaching decree-holder. Nor does the attachment cease under R. 53 (1) (b) (ii), when attaching decree-holder applies to execute the attached decree. The attached decree does not cease to be such when the attaching decree-holder makes an application to execute it. R. 53 (1) (b) (ii) relates not to the date of cessation of attachment, but only the manner in which the attachment is to be effected. 15 L. 910=1935 L. 194 (2). *See also* 1939 Cal. 465; 31 P.L.R. 583=1937 Lah. 368. Notice signed by head clerk for Judge, who was then ill, did not invalidate attachment. 9 R. 140=1931 R. 185. Attachment is completed by receipt of notice in the Court. 9 R. 140. If after receipt of order of attachment, a Court proceeds to execute the decree, and sells property in execution, the sale is invalid. 32 C. 1104. *See also* 15



(2) Where a Court makes an order under clause (a) of sub-rule (1), or receives an application under sub-head (ii) of clause (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the

## NOTES.

L. 910=1935 L. 194. A decree for arrears of rent against a tenant whose tenure is governed by the C. P. Tenancy Act is a simple money decree and in itself does not differ from any other decree of that character. There is nothing special or peculiar to it *qua* decree. It can therefore, so far as Civil Procedure Code is concerned be executed in the same way as any other decree. Hence it is also attachable as any other decree under O. 21, R. 53; 1940 N.L.J. 56=1940 Nag. 270.

O. 21, R. 53 (2).—Cross-decrees between husband and wife for restitution of conjugal rights and for money—Execution of. See 68 M.L.J. 461.

O. 21, R. 53 (3).—RIGHTS OF ATTACHING DECREE-HOLDER.—Under R. 53 (3) a person who attaches a decree before judgment must be deemed to be the representative of the holder of the attached decree and is, therefore, a person entitled to make an objection in the execution proceedings of that decree. 1935 A. 125. See also 43 C.W.N. 1076. A preliminary decree for sale of property covered by a security bond cannot be regarded as one for the payment of money, or for enforcement of a mortgage or charge nor is it capable of execution. An attaching creditor of such a decree has no *locus standi* as regards the execution of the final decree that is subsequently passed in favour of a transferee from the decree-holder. 1937 O.W.N. 519=A.I.R. 1937 Oudh 365. An attaching decree-holder in R. 53 of O. 21, C.P. Code, or the certificate-holder in S. 19 of the Bengal Public Demands Recovery Act, is by a legal fiction the representative or agent of the holder of the attached decree for the limited purpose of executing the decree (*i.e.*) enforcing it by process of the Court and of satisfying his own decree out of the proceeds of such execution. He is not an assignee of the decree, so as to acquire all the rights of the original decree-holder in the decree. Nor can he adjust the attached decree. 1940 A.L.J. 617=A.I.R. 1940 P.C. 167=67 I.A. 360=(1940) 2 M.L.J. 952 (P.C.). O. 21, R. 53 (1) (b) does not purport to prohibit the Court to which it is addressed from executing the decree unless the conditions contained in the request are fulfilled. The object of the request is to ensure that the holder of the decree does not himself proceed to execution without the leave of the Court making the attachment. It is not intended to prevent other attaching creditors from asking for execution of the decree. 67 I.A. 350=

A.I.R. 1940 P.C. 173=(1940) 2 M.L.J. 677 (P.C.). The attaching decree-holder has the same remedies against sureties of the judgment-debtor as the decree-holder himself has. 44 P.R. 1919=46 I.C. 584. Where a person attaches the interest which the judgment-debtor has in a certain decree he becomes the representative of the latter on the day when the attachment was ordered and not on the day when he applied for the same. In such a case the person applying for attachment cannot exercise any right such as filing a suit for a declaration that a certain property was liable to attachment at the instance of the judgment-debtor unless the suit by the latter had not itself become time barred. 6 O.W.N. 710=1929 O. 413. Revival of attachment—Attachment of *ex parte* decree passed in favour of judgment-debtor—*Ex parte* decree set aside but decree again passed on merits. 1933 R. 346. The mere use of the word representative in O. 21, R. 53 (3), C. P. Code, cannot be taken as justifying the conclusion that the attaching decree-holder is the representative of the holder of the attached decree for all purposes. The holder of the attaching decree can be treated as the representative of the holder of the attached decree only for the purpose contemplated in O. 21, R. 53 (3), namely for the purpose of execution, but he cannot exercise the power conferred under O. 21, R. 2 upon the decree-holder himself of certifying an adjustment made out of Court as a satisfaction of the decree. 51 L.W. 148=A.I.R. 1940 Mad. 534=(1940) 1 M.L.J. 292. There is no reason for thinking that a judgment-creditor who has succeeded in attaching a decree is unable to apply to the Court for execution of the decree without obtaining the concurrence or consent of other attaching creditors. On the contrary R. 53 (3) of O. 21, provides in terms that an attaching creditor shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute the attached decree in any manner lawful for the holder thereof. The fact that there may be other attaching creditors in the same position is immaterial. Any money recovered by the execution creditor will be held by the Court and be subject to the provisions of S. 73 of the Code. Any payments made out of Court to the attaching creditor as representative of the holder of the attached decree would be avoided as against the other attaching creditors by S. 64 of the Code. The other attaching creditors are therefore adequately protected, and their concurrence in or consent to the execution



representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attachment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent.

#### NOTES.

is unnecessary. 52 L. W. 540=A. I. R. 1940 P. C. 173=(1940) 2 M. L. J. 677 (P.C.). An attaching decree-holder will be liable in damages to his judgment-debtor if he allows the attached decree to lapse. 35 M. 622=21 M.L.J. 577. The attaching creditor can himself execute the decree even when the decree attached and the decree sought to be executed are decrees of one and the same Court. 15 C. 375. If it is found that the attaching decree-holder who has executed and realised the attached decree had no right he must be regarded as trustee of the person beneficially entitled to the profits of the decree. 5 R. 595. See also 41 C.W.N. 880=1937 Cal. 468. Attachment of decree—Effect—Payment to wrong person—Order for refund. 150 I.C. 174=36 P.L.R. 147=1934 L. 142.

SALE OF ATTACHED DECREES.—Per *Nazim Ali, J.*—Where a plaintiff in a suit attaches before judgment a decree that the defendant had obtained in his favour against another, the attachment, after a decree is passed in the suit, operates as an assignment of the attached decree in favour of the plaintiff-decree-holder for the *pro tanto* satisfaction of his decree. Money realised in execution of the attached decree must be taken as lying in Court to his credit for *pro tanto* satisfaction of his decree, at any rate, after he applies for payment of the money to him. 43 C.W.N. 1076. Per *Mitter, J.*—When the plaintiff obtains a decree against the defendant and attaches the decree which the defendant had obtained against another, he becomes entitled to all the rights which are given to the attaching decree-holder under O. 21, R. 53. Any payment by the judgment-debtor of the attached decree would go to satisfy not only that decree but also the decree of the attaching decree-holder. 43 C.W.N. 1076. Preliminary decree passed in partition suit is liable to be proceeded against in execution according to procedure prescribed by Cl. (4) and not Cl. (1) of R. 53. 58 C. 934=133 I.C. 181. Case of preliminary decree for foreclosure attached. 1933 O. 349. A decree for dissolution of partnership can be regarded as a money decree and can be attached but cannot be sold. 27 B. 556. See also 18 Pat. 688. A preliminary decree for accounts in a partnership action is not saleable at the instance of a creditor who has attached it, though it is attachable. 19 Pat. 935=21

C. C. M.—128

Pat.L.T. 728. No decree can be sold in execution of another decree. See 20 C. 111; 2 A. 290. Also 45 B. 343=59 I.C. 541. But see 44 I.C. 252=16 N.L.R. 72. A decree for mesne profits cannot be sold. The right procedure is to execute it. 4 P. L.J. 336=48 I.C. 188; 1 R. 360=1924 R. 21. Where the decree attached is a maintenance decree charging immovable property it can be purchased and a separate suit brought for its sale. Or as representative of the maintenance decree-holder, he can also directly bring the property to sale. 47 I.C. 630. See also 148 I.C. 196=1934 N. 83. The transfer of a decree by the holder thereof, after it has been attached in execution of another decree passed against him and in a fraudulent and dishonest way, is invalid and confers no rights on the transferee. 18 R.D. 606=15 L.R. 703 (Rev.). The assignee of an attached decree cannot execute it. 13 I.C. 659. But see 23 N.L.R. 20=1927 N. 132; 7 P. 726=1929 P. 1.

SAVING OF LIMITATION.—Since an attached decree can be executed, an application for execution even though dismissed will save limitation. 11 M.L.T. 144=13 I.C. 659.

O. 21, R. 53 (4).—The words “the Court which passed the decree” in O. 21, R. 53 (4), C.P. Code, include the Court to which the decree has been sent for execution, and such Court, and not only the Court which actually passed the decree, has jurisdiction to attach a decree passed in favour of a judgment-debtor, in the manner laid down by O. 21, R. 53 (4). Having regard to the terms of S. 42, C. P. Code, the Court to which the decree has been sent for execution is empowered to execute it in any of the ways prescribed by S. 51, C.P. Code, that is applicable to the particular kind of decree, and in the case of a partition decree, the executing Court is empowered, by reason of S. 42, to effect attachment in the manner prescribed by O. 21, R. 53 (4). 1940 Pat. 557. *Rowland, J.*—The steps contemplated by O. 21, R. 53 (4), C. P. Code, are things to be done in executing the decree, and, therefore, in this matter the powers of the Court to which a decree has been sent are co-extensive with the powers of the Court which passed the decree even without the addition in the rule of words specifically permitting the Court to which the decree has been sent to do a particular thing. 19



(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.

LOC. AMS.—[ALLAHABAD AND OUDH.] O. 21, r. 53 (1) (b). *Add* :—

“and to any other Court to which the decree has been transferred for execution” *after* the words “such other Court” in sub-cl. 1 (b) and in sub-r. (4).

And in sub-r. (6), *for* the words “after receipt of notice thereof” *read* “after receipt of notice, or with the knowledge thereof.”

[CALCUTTA.] O. 21, r. 53.—In sub-rule (1)(b), r. 53, *after* the words “to such other Court” *insert* the words “and to any Court to which it has been transferred for execution” and also *insert* therein the words “or Courts” *after* the words “requesting such other Court.”

#### NOTES.

Pat. 832=21 Pat.L.T. 427=A.I.R. 1940 Pat. 557.

O. 21, R. 53, Cls. (4) and (6).—A purchaser of an attached decree has no right to execute that decree for himself, although no notice of attachment was served upon his vendor previous to the sale by him of his decree. Sub-Cl. (6) of R. 53 of O. 21, affords no help to the purchaser at all. Its purpose is to protect payments made by the judgment-debtor of the attached decree to his creditor before he receives notice of the attachment. Nor is sub-Cl. (4) of any avail to the purchaser. The mere fact that the decree was sold after the attachment would not prevent the attaching creditor from executing the decree himself. 66 C. L.J. 459=A.I.R. 1938 Cal. 401. When a decree-holder seeks to execute his decree by attachment of another decree, in order that the attachment may be effective notices to the decree-holder and judgment-debtor of the attached decree are imperative and the mere order communicating the fact of attachment to the Court passing the decree is not enough. 1939 N.L.J. 73=A.I.R. 1939 Nag. 17.

O. 21, R. 53 (6) applies to attachment before judgment as well. 14 I.C. 285=22 M.L.J. 394. *See also* 1939 Pat. 81. The transfer of a decree by the holder thereof, after it has been attached in execution of another decree passed against him and in a fraudulent and dishonest way, is invalid and confers no rights on the transferee. 18 R.D. 606=15 L.R. 703 (Rev.). Attachment before judgment—Decree—Insolvency of judgment-debtor—No right of creditor to proceed under O. 21, R. 53. 145 I.C. 695=29 N.L.R. 303=1933 N. 229. If no notice under O. 21, R. 53 (6) is issued on the judgment-debtor and bound by the attached decree, an adjustment between him and his decree-holder would be valid.

43 C.W.N. 374. *See also* 18 Pat. 688. Attachment is complete without notice to judgment-debtor. Any adjustment after attachment is invalid. 48 I.C. 109=9 L.W. 32. *See also* 50 M. 677=1927 M. 728=53 M.L.J. 150 (F.B.); 9 R. 140=1931 R. 185; 1933 A. 82=1932 A. L.J. 792. A compromise between parties can be regarded as an adjustment of a decree although it is presented to the Court of appeal instead of being presented to the original Court in the course of execution proceedings. 43 P.L.R. 471=A.I.R. 1941 L. 402. Payment to the judgment-debtor while the attachment of the decree subsists is invalid. 24 I.C. 795 (A.). On payment of attached decree amount into Court interest on both the decree cease. 64 I.C. 780=35 C.L.J. 901. A Court, merely because a decree has been attached, will not recognize a payment or adjustment of that decree which has not been duly certified or recorded under O. 21, R. 2. 145 I.C. 525=1933 R. 239.

ATTACHMENT—CLAIM BY THIRD PARTY—REVISION.—A decree-holder has a right to ask that the property of the judgment-debtors should be attached in execution of his decree. If the property did not belong to them, then it is open to the person claiming to be owner of the property to come forward and file objections. The only method by which a third person can object to an attachment is to file objections after the attachment had been made. He can come to Court and file objections under R. 58. There is nothing in the Code which allows a third party to come forward with objections before an attachment has been made. Where, therefore, the lower Court permits the objections of a third party to be filed before attachment and allows them, the procedure adopted by it as altogether wrong and *ultra vires* and the case is one in which the High Court will interfere in revision. 1935 A.L.J. 344=1935 A. 343.



In sub-rule (1) (b) (ii), *ibid.*, cancel the words "to execute its own decree" and substitute therefor the words "to execute the attached decree with the consent of the said decree-holder expressed in writing or the permission of the attaching Court."

In sub-rule (4), *ibid.*, insert after the words "by sending to such other Court," the words "and to any Court to which it has been transferred for execution."

In sub-rule (6), *ibid.*, substitute the words "in contravention of the said order with knowledge thereof" for the words "in contravention of such order after receipt of notice thereof."

[LAHORE.] (1) Add the following words under sub-rule (1) (b) after the words "to such other Court" :—

"and to the Court to which it has been transferred for execution."

(2) In sub-rule (1) (b) (ii), substitute the words "the attached" for the words "its own," and add the following proviso to the same :—

"with the consent of the said decree-holder expressed in writing or with the permission of the attaching Court."

(3) In sub-rule (6), substitute the words "with the knowledge," for the words "after receipt of notice."

[MADRAS.]<sup>1</sup> (i) Add the following as sub-rule (1) (c) to r. 53 of O. 21 :—

"(c) If the decree sought to be attached has been sent for execution to another Court, the Court which passed the decree shall send a copy of the said notice to the former Court, and thereupon the provisions of cl. (b) shall apply in the same manner as if the former Court had passed the decree and the said notice had been sent to it by the Court which issued it."

(ii) Substitute the following for sub-rule (1) (b) (ii) :—

"(ii) the holder of the decree sought to be executed or his judgment-debtor if he has obtained the consent in writing of the decree-holder or the permission of the attaching Court, applies to the Court receiving such notice to execute the attached decree."

[NAGPUR.] R. 53.—In clause (b) of sub-rule (1) and in sub-rule (4) of r. 53, after the words "to such other Court" insert the words "and to any other Court to which the decree has been transferred for execution."

In sub-cl. (ii) of cl. (b) of sub-rule (1) of r. 53—

(a) after the word "judgment-debtor" insert the words "with the consent of the said decree-holder expressed in writing or with the permission of the attaching Court,";

(b) for the words "its own" substitute the words "the attached".

[N.-W.F.P.] In sub-rule (1) (b) and in sub-rule (4), after the words "to such other Court," add the words "or to any other Court to which the decree has been transferred for execution."

In sub-rule (1) (b) (ii) for the words "its own decree," substitute the words "the attached decree."

In sub-rule (6) for the words "after receipt of notice thereof," read "after receipt of notice or with the knowledge thereof".

[PATNA.] O. 21, r. 53. Substitute the following for r. 53 (1) (b) :—

"53. (1) (b) If the decree sought to be attached was passed by another Court, then by the issue to which such other Court (or to the Court to which that decree may have been transferred for execution) of a notice by the Court before which the application has been made requesting such other Court (or the Court to which the decree may have been transferred for execution as the case may be) to stay the execution of the decree sought to be attached unless and until—

(i) the Court which has issued the notice shall cancel the same, or

(ii) the holder of the decree sought to be executed, or his judgment-debtor, with the consent of the said decree-holder expressed in writing or the permission of the attaching Court, applies to such other Court (or to the Court to which the decree may have been transferred for execution) to execute the attached decree."

[RANGOON] (1) R. 53 (1) (b).—After the words "to such other Court" occurring in the second and third lines of the clause, the words "and to any Court to which it may have been transferred for execution" shall be added, and for the word "its" occurring in the 3rd line the word "the" shall be substituted.

(2) R. 53 (1) (b) (ii).—For the words "its own" the words "the attached" shall be substituted and the following shall be added, namely :—

"With the consent of the said decree-holder expressed in writing or with the permission of the attaching Court."

In sub-rule (6), for the words "after receipt of notice thereof" the words "with the knowledge thereof" shall be substituted.

54. (1) Where the property is immovable, the attachment shall be made

#### LEG. REF.

<sup>1</sup> Vide Fort St. George Gazette, dated 20th October 1936, Pt. II, pp. 1934-1936.

#### NOTES.

O. 21, Rr. 53 and 54.—When a decree is for possession by partition of property,

it is not even a preliminary decree for partition and hence if such a decree is to be attached, one has to proceed under R. 53 and attachment under R. 54 is invalid as it deals with attachment of immovable property. 166 I.C. 867=1937 Pesh. 13.



Attachment of immovable property.  
transfer or charge.

by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.

#### NOTES.

**O. 21, R. 54:** SCOPE.—Rent in a shrotriam village is 'revenue' under this rule. 46 M. 736=45 M.L.J. 263. Land includes sites as well as buildings thereon. 1925 L. 583. Under the Code, property may be attached without view to immediate sale. 14 M.I.A. 529. A debt secured by a mortgage, by a lien upon immovable property cannot be regarded as immovable property within the meaning of this rule. 12 C. 546 (550). See also 9 M. 5; 1933 R. 61=144 I.C. 175. But it is otherwise if it is a purely usufructuary mortgage. 1931 P. 63. This rule has no application to the attachment of a decree for redemption. 10 B. 444; 20 C. 895. The attachment of the equity of redemption of the mortgagor can be effected under this rule. 21 B. 226; also 62 I.C. 167=33 C.L.J. 7. A judgment-debtor, whose property is under attachment, cannot transfer it privately to another. 16 L. 328=157 I.C. 806=1935 L. 71. See also 42 P.L.R. 356 (Effect of a portion of attached property vesting in judgment-debtor only after attachment).

**REQUIREMENTS OF A VALID ATTACHMENT.**—As to how an attachment is to be effected, see 1925 L. 583. Attachment is complete only when the procedure prescribed by this rule is followed. 39 I.C. 562; also 42 M. 844=37 M.L.J. 375 (F.B.); 51 M. 349 (P.C.); 151 I.C. 337=1934 R. 207. See also 34 I.C. 34. But see 42 M. 1=35 M. L.J. 387; 39 P.L.R. 887=1937 Lah. 671. In order to effect an attachment of immovable property, it is necessary (1) to pass an order prohibiting the judgment-debtor from transferring or charging the property in any way, and (2) to have that order proclaimed by beat of tom-tom near the property and to have copies of the order affixed on a conspicuous part of the property, of the Court house, and also in the office of the Collector of the district. The prohibitory order must be passed by the Court, and it is not enough for the Court to say "attach" and for the Amin to say "I have attached," to constitute a valid attachment. 50 L.W. 656=A.I.R. 1939 Mad. 793=(1939) 2 M. L.J. 375. An attachment under R. 54, cannot be made by a non-official who has no authority to effect any attachment at all. 1940 Lah. 30=41 P.L.R. 838. Attachment may be presumed to be regular, in the absence of positive evidence to the contrary and no contention was raised in lower Court. 58 C. 598=134 I.C. 561=1931 C. 763. See

also 151 I.C. 221=1934 P.C. 217=67 M. L.J. 641 (P.C.); 41 P.L.R. 149=1939 Lah. 284. Issue of a prohibitory order under sub-R. (1) does not mean or include the service of a copy of the order on the judgment-debtor or defendant as the case may be. 164 I.C. 1044=1936 R. 403. There is nothing to prevent a Court issuing a notice to a judgment-debtor living outside its own jurisdiction on an application made for attachment of property situate within its jurisdiction. 1939 Rang.L.R. 587=A.I.R. 1939 Rang. 433. Under O. 21, R. 54, personal service of the prohibitory order on the judgment-debtor is not necessary. 1939 Rang. L.R. 594=A.I.R. 1939 Rang. 434 (S.B.). There is no warrant for the proposition that an attachment is not complete until notice of the prohibitory order is served upon the owner of the property. There is no direction in O. 21, R. 54 that a copy of such order shall be served upon the defendant. All that is enjoined is that the order shall be proclaimed and affixed. If those are done, the attachment is complete and valid. 1940 A.L.J. 894=1941 All. 41. Proclamation necessary for a valid attachment. 4 L. 211=1923 L. 423; 104 I.C. 340=1927 C. 885; 1929 A. 846. Non-affixure of the attachment order or proclamation copy is a fatal defect. 60 I.C. 527; 1935 Lah. 57=152 I.C. 630=35 P.L.R. 735. See also 181 I.C. 542=1939 Pesh. 9; 41 P.L.R. 149=1939 Lah. 284; 1937 Lah. 671. Omission to post order of attachment in Collector's Office is not fatal. 69 I.C. 563=1923 N. 78. See also 7 A. 731; 39 P.L.R. 870. But see 9 P. 860. Nor omission to affix order in Court-house. 63 C.L.J. 560=40 C.W.N. 1338. As to what is conspicuous part of the property in the case of a fishing right in a river, see 44 I.C. 412=1918 P. 33. Non-affixure of the proclamation order on the property is a material irregularity. 1923 L. 671. When attachment is disputed certified copy containing report of posting of notice of attachment is not legal evidence, but may be used as basis of evidence. 1925 R. 89=85 I.C. 308. As to how to prove service of prohibitory order when the records are lost, see 83 I.C. 878=1925 A. 747. A prohibitory order cannot be treated as notice to the world. 29 B. at 202. The requirements of this rule must precede the posting of the notices in Court-house, as required by R. 68. 7 C. 34 at 39. See also 5 M.L.J. 70; 59 C. 1176=36 C. W.N. 733. As to the effect of failure to



LOC. AM.—[ALLAHABAD.] In rule 54 at the end of cl. (2) *substitute* a comma for the full-stop and thereafter *add* the following :—

“and, where the property, whether paying revenue to Government or otherwise, is situate within Cantonment limits, in the office of the Local Cantonment Board and of the Military Estates Officer concerned.”

[ALLAHABAD, N.-W.F.P. AND OUDH.] *Add* the following as sub-r. (3) to O. 21, r. 54 :—

“(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment-debtor from the date on which such order is made.”

[BOMBAY.] The following shall be *added* to sub-r. (1) of r. 54 of O. 21 :—

“Such order shall take effect, where there is no consideration for such transfer or charge, from the date of such order, and where there is consideration for such transfer or charge, from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged.”

[CALCUTTA.] O. 21, r. 54 (3). *Add* the following as sub-r. (3) :—

“(3) Such order shall take effect, where there is no consideration for such transfer, or charge, from the date of the order, and where there is consideration for such transfer or charge from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged or from the date when the order is proclaimed under sub-r. (2) whichever is earlier.”

#### NOTES.

have the drum beaten, *see* 10 B. 504; 1933 A.L.J. 73=55 A. 182=1933 A. 747. Mere oral proclamation where beat of drum was resisted by judgment-debtor was held sufficient. 136 I.C. 335=1932 O. 76. A proclamation of sale by beat of drum is sufficient. The drum need not be beaten at the time of sale. 56 I.C. 523. No other notice of sale except the publication provided for by this rule is necessary. 89 I.C. 107. *See also* 1926 O. 45. In the case of a joint family member, his undivided share is to be attached. 53 I.C. 336=10 L.W. 449. Separate proclamation is not necessary to be served in every mouza comprising an estate or a tenure. 105 I.C. 689 (2)=6 P. 588. Properties situate near one another—Copy of sale proclamation affixed to one of them—Compliance with the section. 121 I.C. 369. For the effect of such an attachment, *see* 89 I.C. 291. Immovable property in custody of Receiver in another suit—Attachment—Calcutta High Court Original Side Rules, Ch. XXVII. 60 C. 345=144 I.C. 142=1933 C. 417. When a single parcel of land with the buildings thereon is to be attached, the attachment is validly made, within the terms of sub-R. (2), R. 54, if a copy of the order of attachment is affixed on some one part of the property. 164 I.C. 1044=1936 R. 403.

EFFECT OF ATTACHMENT.—Attachment under this rule does not constitute dispossession of the property in actual possession. 4 B. 529. A private alienation of property after an order of attachment which has not been effected is valid. 26 I.C. 204. *See also* 31 Bom.L.R. 1111. Sale on date of attachment—Attachment irregular—Validity of sale. 146 I.C. 693=1933 R. 198 (2). A re-attachment of property after decree does not imply an abandonment of an attachment obtained before decree. 6 C. 129. *See also* 16 A. 133. *See also* 34 I.C. 34.

WHERE NO ATTACHMENT IS NECESSARY.—In the execution of a decree for the enforcement of a mortgage, property liable by

virtue of the decree to be sold, need not be attached. 4 B. 515; 20 C. 805. No attachment is necessary in execution of a decree charging immovable property with payment of decree amount—Procedure. 24 L.W. 836=99 I.C. 656=1927 M. 190. The process of attachment is intended only for the protection of the decree-holder, and even if there is no attachment as required by the Code, a sale in execution is valid. 30 M. at 264. *See also* 34 C. 787; 18 C. 188; 15 B. 222 (P.C.). Security bond executed by judgment-debtor for performance of decree—Enforceability in execution—Formal order of attachment not necessary. 8 P. 801. Attachment of properties under money decree—Sale of some items and partial satisfaction of decree—Subsequent transfer of properties to another jurisdiction—Decree transferred to Court having jurisdiction for execution—Order for sale by that Court without fresh attachment—Legality. 30 L.W. 649=1929 M. 852.

O. 21, R. 54 (3) (Allahabad).—Sub-R. (3) added by Allahabad High Court to O. 21, R. 54, speaks of the ‘date’ but makes no provision as to the ‘time’ from which the order shall take effect as against the person mentioned therein. The word “date” in the rule, must be interpreted to mean ‘time’. Therefore where the execution of the sale deed and the attachment of the same property take place on the same date, there is no statutory provision for priority as between the two. As such, rules of justice, equity and good conscience must be followed. 1939 A.L.J. 7=1938 A.W. R. (H.C.) 876=A.I.R. 1939 All. 154.

O. 21, R. 54 (3) (Nagpur).—The word “purchaser” in sub-R. (3) to R. 54 is used in its technical English legal sense and includes a mortgagee. 19 N.L.J. 94. A creditor who takes a mortgage from his debtor to secure his debt cannot be deemed to be fraudulent in so doing, even though he knows that another creditor has obtained an order of attachment of the property mortgaged and even though the mortgage is for



[LAHORE.] O. 21, R. 54. *Substitute* the following for the last paragraph of sub-rule (2) as added by High Court Notification No. 109—R.—XI—Y.—14, dated 21st April, 1939:—

“Where the property is land situated in a Cantonment, copies of the order shall also be forwarded to the Cantonment Board and to the Military Estates Officer in whose area the Cantonment is situated.”

The following was added as sub-r. (3) for r. 54 :—

“(3) The order shall take effect, as against persons claiming under a gratuitous transfer from the judgment-debtor, from the date of the order of attachment, and as against others from the time they had knowledge of the passing of the order of attachment or from the date of the proclamation whichever is earlier.”

[MADRAS.] The following shall be substituted for sub-rule (2) of rule 54 of Order XXI of the First Schedule to the Code of Civil Procedure, 1908, namely:—

“(2) The order shall be proclaimed at some place on or adjacent to such property by bea, of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court-house, and also where the property is land paying revenue to the Government in the office of the Collector of the District in which the land is situate, and where the property is situate within Cantonment limits, in the office of the local Cantonment Board and the Military Estates Officer concerned.”

(Vide *Fort St. George Gazette*, Part II, Dated 8th April, 1941.)

Add the following as sub-r. (3) :—

“(3) The order of attachment shall be deemed to have been made as against transferees without consideration from the judgment-debtor from the date of the order of attachment, and as against all other persons from the date on which they respectively had knowledge of the order of attachment, or the date on which the order was duly proclaimed under sub-r. (2), whichever is earlier.”

(Vide *Fort St. George Gazette*, dated 20th October, 1936, Part. II, pp. 1394-1396).

[NAGPUR.] Rule 54.—The following amendment is made to sub-r. (2) of r. 54 under S. 122, C. P. Code :—

Delete the full-stop at the end and add the following words :—

“and also where the property is situate within cantonment limits, in the office of the local Cantonment Board and the Military Estates Officer concerned.”

After sub-r. (2) of r. 54, insert the following sub-rule :—

“(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment-debtor from the date on which such order is made.”

(Notification No. 5834, dated 20-9-40, C. P. and Berar Gazette, dated 27-9-40, Pt. III, p. 1533.)

[PATNA.] Insert a comma in place of the full-stop at the end of sub-r. (2) of r. 54 and add the following :—

“and also where the property is situate within cantonment limits, in the office of the local Cantonment Board and the Military Estates Officer concerned.”

(High Court Notification No. 21-B, dated 28—1—1941.)

[RANGOON.] Add as sub-r. (3) to O. 21, r. 54 :—

“(3) The order of attachment shall take effect, as against transferees without consideration from the judgment-debtor from the date of the order of attachment, and as against all other persons from the date on which they respectively had knowledge of the order of attachment, or the date on which the order was duly proclaimed under sub-r. (2), whichever is the earlier.”

Removal of attachment after satisfaction of decree.

55. Where—

(a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

#### NOTES.

an amount higher than his pre-existing debt. Such a mortgage cannot be held to be one not made in good faith—When such a mortgage is effected and completed before the attachment of the property is actually effected by affixing the order on the property in question, the mortgage is not void under S. 64. 19 N.L.J. 94.

O. 21, R. 54 and O. 38, R. 5: CONDITIONAL ORDER OF ATTACHMENT BEFORE JUDGMENT.—Where there was a conditional order of at-

tachment before judgment and no order absolute was later on made and where though no process was issued under O. 21, R. 54, all other requirements were observed. *Held*, that the attachment was validly made and that the mere omission to record an order absolute does not make the attachment ineffectual. 66 C.L.J. 222=A.I.R. 1938 Cal. 236.

O. 21, R. 55.—The moment sale is held attachment does not *ipso facto* cease. 74 I. C. 87. See also 1938 Nag. 475=I.L.R.



(b) satisfaction of the decree is otherwise made through the Court or certified to the Court, or

(c) the decree is set aside or reversed,  
the attachment shall be deemed to be withdrawn, and, in the case of immovable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

LOC. AMS.—[ALLAHABAD.] O. 21, r. 55.—*Substitute the following for r. 55 :—*

“55. (1) Notice shall be sent to the sale officer executing a decree of all applications for rateable distribution of assets made under S. 73 (1) in respect of the property of the same judgment-debtor by persons other than the holder of the decree for execution of which the original order was passed.

(2) Where—

(a) the amount decreed [which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-s. (1)] with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(b) satisfaction of the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-s. (1)] is otherwise made through the Court or certified to the Court, or

(c) the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-s. (1)] is set aside or reversed,  
the attachment shall be deemed to be withdrawn, and, in the case of immovable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.”

#### NOTES.

(1940) Nag. 306. The attachment of money must be deemed to continue so long as that money which is brought into Court by the attachment is not disposed of by the Court attaching that money. 1940 O.W.N. 591 = A.I.R. 1940 Oudh 360. Attachment continues until the confirmation of sale. 27 S.L.R. 256. *See also* 15 L. 910 = 1935 L. 194; 16 Luck. 76. In the case of an instalment decree, the instalment which has become due and in respect of which attachment has been made is the amount decreed in R. 55. 105 I.C. 799. Omission to mention encumbrance in sale application—Order that the petition is closed—Attachment does not terminate. 1928 M. 398 = 106 I.C. 138. Attachment cannot be deemed to be withdrawn when only part satisfaction is certified. 15 I.C. 677 = 10 A.L.J. 165. Money paid to remove attachment is not available for rateable distribution but must be paid to attaching creditor. 63 I.C. 599 = 21 Bom. L.R. 975. But *see* 1930 S. 350; 13 P. 446 = 1934 P. 685. O. 21, R. 55 (a), should be read in such a way that it does not conflict with S. 73, C. P. Code. Attachment shall be deemed to be withdrawn on payment under O. 21, R. 55 (a), only when the decree has been satisfied, and the decree can be satisfied only if the amount deposited is available to the decree-holder in full satisfaction of the decree. This result cannot ensue in cases falling under S. 73 which are imperative. The law intervenes in such a case and directs that although the full amount is intended to be paid to the particular decree-holder whose attachment is sought to be got rid of, it has to be diverted by reason of S. 73. 18 Pat. 404 = 20 P.L.T.

646 = A.I.R. 1939 Pat. 392. If the reversed decree on first appeal raises the attachment, the confirmation of the decree on second appeal revives the attachment. 48 I.C. 386. Where an attachment is released owing to the reversal of the decree, it should not be deemed to have revived on the passing of the decree once again after remand, and to relate back to the date of the original attachment. When the first attachment is removed, there is no bar left to any alienation until a second attachment takes place. 163 I.C. 892 (Lah.). Cessation of attachment apart from this rule—Claimants for rateable distribution—Position of. 4 A.W.R. 1236 = 1934 A. 1057; 1939 P.W.N. 242. *See also* 150 I.C. 770 = 1934 A. 896.

O. 21, R. 55 (2) (b) (as amended by Oudh Chief Court).—Rule 55 (2) (b), as amended by the Oudh Chief Court, undoubtedly means that unless along with the decree of the attaching creditor, the decree of an applicant for rateable distribution is also satisfied, the attachment shall not be deemed to be withdrawn. In other words, the meaning is that the original attachment shall enure for the benefit of the decree-holder who has applied for rateable distribution of assets under S. 73 of the Code. This, however, does not and cannot mean that the attachment will enure for the benefit even of those who may apply for execution by rateable distribution of assets in future. The words “notice of which *has been sent* to the sale officer under sub-rule (1)” clearly show that R. 55 (2) can be availed of only by those decree-holders who have applied for rateable distribution prior to the satisfaction of the decree. 164 I.C. 1031 = 1936 O.W.N. 861.



[OUDH.] Substitute the following for r. 55 :—

“ 55. (1) Where an application has been made to the Court under S. 73, sub-s. (1), for rateable distribution of assets in respect of the property of a judgment-debtor by a person other than the holder of the decree for the execution of which the original order of attachment was passed, notice shall be sent to the sale officer executing the decree.

(2) Where—

(a) the amount decreed [which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-r. (1)] with costs and all charges and expenses resulting from the attachment of any property is paid into Court, or

(b) satisfaction of the decree [including any decree passed, against the same judgment-debtor, notice of which has been sent to the sale officer under sub-r. (1)] is otherwise made through the Court or certified to the Court, or

(c) the decree [including any decree passed, against the same judgment-debtor, notice of which has been sent to the sale officer under sub-r. (1)] is set aside or reversed, the attachment shall be deemed to be withdrawn, and ; and in the case of immovable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.”

56. Where the property attached is current coin or currency notes, the

Order for payment of coin or currency notes to party entitled under decree.

Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the

same.

57. Where any property has been attached in execution of a decree but by

Determination of attachment.

reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for

any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.

#### NOTES.

O. 21, R. 57: SCOPE.—Construction and applicability of rule. 33 Bom.L.R. 1130=55 B. 693; 1933 P. 609; 1935 M. 212=68 M.L.J. 265. Under the old Code attachment did not *ipso facto* cease as under the present rule. 23 C.W.N. 608=23 C.L.J. 411; also 36 M. 553=24 M.L.J. 545. Order for attachment—Subsequent transfer of properties to another jurisdiction—Execution application transferred to Court of that place—Attachment order continues in force. 30 L.W. 649. The rule does not refer or apply to a case where the attachment ceases on account of an explicit order of Court. 66 I.C. 642. Object of the rule is to prevent continuance of attachment for an indefinite period by the practice of “striking off” for statistical purposes. 28 I.C. 62=1915 M.W.N. 159. An order such as “striking off” is unknown to law, and its effect is to be determined according to circumstances in each case. It may amount to an adjournment *sine die*. 15 I.C. 406=1912 M.W.N. 407; 31 Bom.L.R. 1209; 123 I.C. 113. An order striking off the execution does not terminate the attachment. 107 I.C. 574. An execution petition which is “closed” does not stand dismissed so as to attract the mischief of O. 21, R. 57. The attachment under it is still effective. 41 L.W. 325=1935 M. 212=68 M.L.J. 265=156 I.C. 525. The rule is mandatory and will take effect in spite of an erroneous order continuing attachment. 38 C. 482=15 C. W. N. 428.

But see 44 A. 274=20 A.L.J. 113; 1930 M. 414; 1930 R. 325. The rule operates even when the Collector to whom the execution is transferred, dismisses it. 68 I.C. 643=1923 N. 18; also 18 N.L.R. 152=1923 N. 267. An attachment made under O. 38, i.e., an attachment before judgment does not cease on the dismissal of the execution application. 14 I.C. 345=16 C.W.N. 1097; also 42 M. 1=35 M.L.J. 387; 18 Pat. L. T. 585=1937 Pat. 626; 22 I.C. 351=26 M. L. J. 215. But see 20 I.C. 149=19 C.L.J. 248; 1925 M.W.N. 887; 92 I.C. 833=1926 M. 211=51 M.L.J. 172; 31 Bom.L.R. 1101=1929 B. 455. See also 1930 M. 303. O. 21, R. 57 applies to a case where application is made in execution against property attached before judgment and the application is dismissed on default of the decree-holder. 1941 Sind 13. *Weston, J.*—An attachment obtained before judgment under O. 38, is, after judgment, as much an attachment in execution as an attachment obtained on application under O. 21, R. 11. 1941 Sind 13=I.L.R. (1940) Kar. 454. Where a sale of property attached before judgment is prayed for in a darkhast and the darkhast is disposed of, the attachment is determined so far as such property is concerned. This is a general rule applicable to the determination of an attachment before judgment after the disposal of the darkhast in which the property attached is sought to be sold; it does not, however, apply to a case where there is a specific order for continuance of



LOC. AMS.—[CALCUTTA.] O. 21, r. 57. Add the following words at the end of r. 57, O. 21 :—

“unless the Court shall make an order to the contrary.”

[MADRAS.] Substitute the following for r. 57 :—

“57. (1) Where any property has been attached in execution of a decree and the Court hearing the execution application either dismisses it or adjourns the proceedings to a further date, it shall state whether the attachment continues or ceases : Provided that when the Court dismisses such an application by reason of the decree-holder's default the order shall state that the attachment do cease.

(2) Where the property attached is a decree of the nature mentioned in sub-r. (1) of r. 53, and the Court executing the attached decree dismisses the application for execution of the attached decree, it shall report to the Court which attached the decree the fact of such dismissal. Upon the receipt of such report the Court attaching the decree shall proceed under the provisions of sub-rule (1) and communicate its decision to the Court whose decree is attached.”

[NAGPUR.] For r. 57 substitute the following rule :—

“57. Where any property has been attached in execution of a decree, and the Court for any reason passes an order dismissing the execution application, the Court shall direct whether the attachments shall continue or cease. If the Court omits to make any such direction, the attachment shall be deemed to have ceased to exist.”

#### NOTES.

the attachment made with the consent of the parties. 42 Bom.L.R. 423=A.I.R. 1940 Bom. 250. Applicability—Attachment before judgment—Passing of decree—Dakhasts claiming relief against movables—Dismissal—Effect—Application for rateable distribution of sale proceeds—Whether amounts to application for sale. 53 B. 543=31 Bom.L.R. 652=119 I.C. 769=1929 B. 321. R. 57 of O. 21, deals in terms with a case where on the petition which is ultimately dismissed an attachment has taken place. In such case the execution petition must *ex hypothesi* have been taken cognizance of and execution ordered and it is only at a later stage that it must be dismissed as contemplated by R. 57. The words of the rule must be applied with caution to cases in which an attachment has taken place before judgment or on a prior execution application. In these classes of cases, if an application for execution is rejected under R. 17 of O. 21, *in limine* as not complying with the formal requirements of law, it does not amount to a “dismissal” within the meaning of O. 21, R. 57. The legal position is that no execution application in accordance with law must be deemed to have been filed; and therefore an attachment effected before judgment and existing does not come to an end. 1940 M.W.N. 69=A.I.R. 1940 Mad. 615. When a suit is dismissed attachment before judgment terminates without any order of the Court and if the judgment is reversed on appeal or annulled on review the judgment does not revive it so as to affect alienations made before the date of such reversal. Even where the plaintiff on the reversal of the decree of the first Court dismissing his suit appeals and on appeal gets a decree in his favour and re-attaches the property in suit, his claim is not one enforceable under the original attachment. 1933 A.L.J. 1501. See also 16 Pat. 589=1937 Pat. 626. But see 48 I.C. 386. “Default” means want of prosecution and not merely default in appearance. Thus where

C.C.M.—129

a decree-holder admitted mistake in property sold, and agreed to apply again, there is default. 41 A. 157=49 I.C. 113. See also 150 I.C. 1053=36 P.L.R. 241=1934 L. 395; 39 Bom.L.R. 1105; 3 L. 7=1922 L. 108; 1929 N. 82; 35 P.L.R. 604=1934 L. 697. When the judgment-debtor accepts part satisfaction and agrees to give time, this amounts to default. 4 Pat.L.T. 418=71 I.C. 881. See also 40 L. W. 883=67 M.L.J. 801. Omission to apply for issue of notice under R. 66 is default. 38 C. 482=15 C.W.N. 428. The decree-holder's refusal to proceed with his execution application amounts to a “default” as contemplated by O. 21, R. 57. 189 I.C. 810=A.I.R. 1940 Pesh. 29. There is no default by decree-holder when the Court strikes off execution proceedings to suit its own convenience. 48 A. 698=97 I.C. 102=1926 A. 734. See also 107 I.C. 574. Nor a bare omission to carry out a direction of Court, constitutes default. 40 L.W. 263=1935 M. 275. The inability on the part of the decree-holder to get the property attached would not amount to default contemplated by O. 21, R. 57 and the consignment of the execution case to the record room would not amount to a dismissal of the application so as to attract the penal provisions of O. 21, R. 57. A.I.R. 1938 Lah. 123, (Reversed). 1938 Lah. 728; see also 40 P.L.R. 473=1938 Lah. 590. The question whether a particular order is or is not to be taken as tantamount to dismissal has to be decided on facts of each case. A decree-holder who had attached property made a statement to the effect that the proceedings might be consigned to the record room for the time being, the attachment being kept intact and that certain documents on the record might be returned to him and that he would present an application again within two days. The Court accordingly passed an order consigning the proceedings to the record room and directing that the attachment would continue. Held, that the order consigning the case to the record



[N.-W.F.P.] Cancel the concluding sentence of r. 57 "upon the dismissal . . . shall cease" and substitute the following :—"In dismissing such application the Court shall direct whether the attachment shall continue or cease. In the absence of any such directions the attachment shall be deemed to cease."

[OUDH.] O. 21, r. 57 substituted by Oudh Chief Court.—Where any property has been attached in execution of a decree, and the Court for any reason passes an order dismissing the execution application, the Court shall direct whether the attachment shall continue or cease. If the Court omits to make any such direction, the attachment shall be deemed to subsist.

[PATNA.] O. 21, r. 57. Delete the last sentence and add.

"Upon every order dismissing an execution case in which there is an attachment, the attachment shall cease unless the Court otherwise directs."

[RANGOON.] In O. 21, the following shall be inserted as r. 57-A :—

"57-A. A judgment-debtor may secure release of his attached property by giving security to the value thereof to the Court."

#### NOTES.

room could not be looked upon as one of dismissal. I.L.R. (1940) Lah. 516=A.I.R. 1940 Lah. 78. Order directing attachment to subsist while petition is dismissed for default, though irregular is binding on the parties to it. 87 I.C. 349=1925 A. 456. The presumption is that an attachment is subsisting. 31 I.C. 911. Where by way of caution a decree-holder applies for a second attachment, he does not abandon or waive the original attachment. 13 M.L.J. 221. See also 56 C. 416=119 I.C. 113=1929 C. 465. Judgment-debtors objecting to proceedings in execution must state at the earliest opportunity all their objections to the execution and cannot be allowed to delay proceedings by putting forward their objections piecemeal at whatever time they think most convenient to themselves. 121 I.C. 845=1930 M. 303. Decree in one Court attached by another—Execution petition by decree-holder dismissed by former Court—Effect on attachment. 1931 M.W.N. 211. See also 132 I.C. 667=1931 L. 705. Attachment of property in execution of decree—Mortgage of such property after attachment has ceased and before fresh attachment. Held, that the mortgage was valid and that mere knowledge of the mortgagee about the long pending execution against mortgagor did not make the transfer made *bona fide* for value invalid. 146 I.C. 954=1933 R. 169.

DISMISSAL OF EXECUTION APPLICATION.—Until the formal order dismissing the application, all executions are pending. 39 M. 570=29 M.L.J. 96. In connection with execution petitions, the legal result of orders, such as "rejected," "struck off," "closed," "recorded" and "dismissed," is a matter to be ascertained with reference to the attendant circumstances and not merely from the form of the order. Under O. 21, R. 57, C. P. Code, the Court, where it is unable to proceed further with an execution application, even when it is by reason of the decree-holder's default, can either adjourn the matter or dismiss the petition. Where the order is "Adjourn—Rejected," the order does not amount to a dismissal, but is clearly one of adjournment only. The petition

does not cease to be pending and the attachment does not terminate. 1937 M.W.N. 480. It is clear from the language of R. 57 of O. 21, that before a pending attachment shall cease, there must be a dismissal of the application for execution in which the attachment was effected. As long as that application for execution is pending and no final orders have been passed on it, any order of dismissal passed on an interlocutory application in the pending execution petition would not terminate the attachment. The fact that owing to a mistake or ignorance of legal rights the decree-holder obtains a fresh attachment would not terminate the previous attachment which is already subsisting. The fresh attachment is a superfluity. 1939 M.W.N. 1157=(1939) 2 M.L.J. 916. An order dismissing an execution application for non-payment of process-fees and for non-prosecution falls under O. 21, R. 57, and the attachment therefore terminates in spite of the fact that the Court orders that the attachment will continue. The order continuing the attachment in such a case is illegal and invalid. There is no legal and valid attachment after that dismissal, and if the judgment-debtor alienates the property, the alienation would not be void by reason of the attachment, because the attachment has ceased. The fact that the Court passed the order of dismissal under a misapprehension because the execution application only contained a prayer for attachment and not any prayer for sale does not make the order of dismissal any the less binding on the decree-holder. If it is not set aside by appeal or review, it stands as a final order and binds the decree-holder and would operate as *res judicata*, in subsequent applications for execution. 43 Bom.L.R. 727=A.I.R. 1941 B. 395. An adjudication of the judgment-debtor as an insolvent does not automatically raise an attachment effected on his properties prior to the adjudication, and it cannot be said that there will be no attachment if and when the adjudication is annulled. Where the executing Court on being informed of the insolvency erroneously passes an order dismissing the execution petition then pending, instead of staying the proceedings as it



## NOTES.

should under S. 29 of the Provincial Insolvency Act, it cannot be said that the order of dismissal is an order of dismissal for default of the decree-holder within the meaning of O. 21, R. 57, so as to have the effect of automatically terminating the attachment. In such a case, where there has been an attachment at the time of the adjudication, and the insolvency is not prosecuted with the result that the adjudication is annulled, subject to the special contingencies contemplated by S. 37 of the Provincial Insolvency Act, the property goes back to the debtor with any burdens which existed upon it at the time of the adjudication. His interest in the property would still be bound by the attachment on the date of the annulment. 50 L.W. 716=1940 M. 129=(1939) 2 M. L.J. 786. An attachment is not disturbed by an order for stay of execution. 46 C. 64=44 I.C. 249. In execution proceedings, the Court finding that all the representatives of the deceased decree-holder were not included in the application for substitution, passed an order consigning the application to the record room, though the attachment in that execution was to remain in force. *Held*, that the order was erroneous to the extent that instead of consigning the proceedings to the record room, it should have got the application for substitution amended. But the order was not tantamount to dismissal of the application for execution, nor did it have the effect of terminating the prior attachment. All that the order meant was that execution proceedings should stand adjourned *sine die*. (1922 All. 62 and 1926 All. 734, Rel. on.) 1936 Lah. 873. *See also* 23 O.C. 166=57 I.C. 509. Where an objection is filed by a person to an attachment of property in execution of decree on the ground that he has a lien over it, the Court should investigate into the matter and not hastily allow the objection and dismiss the execution application. 145 I.C. 730=1933 L. 421. An order "proclamation not filed" amounts to dismissal and the attachment ceases. 18 I.C. 441=17 C.W.N. 204. Whether an attachment ceases on the dismissal of an execution application depends on the facts of each case. 44 I.C. 566=1917 M.W.N. 816; *also* 23 I.C. 155=7 L.W. 16; 38 I.C. 300=5 L.W. 204; 35 I.C. 240=3 L.W. 601; 46 B. 942=1923 B. 30. When an execution application is dismissed on the judgment-debtor's objection and an application for review of the order is pending, the attachment continues. 34 A. 490=15 I.C. 49. Attachment of decree—Application by attaching decree-holder to execute—Dismissal for default—Attachment, if ceases. *See* 15 L. 910.

**REVIVAL OF ATTACHMENT.**—Restoration of an execution application to file revives attachment. 18 N.L.R. 152=64 I.C. 420. On a sale being set aside, a fresh execution

application revives the old attachment. 45 I.C. 589=3 Pat.L.J. 310. A revival of attachment on the revival of an execution application does not affect the rights acquired by third parties in the meantime. 14 C. L.J. 476=16 C.W.N. 332. But *see* 24 A. L.J. 901=97 I.C. 102=1926 A. 734. Strangers to the petition and order need only look to the order and nothing which took place behind their back will bind them. 1925 M. 1113=48 M.L.J. 116.

**O. 21 R. 57: Nagpur.**—Under R. 57 of O. 21, as it now stands after its amendment in Nagpur in 1930, a Court has power to dismiss an execution application and to continue the attachment. Where a Court passes an order to the effect that "the case is struck off as wholly infructuous at the instance of the decree-holder; house shall remain under attachment for three months," it must be held, that the Court dismisses the application and not merely adjourns it. The execution application in such a case cannot be held to be pending for the purpose of enabling the decree-holder to claim rateable distribution of assets received on a date subsequent to such dismissal. The expression "struck off" is ambiguous and unauthorized and should not be used. I.L.R. (1938) Nag. 346.

**O. 21, R. 57: Oudh Chief Court.**—Where further execution proceedings after attachment are stayed on account of insolvency application filed by judgment-debtor, *held*, that the attachment did not absolutely cease to subsist during the pendency of the insolvency proceedings, but was merely dormant, and there was no bar to the application of the decree-holder being regarded as being in continuation of the former execution application, the obstacle to the continuance of the previous execution proceedings having been removed by the order annulling the adjudication of the insolvent. 158 I.C. 807=1935 O.W.N. 1107.

**O. 21, Rr. 57, 58 and 63.**—R. 57 of O. 21, is not exhaustive of all the ways in which an attachment can be raised. It must be held that when an execution petition has been in fact and intention dismissed finally, even though the dismissal might be due to causes which cannot be described as the default of the decree-holder, then the attachment made under that petition must automatically cease to operate. When an attachment ceases to operate there is no longer any occasion for a defeated claimant to file a suit under O. 21, R. 63. Nor can it be contended that when there is a subsequent attachment and a claim against such attachment, the claim must be related back to the prior attachment; the claim under the subsequent attachment is not barred by the claimant's failure to file a suit to set aside the dismissal of the claim under the earlier attachment which has come to an end owing to an order dismissing the execution petition. 1940 M.W.N. 459=A.I.R. 1940 Mad. 763.



*Investigation of claims and objections.*

58. (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit :

## NOTES.

**O. 21, R. 58:** SCOPE.—Nature of objection under this rule. 1936 A.L.J. 142=161 I.C. 107=1936 A. 378. Rule of *res judicata* in execution proceedings. 26 L.W. 106. The rule is only permissive. Such a claim is never compulsory. 40 C. 598=40 I.A. 56 (P.C.). Also 18 A 410; 23 B. 266; 18 M. 13 (17); 4 A.L.J. 574; 20 B. 403 (407). See also 41 L.W. 550=68 M. L.J. 518. Deposit in connection with cash certificate attached—Application of Post Master-General—Duty of Court to adjudicate. See 1938 Cal. 445. Where an applicant under O. 21, R. 58 claims that he has a share in, and is in joint possession with the judgment-debtor along with certain other members of the family, of the attached property, as provided by R. 58, the Court should proceed to investigate the claim. No doubt the extent of the investigation to be carried out would depend upon the circumstances of each case, but a refusal to make any investigation at all is a failure to exercise jurisdiction vested in the Court. 1938 A.M.L.J. 23. See also 1938 Cal. 445. This rule does not contemplate the investigation of a claim by a tenant of the judgment-debtor to occupancy rights in the property advertised for sale and an order on that claim directing it to be notified and stating that the sale shall not prejudice the rights of the claimant is not conclusive under O. 21, R. 63. 58 M. 936=1935 M. 547=68 M.L.J. 518; 153 I.C. 577=1935 A. 183; 39 C. W.N. 457. A Small Cause Court can neither attach immovable property nor investigate claim resulting therefrom. 28 C. W.N. 16=1924 C. 198. The rule does not apply in the case of a mortgage decree for sale. 1925 N. 185. See also 68 I.C. 271=26 C.W.N. 50; 18 I.C. 215; 55 I.C. 895; 58 P.R. 1918=44 I.C. 986; 50 I.C. 448=1919 P. 79; 117 I.C. 815=1929 L. 167; 1929 L. 760=116 I.C. 882; 1930 M. 712; 1932 L. 618. But see 8 Bur.L.T. 214=29 I.C. 941. A mortgagee in possession is not entitled to object under O. 21, R. 58, to the attachment of the property at the instance of a person who holds a decree against the mortgagor. His proper remedy is to wait and to take action under O. 21, Rr. 100 and 103, at the proper time, provided always that he does not in the meantime bring a suit to have the property sold. I. L. R. (1938) Lah. 593=A.I.R. 1938 Lah. 568. When an attachment of mortgaged property in a decree for its sale has actually been made although such an attachment was unneces-

sary, an objector is entitled to come into Court and make an objection under R. 58. [29 I.C. 941 (F.B.) and 1928 M. 525, *Foll.*; 33 I.C. 603, *Dist.*; 1918 L. 368; 18 B. 98; 19 A. 480; 1930 M. 712 and 18 I.C. 215, *Not Foll.*] 161 I.C. 194=1936 Pesh. 53; 1937 Pat. 63; 1937 Lah. 360. R. 58 does not apply to a tenure or holding attached in execution of a decree for arrears of rent thereof. 10 P.L.T. 118=1929 P. 195. See also 17 P.L.T. 385. Objection can be prepared under this rule only after attachment and not before. 156 I.C. 801=1935 A.L.J. 344=1935 A. 343. This rule applies only to attachments after decree. 58 P.R. 1918=44 I.C. 986. It does not apply to attachment before judgment. 41 M. 849=35 M.L.J. 231 (F.B.). Also 42 I.C. 554=6 L.W. 518. Objection can be taken to an attachment after the decree even though an attachment before judgment was not objected to. 38 C. 448=10 I.C. 305. A claim preferred within a reasonable time after the decree and the application for execution is not "designedly or unnecessarily delayed" within the meaning of proviso to R. 58. The question of delay should be decided with reference to the date of the application for execution made by the decree-holder and it is only according to that date that conditions laid down in the proviso to R. 58 (1) should be decided. (38 C. 448 and 1921 N. 57, *Foll.*; 1929 L. 865; 1927 A. 593 and 41 M. 849=35 M.L.J. 231, *Dist.*) 31 N.L.R. 426=158 I.C. 353=1935 N. 222. Court has no jurisdiction to enquire into question of title but should confine itself to determine the question of possession. 1928 M. 163=54 M.L.J. 321; 103 I.C. 12=1927 N. 286; 115 I.C. 167=1929 N. 66. But see 98 I.C. 888=1927 S. 114; 155 I.C. 419=1935 P. 267; (1910) 2 M. L.J. 305. The words "possessed" and "possession" in these rules include constructive possession or possession in lieu of debts and other intangible property. 27 M. 67 (F.B.). But see 22 W.R. 36 and 4 B. 323. As to extent of investigation necessary when judgment-debtor is in possession and claim made by third party, see 156 I.C. 586=1935 R. 161. When an objection is raised under O. 21, R. 58 the Court dealing with it has to concentrate its attention only to the question of possession and to decide whether the judgment-debtor, is in possession of the property on his own behalf or on account of or in trust for some person. If the property is found to be in possession of somebody else, then it has to be decided



## NOTES.

whether it is in trust or on behalf of the judgment-debtor. The question of title to the property, is not the Court's concern, nor is it competent to consider and decide it. The order of the Court must be based entirely upon the finding on the question of possession. 1938 A. L. J. 1118=1939 All. 117. It is not a condition precedent in all cases for a claimant to show that he was in possession before he could attack the validity of an attachment. 119 I.C. 33=1929 M. 383. In a claim arising under O. 21, R. 58, the Court is not entitled to go into the questions of benami. 119 I.C. 909=1929 P. 273. But see 155 I.C. 419=1935 P. 267. Claimant transferee in possession of colliery with entire rights issuing bills to previous customers of transferor in name of transferor payable to transferee—Attachment of bills by transferor's decree-holder—Property in bills held to belong not to transferor and order disallowing a claim of claimant held to be without jurisdiction and was set aside in revision. 1929 P. 751. Where a claim is made by a Hindu wife to a house purchased in her name, which is attached in execution of a decree against her husband, if she is found to be in possession on the date of the attachment her claim should be allowed. It is not enough for the decree-holder to plead that she is only a *benamidar* for her husband, the judgment-debtor. Nor will the suspicion that it is a *benami* transaction be a ground for the Court disallowing the claim, when the claimant's possession has been made out. 64 C. L.J. 399=1937 Cal. 639; 188 I.C. 481; 19 Pat. 494. In a claim case under R. 58, the Court must come to a finding as to whether the claimant had at the date of attachment some interest in or was possessed of the property attached. When the Court is satisfied that the property was in possession of the claimant it must be found whether he held it on his own account or in trust for the judgment-debtor and in certain cases in order to determine this question it may be necessary incidentally to go into the basis of the claim put forward by claimant. 119 I.C. 909=1929 P. 273; 155 I.C. 419=1935 P. 267; 14 R. 516=164 I.C. 608=1936 R. 306. Where the objector is in possession of the property, the burden of proving that that property is in fact that of the judgment-debtor is on the decree-holder. It is not sufficient for him merely to show that it is not the objector's property. 146 I.C. 1023=10 O.W.N. 1017=1933 O. 473. See also 1937 Cal. 639. The proviso regarding delay applies even to cases where the executing Court not having jurisdiction over the property, exercises it. 41 I.C. 446. In claim investigations, Court will enquire into who was in possession at the time of attachment and not whether such possession was fraudulent or void. 13 Bur. L. T. 214=64 I. C. 66; 132 I.C. 666=1931 L. 666. The Court is bound to decide the question of

possession. 87 I.C. 189=48 M.L.J. 603. Also 49 M.L.J. 706; 1928 M. 163=54 M. L.J. 321; 1937 Cal. 639. Court has no power to entertain an objection after sale of property. 4 P.L.T. 544=74 I.C. 87; 5 R. 751. See also 15 I.C. 53=16 C.W. N. 1023; 87 I.C. 168 (1). Whether claim can be heard after sale, see 1926 C. 468. An investigation may be refused, but once it is made an order must be passed. 39 I.C. 345=11 Bur.L.T. 41. Also 44 M. L. J. 141=1923 M. 295. An objection under O. 21, R. 58 lodged after the execution sale which is subsequently confirmed is incompetent. 40 P.L.R. 522=I.L.R. (1938) Lah. 593=A.I.R. 1938 Lah. 568. The attachment does not cease when the property is sold in execution; and a valid objection can be made even after sale to the attachment under O. 21, R. 58. 1940 Nag. 7; I.L.R. (1940) Nag. 306=A.I.R. 1938 Nag. 475. When a claim is rejected Court will not again interfere by a revision. 74 I. C. 546=1923 O. 208. Where claim is accepted in default of decree-holder, latter's remedy is only by suit, and he cannot apply for restoration and rehearing of the claim. 1936 Pesh. 115. When an objection to execution proceedings is dismissed under R. 58 as being made after unnecessary delay the order is one made under R. 63, and the time within which to bring a suit to establish the applicant's claim is limited to one year. 57 B. 213=35 Bom.L.R. 147=1933 B. 190. In a proceeding under this rule the Court cannot enquire whether the execution is time barred. 60 I.C. 375=2 P.L.T. 275. Civil Court executing warrant issued by Magistrate which becomes its decree under S. 386, Cr. P. Code—Mere differences between procedures of Civil and Criminal Courts does not entitle executing Court to go behind decree. 119 I. C. 33=1929 M. 383. A direction to proceed with sale after simply notifying claim amounts to an adverse order. 1925 M. 368=82 I.C. 737. But see *contra* 1926 M. 216=91 I.C. 985=49 M.L.J. 706. It is not within the scope of the enquiry in applications for removal of attachment to decide whether the attaching creditor had the right to execute the decree and an order cannot be refused merely because the application in execution was time-barred. 7 R. 132=117 I. C. 578=1929 R. 152. Execution sale—Objection by alleged purchaser—Sale not registered—Possession taken by purchaser not sufficient. 34 C.W.N. 254=1930 C. 390. Execution of rent decree, claim if lies. 17 P. L.T. 385. Decree for rent against wrong person—Execution—Claim by third party—Maintainability. 15 P. 812. Attachment of salary of public servant whose salary is exempt from attachment—Objection by disbursing officer to legality is maintainable. 43 Bom. L. R. 758 cited under R. 48 *supra*. See also 1938 Cal. 445. Where objection is to the execution sale of property and not to attachment, the ground being that there was a prior execution sale in objector's favour, the matter



## NOTES.

does not fall under this rule. 31 N.L.R. 301=1935 N. 171. *See also* 1937 Pat. 341.

CLAIMS UNDER THIS RULE—WHO CAN BRING CLAIMS.—A person who has only a beneficial interest in property can prefer a claim. 11 M.L.J. 346. Also the assignee for value of a decree subsequently attached in execution of a decree against the assignor, and who seeks to have the decree released from attachment. 10 M.L.J. 116=5 R. 395. A claim by a garnishee also comes within this rule. 38 B. 631=25 I.C. 375; 133 I.C. 248=33 Bom. L.R. 396=1931 B. 288. *See also* 1931 M.W. N. 259=1931 M. 570=135 I.C. 543. Attachment of debt—Garnishee denying any debt due—Order disallowing objection and directing him to pay—Subsequent suit by decree-holder as receiver for realising debt attached—Plea of denying debt—If barred. 70 M.L.J. 20. Claim by a judgment-debtor as a trustee comes under this rule. 38 I.C. 152. *See also* 4 O.W.N. 102=1927 O. 120; 1930 N. 293=27 N.L.R. 10; 17 Pat.L.T. 810. Or by his legal representative as trustee. 75 I.C. 1053=1924 A. 183 (2). Purchasers after attachment cannot bring claim proceedings. 9 I.C. 194=16 C.W.N. 542. Transferee of property subject to a contract of a sale, prior to attachment comes under this rule. 38 I.C. 107=5 L.W. 234. A transferee of property attached in execution of a money decree can object under this rule. 123 P.L.R. 1912=13 I.C. 563. Also Administrator-General when empowered to collect the assets of a deceased person. 23 B. 428. Also Official Assignee, after a vesting order has been passed. 21 B. 205 (218). *See also* 68 M.L.J. 78. The claim of the Official Receiver under S. 34 of the Provincial Insolvency Act where the vesting was after attachment does not come under this rule. 41 M.L.J. 334=69 I.C. 326. *See also* 68 M.L.J. 78. In a decree for money with lien on mortgaged property, claims may be enquired into. 101 P.R. 1915=32 I.C. 43. A usufructuary mortgagee in possession does not come under this rule but under R. 100. 70 I.C. 306=1 P. 159; 1937 Pat. 63 (F.B.). While proceedings by way of attachment are not appropriate to mortgage decrees, claims and objections to the attachment can be made under O. 21, R. 58, if the decree-holder applies for and obtains an order of attachment and the property is attached. On dismissal of his objection, the objector is entitled to bring a suit for declaration of his title under O. 21, R. 63. 39 P.L.R. 568=A.I.R. 1937 Lah. 360. But *see* 1927 P. 51; 10 Bom.H.C.R. 100. *Also* 97 I.C. 255. Attachment of equity of redemption continues even though a usufructuary mortgagee applies for the release of the property. 80 I.C. 428=1925 C. 296. A prior mortgagee cannot intervene under this rule as it does not apply to cases where the property has not been attached. 27 A. 700; 18 B. 98; 14 C. 63. Petition by simple mortgagee for insertion of his mortgage in sale proclamation comes under this rule and its dismissal amounts to an adverse order. 25 A.L.J. 659=102 I.C. 792

=1927 A. 593; 1929 L. 865=11 L. 369. But *see* 1926 N. 423; 1926 M. 593; 16 P. 54=17 Pat.L.T. 812=1937 P. 63 (F.B.); (1940) 2 M.L.J. 305. Where the interest of a claimant accrued after the attachment, he is not a person who could come under R. 58. 152 I.C. 902=1934 P. 511. A claim by a widow in possession of a house in lieu of a deferred dower, comes under this rule. 31 I. C. 722=80 P.R. 1915. Money paid to avert an attachment, cannot be claimed back under this rule. 34 I.C. 492=9 S.L.R. 213. Objection by the judgment-debtor as being wakf property comes under this rule. 1 P. 637=67 I.C. 438. *See also* 7 Pat.L.T. 810. If the objection is raised by judgment debtor in his own behalf or in a representative capacity in which he has been sued, it is a question to be decided under S. 47. 15 C. 437 (443). But *see* 17 C. 711 (F.B.); 10 M. 117 (119); 10 M.L.J. 85; 2 A. 752; 23 M. 165 (F.B.). *See also* 6 Pat.L.T. 725=1925 P. 482. Claim by a legal representative in the same capacity does not come under this rule. 38 I.C. 360=5 L.W. 158. *Also* 3 Pat.L.T. 613=38 I.C. 369; 1932 A.L.J. 125=1932 A. 263; 1935 M. 923; 179 I.C. 538. Mortgage decree—Execution against legal representatives of mortgagor—Objection to validity of decree—If open. 37 P.L.R. 123=1935 L. 549. Burden of proof—Decree against Hindu coparcener—Execution against joint family property—Objection by other coparceners—Onus of proof of binding character of decree. 1936 P. 319. The objection by the executor that the decree cannot be executed against him as he was not a party is one under S. 47 and cannot be treated as one under O. 21, R. 58. 149 I.C. 926=58 C.L.J. 487=1934 C. 258. Objection by an exonerated defendant does not come under this rule. 54 I.C. 536=37 M. L.J. 624. *See also* 1925 N. 185 (Mortgage decree). Attachment must be deemed to continue until the sale is confirmed and so till then an objection to the attachment could be made under O. 21, R. 58 even though the execution sale is over. 1940 Nag. 7=1939 N.L.J. 496. The fact that an execution sale of the attached property has already taken place does not deprive the Court of jurisdiction to hear the claim petition under O. 21, R. 58, so long as the sale is not confirmed by the Court. The mere accident of the sale having taken place would not shut out a claimant for ever from getting his property released from attachment. 1939 P.W.N. 229=A.I.R. 1939 Pat. 430. *See also* 1938 Nag. 475; 1938 Lah. 538. Rent suit—One of the tenants not impleaded—Decree against cotenants—Claim by tenant not party—Maintainability—Effect of Ss. 143 and 170, Bengal Tenancy Act. *See* 45 C.L.J. 229=102 I.C. 125=1927 C. 381. Suit for rent by landlord against occupancy tenant—Transfer of holding by tenant *pendente lite*—Non-joinder of transferee—Landlord having knowledge of transfer—Decree—Execution against holding—Claim by transferee—Maintainability. 40 C.W.N. 683=1936 C. 279. *See also* 15



## NOTES.

Pat. 812. An objection to the sale of a property by a third person on the ground that subsequent to its attachment he has purchased it at an auction sale in execution of another decree against the same judgment-debtor is, no debt, not maintainable under O. 21, R. 58. Although the objection is wrongly put in under that rule, the executing Court will be justified in taking notice of it. For as the judgment-debtor has no longer any saleable interest in the property owing to the valid title acquired by the objector by a prior sale in execution in his favour, the property is not "liable to sale" under O. 21, R. 64, and therefore could not be sold again. The objection could at least be entertained in the exercise of inherent powers under S. 151, and it would be desirable to do so to prevent unnecessary complication. 41 P.L.R. 305=1939 Lah. 380. It is not competent to a Court to order the issue of proclamation of sale while a claim petition is pending. 1940 Mad. 6=50 L.W. 338 (1)=(1939) 2 M.L.J. 505.

**PARTIES TO CLAIM.**—Judgment-debtor is not a necessary party to a claim. 22 B. 875 (882); 15 C. 674. A defendant, discharged, not because he was an unnecessary party, is discharged not from the suit but from liability and it is the decree itself that discharges him from liability. He therefore continues to be a party to the suit. See also 10 Pat.L.T. 75=1929 N. 179. A Co-operative Society has an interest in the shares of a member as these shares form part of its capital. Hence where three shares are attached by a person in execution of a decree against the member, the Society has *locus standi* to object to the attachment of these shares. Apart from this when the Society is being made personally liable it has a right to show that the attachment order was *ultra vires* as the shares held by a member are not liable to attachment and sale under S. 20, Co-operative Societies Act. A.I.R. 1939 Lah. 305.

**APPEAL.**—Order of dismissal of objection by judgment-debtor stating that he has no saleable interest, is appealable. 28 O.C. 175=85 I.C. 997. See also 1927 L. 895=28 Punj.L.R. 121. I.L.R. (1941) Kar. 211; 194 I.C. 45. Where a joint application was made by a party and another not a party, objecting to the attachment, and the parties acquiesced in the application being heard under this rule, an order on the application under these circumstances is appealable. 5 R. 110=101 I.C. 794=1927 R. 137. See also 57 M. 822=40 L.W. 144=151 I.C. 24=1934 M. 435 (1)=67 M.L.J. 36. But see 1933 S. 126=143 I.C. 702. An order on the original side dismissing an application under R. 58 is not appealable under cl. 15, Letters Patent, because of the prohibition contained in R. 63. 60 C. 915=37 C.W.N. 641=1933 C. 715.

**AMENDMENT.**—This can be allowed by substituting the name of the real claimant,

where Court is satisfied that the wrong name has been used through a *bona fide* mistake, and where the other parties are in no way misled or prejudiced. 21 B. at 210.

**EFFECT OF ORDER.**—See 45 M. 84=41 M.L.J. 393; 24 A.L.J. 334=1926 A. 244. An order in favour of a claimant must be the result of an investigation. 118 I.C. 634=1929 R. 123. Judgment-debtor is not bound by orders in claim proceedings to which he is not a party. 110 I.C. 511; 1939 A.W.R. (H.C.) 729=A.I.R. 1939 All. 728. See also 10 Pat.L.T. 581=1929 P. 604. Where the application of the petitioner's father under R. 58 is dismissed and the order has become conclusive, the petitioner who derives his rights from him is bound by the order. 149 I.C. 1059=36 P.L.R. 89=1934 L. 193 (2). The claimant whose claim was rejected as too late is incompetent again to apply under R. 100, praying to be restored to possession. The finality of the order rejecting claim petition subject only to the result of a suit under R. 63 is not affected by the fact that the order dismissing the claim was irregular. 148 I.C. 334. See also 1935 P. 122.

**LIMITATION** for fresh suit begins to run from the time of refusal to investigate. Art. 11 of the Limitation Act applies. 45 A. 438=21 A.L.J. 342. But see 43 M.L.J. 467=45 M. 827. When once a claim order is made, limitation begins to run. The filing of a fresh execution application after dismissal of the prior one, does not give a fresh starting point. 66 P.R. 1916=35 I.C. 321. Where the order is an improper one and runs as follows:—"Whatever right the defendant has will pass by the sale. The claim put forward by the petitioner will be noted in the sale proclamation." Limitation for suit does not run from the date of the order. 44 M.L.J. 141=1923 M. 295. But see *contra* 93 I.C. 335=1926 M. 593; also 49 M.L.J. 706. Where a claim is dismissed or struck off without any adjudication, a fresh claim may be entertained. 16 W.R. 59. See also 21 B. at 210. But see 1928 M. 525=110 I.C. 567; 113 I.C. 318=1931 A. 608. **Claim under—Rejection—Court declining jurisdiction—Suit after one year—Maintainability.** 150 I.C. 40=1935 P. 31.

**RESTORATION** after dismissal for default—Power of Court. 143 I.C. 584=29 N.L.R. 176=1933 N. 176. Acceptance of claim in default of decree-holder cannot be reheard on decree-holder's application. 1936 Pesh. 115.

**RIGHT OF SUIT.**—A suit is the only remedy against an adverse order. 89 I.C. 888=1925 N. 288; 130 I.C. 200=1930 A.L.J. 1322. Unless a claim is put in under this rule a suit for bare declaration would be barred by S. 42 of the Specific Relief Act. 5 R. 699. A defeated claimant cannot re-agitate his claim in a suit by the successful party. 1925 M. 368=92 I.C. 737. But if the attachment ceases later on account of the dismissal of the execution petition, he will not be precluded from raising the ques-



Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

#### NOTES.

tion of title in defence, even after a year. 1925 M. 1113=48 M.L.J. 616. The party against whom an adverse order is passed in claim proceedings and has become final by his failure to bring a suit under R. 63 is not precluded from going behind that order in a subsequent suit by him based on an entirely different title. 60 C. 1046=149 I.C. 410=1934 C. 356. See also (1937) 1 M.L.J. 133. Objection by judgment-debtor that attached property is not liable to sell under S. 60, is governed by S. 47. 133 I.C. 858=33 Bom.L.R. 781=1931 B. 446. Claim petition dismissed—Suit by defeated claimant—Burden of proof on the question of title is on the plaintiff. 10 Lah.L.J. 42; 144 I.C. 315=1933 R. 91; 152 I.C. 441; 40 L.W. 685=1934 M. 587=67 M.L.J. 585; 1933 R. 103. The right to suit is not affected by the sale of the property. 70 I.C. 332=3 P.L.T. 832. An attachment in itself gives no cause of action for declaring the other person's title. 10 L. 543=1929 L. 90 (2)=10 Lah.L.J. 491. Claim to attached property even after sale until satisfaction is made through Court after payment of full purchase money is entertainable. 1931 M. 782=61 M.L.J. 884; 27 S.L.R. 256=145 I.C. 142=1933 S. 198. But see 171 I.C. 302=1937 Pesh. 90 (*contra.*).

REVISION.—A wrong order can be set aside in revision. 1925 M. 588=48 M.L.J. 603; 103 I.C. 12; 1929 P. 746; 7 R. 132; 132 I.C. 666=1931 L. 666; 145 I.C. 444=1933 A.L.J. 1177=1933 A. 751 (1). But see 151 I.C. 668=1934 R. 230; 1934 R. 212=154 I.C. 123; 1935 A. 343. The powers of the High Court to interfere in revision with an order under O. 21, R. 58 is not precluded by the fact that a remedy by suit is available to the applicant under O. 21, R. 63. 1938 A.L.J. 1118=A.I.R. 1939 All. 117. In a proceeding under O. 21, R. 58, Court should not allow the parties to go into questions of *benami* to the practical rejection of the direct evidence of possession. The claimants are after all merely advancing claims and not bringing title suits. If a claim case is treated as a title suit, the claimant is taken by surprise, and if the claim case is dismissed, the onus on him in the suit that he may have to bring under O. 21, R. 63 would be rather heavier than in an ordinary title suit. Where although purporting to deal with the question of possession the Court has really been considering the question of *benami*, the High Court will interfere with its order in revision. 188 I.C. 481. See also 1938 A.M. L.J. 23; 1938 Rang. 319; 19 Pat. 494=1940

Pat. 653. The remedy by way of objection under R. 58 is a summary remedy provided by legislature in lieu of a suit, and a refusal of the Court to entertain an objection under the rule can be legitimately considered in revision. 164 I.C. 1012=1936 Pesh. 185. Dismissal of an objection summarily on the ground that there is an unnecessary delay without giving an opportunity to the objector or his Counsel to explain the delay is open to revision. 166 I.C. 337=1937 O.W.N. 48=1937 O. 268. Where a claim is based on a sale deed and possession, and it appears on the facts appearing on the face of the sale deed itself that the sale is invalid in passing any title, the Court must in order to determine whether possession of claimant is on his own behalf or on behalf of the judgment-debtor inquire into the question of title. And where the Court fails to consider the question of the validity or otherwise of the sale deed and refuses to go into the question of title, it fails to exercise jurisdiction vested in it by law and its order is open to revision. 14 R. 516=1936 R. 306.

APPEAL.—An order passed by the Court under R. 58, is conclusive and can only be challenged in a suit brought under R. 63. No appeal lies against such order. 165 I.C. 519=9 R.L. 254=1936 L. 830. Objection to attachment by judgment-debtor in his capacity of trustee—Order upholding objection—Appealability—C.P. Code, S. 47. 50 A. 801=113 I.C. 171; 17 Pat.L.T. 810. If objection is really under S. 47 even though wrongly described and dealt with under R. 58, the order nevertheless operates as a decree and is appealable. 137 I.C. 258=1932 L. 376. Receiver of properties of judgment-debtor—Attachment of monies in his hands in execution of decree against judgment-debtor—Objection by receiver—Order allowing—Appeal—S. 47. 30 S.L.R. 288; (1940) 2 M.L.J. 860.

O. 21, R. 58 (2) (All.): AMENDMENT.—The addition by the Allahabad High Court to sub-cl. (2) of R. 58 of O. 21, to the effect, that the Court may in its discretion make an order 'postponing the delivery of the property after the sale pending such investigation and that in no such case shall the sale become absolute until the claim or objection has been decided,' obviously contemplates the decision of a claim after the sale. Sale can go on and confirmation can be stayed pending decision of claim or objections. 1939 A.L.J. 622=A.I.R. 1939 All. 598. But see 160 I.C. 383=1936 S. 2.

O. 21, Rr. 58 and 63.—The order for release from attachment in a case



LOC. AMS.—[ALLAHABAD AND OUDH.] O. 21, r. 58 (2).—In Allahabad and Oudh, *add*, "or may in its discretion make an order postponing the delivery of the property after the sale pending such investigation. And in no case shall the sale become absolute until the claim or objection has been decided" at the end of sub-cl. (2) in r. 58, O. 21.

[CALCUTTA.] *Add* the following words at the end of sub-r. (2), r. 58, O. 21 :—  
"upon such terms as to security, or otherwise, as to the Court, shall seem fit."

[LAHORE.] *Add* the following proviso under sub-rule (1) :—  
"and that if an objection is not made within a reasonable time of the first attachment the objector shall have no further right to object to the attachment and sale of the same property in execution of the same decree, unless he can prove a title acquired subsequent to the date of the first attachment."

[NAGPUR.] In sub-rule (2) of r. 58, *after* the word "objection" where it occurs for the second time, *insert* the following words :—

"or, where the property to be sold is immovable property, the Court may, in its discretion, direct that the sale be held, but shall not become absolute until the claim or objection is decided."

[PATNA.] <sup>1</sup>*Substitute* the following for existing r. 58 :—

"58. (1) When any claim is preferred to any property, the subject-matter of execution proceedings, or any objection is made to the attachment thereof, on the ground that the applicant has an interest therein which is not bound under the decree, or that such property is not liable to attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit :

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may in its discretion make an order postponing the delivery of the property after the sale pending the investigation of the claim or objection. And in no case shall the sale become absolute until the claim or objection has been decided."

59. The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

#### LEG. REF.

<sup>1</sup> This amendment shall have effect from 1st January, 1938.

#### NOTES.

under O. 21, R. 58 does not put an end to the attachment. If a suit is subsequently brought under O. 21, R. 63 and decreed, the effect of the decree is to set aside the order of release and to maintain uninterrupted the attachment originally made. Hence any alienation in the interim period is void by reason of S. 64. 14 Luck. 543=A.I.R. 1939 Oudh 178. *See also* 1941 N.L.J. 593. Where a sale has actually taken place the executing Court has no jurisdiction to investigate a claim or objection filed under O. 21, R. 58, even though it was filed before the sale was actually held and the sale has not yet been confirmed. It follows, therefore, that an order of dismissal of the claim petition for default passed after the sale is without jurisdiction. 65 C.L.J. 353=41 C.W.N. 845. Where subsequent to the dismissal of a claim under O. 21, R. 58, the attachment ceases within one year from the date of the order, for whatever reason, it is not necessary for the claimant to file a suit under O. 21, R. 63, and the order dismissing the claim is of no effect. 1941 Oudh 95=1940 O.W.N. 1057. Where a mortgagee makes an application under O. 21, R. 58, in respect of the mortgaged property as against the purchaser of that property in execution, and that application is dismissed, whether for default or not the mortgagee must bring a suit on his mortgage within one

year. A suit by him on the mortgage more than one year after the disposal of his application under O. 21, R. 58 is barred and must fail as against the purchaser. 19 Pat.L.T. 746=1938 P.W.N. 752.

O. 21, Rr. 58 and 90.—A third party objecting to the sale of his property for the judgment-debt of another person cannot disregard R. 58 of O. 21, and apply after the sale under R. 90 of that order, treating the case as one of irregularity in publishing or conducting the sale. 1941 O.W.N. 949=A.I.R. 1941 P.C. 45=(1941) 2 M.L.J. 227 (P.C.).

O. 21, Rr. 59-63.—Nowhere is the Court given power to declare in the course of proceedings under Rr. 59, 60, 61 and 63 that a person who has applied for removal of attachment is subject to a decree which was not passed against him. 154 I.C. 1045=1935 R. 11.

O. 21, R. 59.—Principles of Rr. 59 to 61 govern investigation of claims as to property attached before judgment. 146 I.C. 9=1933 N. 297. The rule does not mean that if the claimant establishes that he has some interest he can succeed irrespective of the question of possession; nor should his claim be disallowed if he fails to establish the interest set up, irrespective of the question of possession of judgment-debtor. 24 I.C. 62. Ordinarily Court enquires into possession only, occasionally into title as well. 39 I.C. 275=13 Bur.L.T. 14. But the enquiry is not necessarily confined only to possession. 10 I.C. 994; *also* 48 I.C. 182=11 Bur.L.T.



LOC. AM.—[PATNA.] Substitute the following for r. 59 :—

1<sup>st</sup> 59. The claimant or objector must adduce evidence to show that at the date of the decree or the attachment, as the case may be, he had some interest in, or was possessed of, the property in question."

60. Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time it was so in his possession, not

#### LEG. REF.

<sup>1</sup> This amendment shall have effect from 1st January, 1938.

#### NOTES.

118. But see 24 I.C. 62; also 59 I.C. 947=43 M. 760; 8 I.C. 117=35 M. 35. Where judgment-debtor claims to hold under a title of his own and the claimant sets up an adverse title and is not in possession of the property at the time of attachment, he has so far as R. 59 is concerned, no interest in the property. 146 I.C. 9=1933 N. 297. See also 1934 R. 212=154 I.C. 123.

EVIDENCE.—The applicant has a right to establish what the law requires, by any evidence sufficient for the purpose, and the Court has no power to require from him any particular kind of evidence. 22 W.R. 392. If no evidence of possession is adduced the Court should deal with the question of title only. 32 I.C. 34. When a Judge refuses to receive evidence, any order passed by him is *ultra vires*. 22 W.A. 422; 27 A. 16 (F.B.). A revision lies if the Court acts with material irregularity. 76 I.C. 677=1 R. 276. See also 60 I.C. 616.

O. 21, Rr. 59 and 60: SCOPE AND EFFECT.—The 'interest' referred to in R. 59 is not necessarily an interest in land in the sense that expression is used in S. 54, Transfer of Property Act. The C.P. Code and the Transfer of Property Act are not in *pari materia* and there is no reason to suppose that it was within the contemplation of the legislature that the interest referred to in R. 59 should exclude all rights which are not interests in land. On the contrary, R. 60 shows beyond a possibility of doubt that the word 'interest' is used in a wider sense. A party, in whose favour there is a contract of sale, can enforce specific performance of that contract against a transferee with notice. 41 L.W. 739=1935 M. 193=68 M.L.J. 67.

O. 21, R. 60: SCOPE OF RULE.—As the provisions of R. 60 are clearly mandatory and any breach of those provisions is at the very least a material irregularity. 1938 A.L.J. 1118=1939 All. 117. An order for release has not the effect of putting an end to an attachment duly made. 33 C. 1158. When crops were wrongly attached but were subsequently released from attachment on claim preferred by an objector and the crops were accidentally burnt and destroyed during attachment, and while in the custody of the *supratdar*, the objector would be entitled to

recover the value of the crops burnt. 1936 N. 257. On this rule see also 1940 N.L.J. 561.

NATURE OF INVESTIGATION.—The investigation under this rule should be confined to determining whether or not the property attached was in the possession of the claimant on his own account. 10 C. 1057. See also 18 C. 290; 110 I.C. 365. All that a Court has to find under O. 21, R. 60, is whether the properties in respect of which the claim is preferred were, on the date of the attachment, in the possession of the claimant on his own account or on account of the judgment-debtor or in trust for him. The question of title may be only relevant to determine this matter. 1937 M.W.N. 320 (1). The Court should decide on merits when a claim is put in and not drive the claimant to a regular suit. 248 P.L.R. 1914=27 I.C. 256. The extent to which the investigation should be carried out depends on the circumstances of each case. 15 C. 521 (P.C.); 1 C.W.N. 617. See also 29 C. 543; 18 M. 265; 12 C. 108. If a claim is made by the decree-holder that the persons in possession are only in possession on behalf of the judgment-debtor, the Court should investigate the claim of title. 1934 R. 212=154 I.C. 123. When an intervener claims a share of attached property the Court should determine the respective shares of the debtor and intervener. 27 A. 464. See also 29 M. 225. A conditional order on a claim should not be passed. 44 I.C. 1007. On this rule, see also 91 I.C. 414=1926 M. 355. Building contract—Builder assigning moneys due under Loan Society—Attachment of such moneys by creditors of builder—Validity. 49 C.L.J. 51=115 I.C. 362=1929 C. 225.

APPLICATION OF THE RULE.—A mortgagee in possession holds the property in trust for the mortgagor to the extent of his interest therein, and so far it must be released from the attachment. 10 I.C. 994. When a claimant has a half share in attached movable property the proper procedure is to release the entire property and to proceed by way of attachment under O. 21, R. 47. 59 C. 808=1932 C. 408. See also 1935 R. 11.

IN TRUST.—These words apply to cases in which the possession of a claimant as a trustee is of such a character as to be really the possession of the debtor, and not to cases in which very intricate questions of law may arise as to whether valid trusts may result in particular instances. 14 C. 617



on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

LOC. AM.—[PATNA.] <sup>1</sup>Substitute the following for existing r. 60 :—

"R. 60. Where upon the said investigation the Court is satisfied that for the reasons stated in the claim or objection such property was not, at the date of the decree, or when attached, as the case may be, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property but on account of or in trust for some other person or party on his own account and partly on account of some other person, the court shall make an order releasing the property, wholly or to such extent as it thinks fit, from the execution proceedings, or from attachment.

Where the property has been sold, such order shall have the effect of setting aside the sale, and if it has been purchased by a third party in good faith, the Court may make such order for his compensation by the decree-holder or objector to an extent not exceeding  $12\frac{1}{2}$  per cent. of the purchase price, as it thinks fit."

61. Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

LOC. AM.—[PATNA.] <sup>1</sup>Substitute the following for r. 61 :—

"R. 61. Where the Court is satisfied that the property was, at the time of the decree, or of the attachment, as the case may be, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim."

62. Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge.

#### LEG. REF.

<sup>1</sup> This amendment shall have effect from 1st January, 1938.

#### NOTES.

(620). See also 21 B. 287; 1933 R. 259. Transfer of property after release from attachment on claim is liable to be set aside if the order itself is set aside by a regular suit. 62 I.C. 348=25 C.W.N. 544. See also 2 Bur.L.J. 113=1923 R. 237. When in order to prevent the taking to Court of property attached, the claimant pays to the Amin the amount of the decree, he must, if he wants to have the money refunded, file a regular suit. The Court cannot direct a refund. 22 B. 473. An order in favour of a decree-holder does not enure for the benefit of the other decree-holders who are not parties to the proceedings. 18 A. 413.

APPEAL.—No appeal lies from an order passed under this rule. 28 B. 458. Whether appeal lies under S. 15 of the Letters Patent against order dismissing a claim. See 25 M. 555.

O. 21, R. 61.—The Court cannot merely on suspicion hold that the claim is untenable. 29 C. 543. If necessary, a Judge can go into the question of the validity of a registered or other document, if this entailed a consideration of the *bona fides* of the sale, or the legal effect of the deed of conveyance including the circumstances of the registra-

tion of it. [42 I.C. 182; 15 Cal. 521 (P. C.) and 1924 C. 744, Foll.] 1935 R. 395. Effect of order. See 17 C. 260. Possession of a claimant under a fraudulent and collusive sale must be deemed to be in trust for the judgment-debtor. 17 I.C. 12=16 C.W.N. 959. When a claim is disallowed but the attachment is raised a suit for possession within one year under Art. 13 of the Limitation Act is not necessary. 45 B. 561=59 I.C. 774. Where in a suit against the father and one of the sons the entire property was attached and a subsequent purchaser of the shares of other minor sons not impleaded in the suit claimed a share of the property, held, that if the share of the minor sons was to be treated as not attached, they or the purchaser of their shares had no *locus standi* to come to Court; but in fact the whole of the property, including the minor's shares, were attached, as the decree-holder was entitled to do so in a suit against the father though the minors were not parties to the suit. 146 I.C. 516=1933 M. 839=65 M.L.J. 752.

O. 21, Rr. 62 to 66.—See I.L.R. (1939) 2 Cal. 291=43 C.W.N. 620. The Civil Procedure Code makes a distinction between the case in which property is expressly sold subject to a mortgage under R. 62, and the case in which notice of an alleged mortgage is given in the sale proclamation under R. 66. In the former case the Court



## 63. Where a claim or an objection is preferred, the party against whom

## LEG. REF.

<sup>1</sup> This amendment shall have effect from 1st January, 1938.

## NOTES.

sells under the judgment-debtor's equity of redemption and the purchaser takes the property subject to the mortgage and he is not entitled to question the mortgage. In the latter case, the executing Court does not decide whether the mortgage exists or not. If there is really a mortgage, the purchaser has to redeem it; but if the mortgage notified in the proclamation of sale turns out to be invalid the purchaser takes the property free of the mortgage. 10 Luck. 343=153 I.C. 57=11 O.W.N. 1475=1935 O. 23; 1939 A.L.J. 622=1939 All. 598. Property sold subject to mortgage and notice of encumbrance given in proclamation—Distinction between. 38 L.W. 813=1933 M. 879=65 M.L.J. 819. The expression 'subject to such mortgage' occurring in O. 21, R. 62, means that what is sold is the equity of redemption. There is a distinction between an express order directing the property to be sold 'subject to a mortgage' and cases where notice of an alleged mortgage is given in the sale proclamation. While in the former case the would-be purchaser is made aware of what exactly he is purchasing in the latter case he merely takes a chance of the mortgage being either not in force or enforceable. The price would vary considerably according as to whether a sale is 'subject to a mortgage' or whether a mortgage is merely notified in the sale proclamation. An auction-purchaser who is the decree-holder cannot challenge the finding that a mortgage subsists when the sale is 'subject to a mortgage.' I.L.R. (1939) Nag. 665=1939 N.L.J. 487=A.I.R. 1939 Nag. 305.

**O. 21, R. 62: SCOPE.**—Code makes a distinction between a case in which property is sold subject to a mortgage and a case in which notice of an alleged mortgage is given in a proclamation of sale. The former is provided by this rule, the latter by R. 66. 28 A. 418 at 420; 10 Luck. 343=153 I.C. 57=11 O.W.N. 1475=1935 O. 23. See also I.L.R. (1939) 2 Cal. 291=1939 Cal. 620=43 C.W.N. 999; 41 B. 64=36 I.C. 627; 132 I.C. 767=1931 O. 157. Comparison of this rule with O. 23, R. 1. 20 N.L.R. 106=1925 N. 2. The question whether an order by the executing Court with reference to an attached property is conclusive unless set aside within a year or not depends upon the nature of the petition on which the order is made. If a mortgagee files a *petition of objection or claim* then an order adverse to the mortgagee is conclusive unless set aside within a year. But where the mortgagee apart from informing the Court about his encumbrance and praying that it may be notified in the auction notification does no-

thing more, but the Court on the allegation of the judgment-debtor goes into the question of the satisfaction of the mortgage and finds that it is discharged and dismisses the mortgagee's petition, the order is not one passed under O. 21, R. 62, and hence the mortgagee is not bound to bring a suit to set it aside within a year. A.I.R. 1939 All. 657. See also 43 C.W.N. 999=1939 Cal. 620. If a person prefers a claim on the ground that the properties attached in execution of a rent decree are subject to a mortgage in his favour, the Court must proceed to investigate the claim and cannot order simply without investigation that the sale would be held with notice of the mortgage. Such an order is not one contemplated by O. 21, R. 62, and cannot be sustained. 67 C.L.J. 79.

**APPLICATION OF THE RULE.**—A mortgagee in possession can prefer a claim. 10 Bom. H.C.R. 100. But see 40 P.L.R. 522=1938 Lah. 568. A sale subject to a charge, on the application of a person in possession claiming a charge of maintenance on the property is valid. 44 B. 860=58 I.C. 217. See also 35 B. 275=10 I.C. 913. A purchaser under a sale subject to a mortgage, cannot dispute the mortgage. 47 C. 446=24 C.W.N. 269. See also 29 I.C. 690=21 C. W.N. 401; 50 I.C. 909; 15 N.L.R. 15=1923 N. 282; 30 I.C. 238; 2 O.L.J. 225; 50 I.C. 580; 12 Bur.L.T. 43. A decree-holder purchaser can contest the declaration of lien under this rule, by a suit brought within one year of the declaration. 1931 A. 139=52 A. 1032=131 I.C. 674. But where Court did not direct the sale of the property subject to a mortgage, but the mortgage is simply declared at the time of sale, the auction-purchaser is not precluded from questioning the validity of the mortgage. 36 I.C. 732=3 O.L.J. 422. Order for sale with notice of mortgage—Property—Proper order to be passed. 34 C.W.N. 254=1930 C. 390; 9 R. 367=134 I.C. 746=1931 R. 310. A purchaser of property subject to a mortgage can plead limitation in a suit by the mortgage. 23 I.C. 448=17 O.C. 38.

**O. 21, Rr. 62 to 63.**—An application made by a mortgagee after attachment heading it to be one under O. 21, R. 62, and praying that the fact of the property attached being subject to a mortgage might be notified and proclaimed at the time when the sale takes place, is really a claim petition made under O. 21, R. 62. It is not a mere application for insertion of an incumbrance in the sale proclamation under O. 21, R. 66. If, therefore, it is dismissed, the order is conclusive unless it is set aside by a suit under O. 21, R. 63. I.L.R. (1939) 2 Cal. 291=43 C.W.N. 999=A.I.R. 1939 Cal. 620. See also 1939 All. 657.

**O. 21, R. 63: OBJECT AND SCOPE.**—Suit to show that claimant has a title to the property and that order of attachment was not



an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

LOC. AMS.—[CALCUTTA.] Add the following as r. 63-A :—

"63-A. When an attachment of movable property ceases, the Court may order the restoration of the attached property to the person in whose possession it was before the attachment."

[LAHORE.] R. 63-A which had been added previously was deleted by High Court Notification No. 106-R-XI-y-14, dated 27th April, 1937.

[PATNA.] Add the following heading and rules below r. 63 :—

*Garnishee Orders.*

63-A. Where a debt (other than a debt secured by a mortgage or a debt recoverable only in a Revenue Court or a debt the amount of which exceeds the pecuniary jurisdiction of the Court) has been attached under r. 46 and the debtor prohibited under cl. (i) of sub-r. (1) of r. 46 (hereinafter called the garnishee) does not pay the amount of the debt into Court in accordance with r. 46, sub-r. (3), the Court on the application of the decree-holder may order a notice to issue calling upon the garnishee to appear before the Court and show cause why he should not pay into Court the debt due from him to the judgment-debtor. A copy of such notice shall, unless otherwise ordered by the Court, be served on the judgment-debtor.

NOTES.

properly made would lie under the rule. 37 L.W. 437=1933 M. 328=142 I.C. 395. Terms of R. 63 are wide enough to include a suit based on title; and in order to prove that the claimant has a right to the property in dispute, a consideration of his title as well as of possession will be relevant. The two questions cannot be separated from each other. 68 M.L.J. 590. See also 41 L.W. 550=68 M.L.J. 518. O. 21, R. 63 does not itself confer a right but only gives the creditor the opportunity of enforcing whatever rights he has by a civil suit. I.L.R. (1940) All. 542=1940 A.L.J. 470=A.I.R. 1940 All. 407. Per Mitter, J.—The claimant cannot be allowed in a suit under O. 21, R. 63, C.P. Code, to question the validity of the decree under execution to which he was not a party and by which he is not directly affected. 74 C.L.J. 261. The object of the suit is to get rid of the attachment. Therefore no suit need be filed when attachment is raised and suit abates on removal of attachment. 1917 M.W.N. 851=42 I.C. 683. But see 26 I.C. 532=26 M.L.J. 499. See also 1926 N. 197=93 I.C. 997; 7 L. 235=1926 L. 348. No suit where decree-holder himself withdraws the attachment. 110 I.C. 511; 122 I.C. 865; 41 L.W. 578=156 I.C. 880=1935 M. 544. But see 1929 R. 228. In a suit by a defeated decree-holder under O. 21, R. 63, the plaintiff should not be forced to try out the suit in which he has already obtained a decree. It may be that the decree which is the basis of the execution is not a justifiable decree; but that is not the question for decision in the suit under O. 21, R. 63. 1939 P.W.N. 229=A.I.R. 1939 Pat. 430. An order passed by executing Court on an objection filed under R. 58 which is not pressed subsequently and is therefore dismissed is an order covered by O. 21, R. 63. 7 O.W.N. 1173=1931 O. 1 (F.B.). A regular suit is a continuation of the claim proceedings. 1925 N. 82; 17 Pat. 588=1939 Pat. 138. The institution of a suit by

the attachment creditor under R. 63 is not merely a continuation of the original claim proceedings, but is really in part a new legal proceeding. Nature of suit under R. 63 considered with reference to provisions of S. 16 (2) (b), Provincial Insolvency Act, 1907. 119 I.C. 46 (2)=1929 M. 323=56 M.L.J. 489. It is in the form of an appeal because the summary investigation might not have furnished sufficient material for decision. 90 I.C. 196. A suit can be instituted even when the attachment had virtually ceased the decree having been satisfied from other properties of the judgment-debtor. 9 C. 10; 18 B. 241; 21 B. 58; 31 C. 228; 29 M. 225. But see 27 C. 714; 16 A. 165 (169) (F.B.); 18 B. 260; 12 C. 696 (701); 17 C. 436; 22 B. 640. See also 1940 Mad. 763=1940 M.W.N. 459. There is no doubt or difficulty in applying R. 63 to a case of attachment before judgment. 49 C.L.J. 51=115 I.C. 362=1929 C. 225. When attachment before it does not effect an abatement of a suit it does not effect an abatement of a suit, under this rule. 27 I.C. 800. Whether suit decides the question of title arising in execution. 43 M. 760=39 M.L.J. 350 (F.B.) overruling 43 I.C. 651=33 M.L.J. 705=41 M. 612 (F.B.) and 34 I.C. 778=30 M.L.J. 565. The Court is not restricted to determine only the question of the attachability of the property but can also question the validity of the decree itself. 23 I.C. 755. Rule covers not merely a declaratory suit, but also one for consequential relief. 40 M. 733=31 M.L.J. 394. If attaching creditor withdraws the attachment a suit by him is maintainable not under this rule but under S. 42 of the Specific Relief Act. 33 I.C. 124=9 Bur.L.T. 89; 29 M. 151 (F.B.). See also 41 L.W. 500=1935 M.W.N. 331=34 I.C. 125=9 Bur.L.T. 19; 5 R. 699. A suit under S. 42, Specific Relief Act, before sale would be premature. 52 I.C. 157. Non-objection does not amount to consent, and suit under this rule is not one to set aside a consent order. 28 I.C. 536=1915 M.W.N. 237. Cause of action



63-B. (1) If the garnishee does not pay into Court the amount of the debt due into Court the amount of the debt due from him to the judgment-debtor, and if he does not appear in answer to the notice issued under r. 63-A, or does not dispute his liability to pay such debt to the judgment-debtor, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue against the garnishee as though such order were a decree against him.

(2) If the garnishee appears in answer to the notice issued under r. 63-A and disputes his liability to pay the debt attached, the Court, instead of making an order as aforesaid, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and may proceed to determine such issue, and upon the determination of such issue shall pass such order upon the notice as shall be just.

63-C. Whenever in any proceedings under the foregoing rules it is alleged by the garnishee that the debt attached belongs to some third person, or that any third person has a lien or charge upon or interest in it, the Court may order such third person to appear and state the nature and particulars of his claim, if any, upon such debt, and prove the same, if necessary.

#### NOTES.

for suit under R. 63 is that comprised in the claim petition—Causes of action arising subsequent to the dismissal of a claim petition need not be joined. 28 L.W. 82=1928 M. 840=56 M.L.J. 52. Distinction between case under this rule and one under S. 64—Attachment raised owing to misapprehension—Intervening charge—Subsequent attachment—Effect. 7 R. 201. Decree against firm—Decree-holder seeking to attach property of respondent on ground that he was joint with one of judgment-debtor—Objection by respondent under R. 58 that it was his exclusive property upheld—No suit filed—Decree-holder subsequently obtaining leave to execute decree against respondent under O. 21, R. 50 (2)—Execution against same property—Permissibility. *Held*, that all that was decided in the previous execution proceeding was that the property sought to be attached was the exclusive property of the respondent, and that although after that order the property could no longer be attached in execution of the decree as it originally stood, that order could not stand in the way of the appellant executing the decree against the property of the respondent after he had obtained an order from the trial Court that he was entitled to proceed against the respondent and his property as he was a partner in the judgment-debtor firm. 14 P. 857=1935 P. 409. An order on the Original Side dismissing an application under R. 58 is not appealable under Cl. 15, Letters Patent, because of the prohibition contained in R. 63. 60 C. 914=37 C. W.N. 641=1933 C. 715. Dismissal of claim by mortgagee—Failure to sue within one year—Execution sale and purchase by decree-holder—Delivery of possession—Application by mortgagee under R. 100—If barred. 17 Pat.L.T. 812 (F.B.). *See also* 42 L.W. 649. Where a person has been actually in possession of certain properties adversely to the owner thereof, the dismissal of a claim petition preferred by him under R. 63 does not operate as an interruption of that adverse possession by operation of law especially when the attachment is raised subsequently. 1936 M.W.N. 1113=44 L.W. 617. The fact that the attachment is raised only beyond a year of the dismissal of the claim does not make any difference, because

once it is raised, it ceases to be effective even from the date of the attachment itself. An attachment further does not operate as a disturbance of the possession. 44 L.W. 617. The words "the right which he claims to the property in dispute" show that it is not necessary for the plaintiff to establish his own "title" in the property in question, but what he has to establish is, either the claim to have the property attached, or to have it released from attachment. 17 L. 668=1936 L. 524. *Per Nasim Ali, J.*—An order in a claim case is conclusive as against the party against whom it is made and is conclusive only as regards the properties which are the subject-matter of the claim case. Where a claim is allowed but the judgment-debtor is not a party in the claim case, it cannot be said that the order in the claim case, is against the judgment-debtor. 74 C. L.J. 180.

NATURE OF ORDER IN A CLAIM.—The dismissal for default of a claim amounts to negating it. 26 C.W.N. 126=1922 C. 166. *Also* 15 I.C. 683=16 C.W.N. 882; 64 I.C. 209=24 O.C. 213; 97 I.C. 178=22 N.L.R. 94=1926 N. 423; 1937 Pesh. 97. But an order 'not pressed, dismissed' is not one under the rule. 1925 M. 265=80 I.C. 233. *Contra see* 131 I.C. 77=1931 O. 1. *See* (1941) 2 M.L.J. 956. Where a mortgagee prefers a claim to the mortgaged property attached in execution of a money decree, and the Court upholds the claim based on the mortgage, and no steps are taken to impeach the order within the time limited the order becomes conclusive between the parties; and when the equity of redemption only in the property is sold in Court auction (sale being subject to the mortgage), neither the decree-holder nor the auction-purchaser nor a purchaser from him can go behind the order in the claim proceedings. I.L.R. (1939) Mad. 600=1939 Mad. 393=(1939) 2 M.L.J. 72. Where a claimant applies for withdrawal of claim stating that he will bring a suit and the claim is dismissed, a suit need not be filed within one year as the order does not fall under O. 21, R. 63. [41 M. 985=35 M.L.J. 335 (F.B.), *Expl.*; 110 I.C. 511, *Foll.*] 156 I.C. 906=41 L.W. 500=1935 M. 328. *See also* 41 L.W. 578=1935 M. 544. *Also*



63-D. After hearing such third person and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing as ordered, the Court may pass such order as is provided in the foregoing rules, or make such other order as the Court shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as shall seem just and reasonable.

63-E. Payment made by or levied by execution upon the garnishee in accordance with any order made under these rules shall be a valid discharge to him as against the judgment-debtor and any other person ordered to appear under these rules, for the amount paid or levied, although such order or the judgment may be set aside or reversed.

63-F. The costs of any application for the attachment of a debt or under the foregoing rules and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court. Costs awarded to the decree-holder shall, unless otherwise directed, be retained out of the money recovered by him under the garnishee order and in priority to the amount of his decree.

#### NOTES.

the dismissal of a claim petition for want of jurisdiction does not come under this rule. 41 M.L.J. 198=63 I.C. 431. The order is conclusive even when the claim is rejected as no evidence is adduced to prove it. 32 C. 527. Also 17 M.L.T. 223=28 I.C. 244. Also where it is dismissed as being made after unnecessary delay. 35 Bom.L.R. 147=144 I.C. 993=1933 B. 190. See also 39 C.W.N. 457=61 C.L.J. 5. An order for removal of attachment is final even though passed *ex parte*. 2 Bur.L.J. 60=1923 R. 156. Order under this rule is conclusive. 66 P.R. 1916=35 I.C. 321; 8 N.L.J. 170=1925 N. 390. The word "conclusive" means final, i.e., not appealable. 1 R. 276=1923 R. 195. The order in a claim case is conclusive only with regard to the parties to the claim and the disputed property. 44 C. 698=21 C.W.N. 222. Also 18 A. 413. The judgment-debtor when a party is bound by a claim order only to the extent of the adjudication. The purchaser takes it subject to rights as determined by the Court. 37 M.L.J. 547=54 I.C. 530. When a claim that attached properties should be sold as subject to a mortgage or lease has been decided by an executing Court, the provisions of O. 21, R. 63 apply to the decision. (1926 N. 423, Overruled.) 26 N. L.R. 136=123 I.C. 474=1930 N. 116 (F. B.). Such an order would bind the judgment-debtor if he is a party to it, and the question whether he was a party to it, will depend upon the circumstances under which it was made and the terms of it. 13 M.L.J. 367. But decree-holder purchaser can impeach validity and *bona fides* of the mortgage within a year. 52 A. 1032=131 I.C. 674=1931 A. 139. Even an order passed without investigation is conclusive. 27 I. C. 944=2 L.W. 205; 104 I.C. 289=1927 L. 680. See also 6 N.L.J. 66=71 I.C. 404; 69 I.C. 522=1923 N. 69; 1 R. 481=2 Bur.L.J. 173; 116 I.C. 81. But see 22 B. 875 (882). Also 27 C. 714 (722). An order dismissing an objection under R. 58 whether it is an order disposing of the case on the merits or whether it is an order which held that the objection was not entertainable on the preliminary ground that a certain legal provision was a bar to the maintainability of the application is a disposal of the

application under R. 58 after hearing the parties and therefore is an order contemplated in O. 21, R. 63 and Art. 11 Limitation Act. 115 I.C. 703=1929 P. 116. See also 1937 Pat. 63 (F.B.). Dismissal of claim petition by Court having no jurisdiction—Finality. 112 I.C. 619. Mere recording of objections without an adjudication does not amount to an order against the objector. 52 I.C. 938=1919 M.W.N. 805. But see 37 M.L.J. 159=52 I.C. 720. Where a claim petition is summarily rejected on the ground that "the execution has already been transferred to the Collector," the order is an ambiguous order which must be construed in favour of the claimant; it is not an order "against" the claimant within the meaning of R. 63. 19 N.L.J. 308=1937 N. 170. An order that the allegation of the claimants will be notified to bidders is one made against the claimants and amounts to a rejection of a claim petition. 41 M. 985=35 M.L.J. 335 (F.B.). See also 1925 M. 365. Claim by tenant of judgment-debtor to occupancy rights—Order notifying claim and sale not to prejudice rights of claimants—Effect of—Right of purchase to possession. 41 L. W. 550=68 M.L.J. 518. This rule does not introduce an exception to the rule that the defendant is bound to set up every defence available to him. 17 M. 389. But see 10 B. 659. Attachment—Objection by lessee upheld—Subsequent suit by purchaser for ejection—Lease objected to on the ground of S. 52, T.P.Act—Maintainability. See 104 I.C. 292=1927 A. 657. Dispute only as to priority between attaching creditor and petitioning claimant—Claim dismissed—Dismissal not set aside by suit—The only effect is that attaching creditor gets priority—Property attached under mortgage decree though unnecessarily—Claim preferred and rejected—Claimant must sue within one year. 110 I.C. 567=1928 M. 525. Claim by two persons—Dismissal of—Suit by one of them impleading the other as defendant—No independent suit by the other—Order against him also subject to suit. 152 I.C. 267=36 Bom.L.R. 227=1934 B. 189. Order allowing claim by judgment-debtor's wife—Subsequent insolvency of judgment-debtor—Petition by decree-holder to annul transfer. Held, that the application was not barred by reason of the prior claim



63-G. Out of the amount recovered under the garnishee order the Court shall deduct a sum equal to the Court-fee payable under the Indian Court-Fees Act on a plaint in a suit for recovery of the money and credit the same to the Government.

63-H. (1) Where the liability of any garnishee has been tried and determined under these rules the order shall have the same force and be subject to the same conditions as to appeals or otherwise as if it were a decree.

(2) Orders not covered by cl. (1) shall be appealable as orders made in execution.

#### NOTES.

order under R. 63, because he was acting only in his personal capacity in the claim proceedings, whereas in the insolvency proceedings he was acting in representative capacity, that is, on behalf of all the creditors. The personal disability of the creditor arising from the prior adverse claim order cannot bar the right of the creditors to re-agitate the question. 42 L.W. 215=1935 M. 670=69 M.L.J. 120.

CLAIM NOT CONTESTED—No BAR TO SUIT—An executing Court cannot go into the question as to whether a transaction is benami or not in summary proceedings under R. 58. The fact that the decree-holder does not contest a claim to attached property preferred by the person in whose name the attached property stands and agrees to the claim being allowed does not debar him from bringing a suit for a declaration under R. 63 that the property really belongs to the judgment-debtor and liable to attachment and the purchase in the name of the claimant is only benami and a fraudulent and colourable transaction. Where a decree-holder cannot successfully hope to resist a claim under R. 58, because the question cannot be gone into and decided by the executing Court, he may well ask the Court to allow the claim in order to enable him to bring proceedings under R. 63 without delay. Where he does not give up his right to contest the matter by means of a suit, his admission in the claim must be confined to the claim only and he does not lose his right of suit under R. 63. A party who realises the hopelessness of resisting a claim in summary proceedings and consents to the claim being allowed is nevertheless a party against whom an order is made and consequently he can bring a suit under R. 63; unless a party has clearly contracted himself out of his statutory rights given to him by R. 63, he cannot be debarred from instituting a suit under the rule to obtain the appropriate relief. 19 Pat. 494=A.I.R. 1940 Pat. 653.

SUIT IS THE ONLY REMEDY.—An unsuccessful party must bring a suit to establish his right. He cannot be permitted to raise any defence in any other way. 1922 C. 164; 71 I.C. 45 (1). See also 6 L.W. 281=41 I.C. 684; 1928 A. 327; 115 I.C. 912=1929 R. 104. He must impeach the validity of the order directly as a plaintiff and not indirectly as a defendant. 156 I.C. 586=1935 R. 161. On dismissal of an execution

petition on an objection, an appeal or a suit lies, but no revision. 38 I.C. 299. But if the claim is disallowed no appeal lies. 38 A. 537=35 I.C. 6; 38 I.C. 152; 34 I.C. 759=3 L.W. 377. Since no proper order without proper investigation can be passed, the findings are subject to question in second appeal being mixed questions of law and fact. 37 I.C. 92=19 O.C. 357. A suit under O. 21, R. 63 has nothing to do with S. 52 and the question under S. 52 must be decided by the Court executing the decree and not by a separate suit. A.I.R. 1937 Rang. 531.

APPLICABILITY OF THE RULE.—Where the attachment is raised within a year from the date of the order, no suit need be filed. 97 I.C. 178=22 N.L.R. 94=1926 N. 423; 94 I.C. 120=1929 R. 228; 1931 L. 74. Attachment raised after a year but decree satisfied otherwise. No difference. 131 I.C. 225=1931 L. 74. So also in the case of a summary order of dismissal of objections when the attachment itself is subsequently released owing to the reversal of the decree, and the property in question is not sold. 163 I.C. 892 (L.). A suit by a decree-holder under this rule against a reversioner claimant is not barred under S. 47, C.P.Code. 71 I.C. 1012=1923 A. 192. A suit against judgment-debtor for refund of consideration by an unsuccessful claimant is not a suit under this rule and need not be brought within a year. 46 A. 45=1924 A. 302. The rule applies even when a garnishee objects but his objection is overruled. If he does not bring a suit, to declare that he does not bring a suit to declare, the claim order would be final and conclusive. 44 M.L.J. 588=1923 M. 562; 1931 M.W. N. 259=1931 M. 570. See also 151 I.C. 679=1934 L. 560. Attachment of pronote—Objection by executant that debt discharged—Order for sale without investigation—Subsequent suit on pronote by purchaser in execution—Plea of discharge. Held, that in the execution proceedings there was no order under R. 61, and therefore R. 63 did not apply. Therefore it was open to the executant to take the same objection again. 1937 N. 149. A suit for bare declaration under this rule would be barred by S. 42 of the Specific Relief Act unless a claim has been put in under R. 58. 5 R. 699. See also 103 I.C. 763=1927 L. 631; 1937 Rang. 133; 1937 Rang. 249. The order of rejection of a claim need not be set aside within one year when there is only



[RANGOON.] Add the following rules:—

*Garnishee Orders.*

63-A. Where a debt has been attached under r. 46, the debtor prohibited under cl. (i) of sub. r. (1) of r. 46 (hereinafter called the garnishee) may pay the amount of the debt due from him to the judgment-debtor into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

63-B. Where a debt has been attached under r. 46, and the garnishee does not pay the amount of the debt into Court in accordance with the foregoing rule, the Court, on the application of the decree-holder, may order a notice to issue calling upon the garnishee to appear before the Court and show cause why he should not pay into Court the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the decree together with the costs of execution. A copy of such notice shall, unless otherwise ordered by the Court, be served on the judgment-debtor.

63-C. (1) If the garnishee does not pay into Court the amount of the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the costs of execution, and if he does not appear in answer to the notice issued under r. 63-B, or does not dispute his liability to pay such debt to the judgment-debtor then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue against the garnishee as though such order were a decree against him.

NOTES.

an order of attachment, but no actual attachment effected. 51 M. 349=55 M.L.J. 122=1928 P.C. 139 (P.C.). So also in the case of absence of valid attachment. 160 I.C. 835=1936 Pesh. 41.

LIMITATION.—The suit must be brought within one year from the passing of the order complained of. 15 C. 521 (P.C.); 22 B. 640; 20 B. 801; 11 C. 673 (678); 26 C. 778; 35 Bom.L.R. 147. Art. 11 of the Limitation Act does not come into operation until an adjudication on the merits of an objection is made. 3 L. 7=1922 L. 108. Also 44 M.L.J. 141=1923 M. 295. Plaintiff's suit for a declaration that the defendant has no title in the property is one falling under R. 63 and governed by Art. 11 of the Limitation Act. 130 I.C. 200=1930 A.L.J. 1322. A mortgage suit more than one year after claim was disallowed, would be barred, even though no actual attachment was made in pursuance of an order of attachment. 41 M.L.J. 594=45 M. 90. See 38 M.L.J. 397=56 I.C. 481. See also 37 M.L.J. 159=52 I.C. 720; 1927 A. 593. Where a suit in which an attachment before judgment was obtained was dismissed, but on appeal the decree was reversed, the reversal does not restore the attachment. The period of limitation therefore starts from the date of dismissal of a fresh claim at the time of executing the appellate decree. 87 I. C. 756 (2)=1925 C. 1147. Where claim is disallowed on the ground that claimant's interest accrued only after the attachment, such an order is not one under this rule. 152 I.C. 902=1934 P. 511. Where the claim is disallowed but the attachment ceases under R. 57, the question of title can be raised even after a year. 1925 M. 1113=48 M.L.J. 616. See also 104 I.C. 424=1927 M. 893; 133 I.C. 318=1931 A.L.J. 856=1931 A. 608; 56 A. 537=148 I.C. 676=1934 A.L.J. 19=1934 A. 267 (F.B.); 1937 Pesh. 97. The conclusiveness of an order on a claim petition is conditional on the continuance of the execution proceedings and of the attachment issuing therefrom.

C.C.M.—131

Where after the disallowance of a claim, the execution proceedings come to an end by reason of the execution sale being set aside, the attachment goes and with it the order disallowing the claim also goes and becomes useless and inoperative. A suit brought by the defeated claimant for declaration of his title to the property in question beyond one year is not therefore barred under Art. 11 of the Limitation Act, as the order on the claim is no longer a bar. 165 I.C. 84=40 C.W.N. 146. Art. 11, Limitation Act, will have no application whether the execution proceedings terminate as a result of the setting aside of the sale, within or beyond one year after the adverse claim order. (*Ibid.*) Claim on behalf of idols—Dismissal of—Suit by prospective representative—Limitation. 1928 C. 514. Where an attachment is released as invalid and claim accepted—Suit to declare gift in favour of claimant invalid—Suit is not one under this rule—Art. 11, Limitation Act, does not apply, but only Art. 120. 144 I. C. 378=38 P.L.R. 443=1933 L. 449. A suit under O. 21, R. 63, is in form and substance a declaratory suit, and it would be an unreasonable exercise of discretion by the Court to make a declaration of the decree-holder's right to attach if the period of limitation of 12 years has expired between the date of attachment and the date of the suit unless the property in question has already been sold in time. The suit is often but a step to enable the decree-holder to bring the property to sale; if by reason of the extinction of the title of the judgment-debtor before the sale, there would be nothing to be sold, as declaration in the decree-holder's favour in a suit under O. 21, R. 63, would not only be futile but sometimes even be mischievous, as it may lead an unwary purchaser into thinking that he is buying a subsisting interest. I.L.R. (1939) Mad. 803=1939 Mad. 456= (1939) 1 M. L. J. 802 (F. B.). Order dismissing claim by person in adverse possession—Omission to file suit—Sale in execution subsequently set aside—Decree satisfied otherwise—Effect—Order of dismissal



(2) If the garnishee appears in answer to the notice issued under r. 63-B and disputes his liability to pay the debt attached, the Court, instead of making an order as aforesaid, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and may proceed to determine such issue, and upon the determination of such issue shall pass such order upon the notice as shall be just.

63-D. Whenever in any proceedings under the foregoing rules it is alleged by the garnishee that the debt attached belongs to some third person, or that any third person has a lien or charge upon or interest in it, the Court may order such third person to appear and state the nature and particulars of his claim, if any, upon such debt and prove the same if necessary.

63-E. After hearing such third person and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing as ordered the Court may pass such order as is provided in the foregoing rules, or make such other order as the Court shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as shall seem just and reasonable.

#### NOTES.

does not break adverse possession or estop claimant from pleading it. 49 L. W. 671=1939 Mad. 456=(1939) 1 M.L.J. 802 (F.B.).

FOR COSTS OF CLAIM PETITION.—See 20 L. W. 557=83 I.C. 89=1925 M. 233 (1). Where a claim is preferred under O. 21, R. 58, and is rejected with costs and the defeated claimant files a suit under O. 21, R. 63, it is substantially one to set aside the summary order and where the suit is decreed, each party being directed to bear its own costs it amounts to a setting aside of the summary order, and superseding of the prior order as to costs and hence the prior order as to costs is unexecutable. The prior summary order must be deemed to have been set aside wholly and not in part. 175 I.C. 753=I.L.R. (1940) Nag. 519=A.I.R. 1938 Nag. 376. Suit by defeated claimant—Cost of claim proceedings—If can be decreed. 119 I.C. 213 (1)=1929 R. 128 (1); 1933 R. 91=144 I.C. 315.

JURISDICTION.—In a suit to establish a right to attached property the value of the subject-matter of the suit for determining jurisdiction will be the amount of the decree in satisfaction of which it is sought to bring the property to sale. 2 A. 799; 9 A. 140; 17 A. 69. The valuation for jurisdiction of a suit, involving avoidance of transfer under S. 53, T.P. Act, must be the value of the properties transferred and not the amount of the decree sought to be executed. This valuation cannot be the sum-total of the debts due to all the existing creditors for the term 'creditor' includes not only creditors at the time of the assignment but also those who subsequently become creditors. But when the suit of the attaching creditor does not involve the avoidance of any transfer of property, the Act has no application and the suit need not be brought as a representative suit, and its valuation for jurisdiction would be the amount of the decree sought to be executed or the value of the property whichever is less. 152 I.C. 555=1934 R. 302. See also 12 R. 670=1934 R. 332. The value of the declaratory suit is the value of the decree in execution of which the property was sold and not the value of the property sold. 40 A. 505=

45 I.C. 494. Also 38 A. 72=31 I.C. 879; 253 P.L.R. 1914=25 I.C. 180. But see 82 P.R. 1913=18 I.C. 820; 17 I.C. 196=41 P.R. 1913; 29 L.W. 349=56 M.L.J. 489=1929 M. 323; 39 M. 602; 17 A. 69; 137 I.C. 54=1932 R. 20. The valuation of the suit in cases where the value of the property is greater than the amount of the decree, is the amount of the decree. (38 A. 72, Appr.; 17 A. 69, Overruled.) 55 A. 315=1933 A.L.J. 222=1933 A. 249 (F.B.). The amount which settles jurisdiction is the amount which the execution creditor will recover if he is successful, and not the value of the property attached. 15 C. 104. The nature of the claim and the right sought to be enforced, determine the Court in which the suit has to be instituted. 7 C. 608. A Revenue Court has no jurisdiction to try a suit under R. 63 of the Code (51 M. 774 and 1932 M. 716, Rel. on). 146 I.C. 600=1933 M. 865=65 M.L.J. 775. See also 1937 O.W.N. 1164. Where in execution of rent decree a certain land was attached but, on intervention of an objector, the land was held not liable to attachment, a suit by the decree-holder to determine the rights between the objector and himself is not one which the Revenue Court, the jurisdiction of which is strictly limited, is competent to entertain under S. 77 of the Punjab Tenancy Act. Having regard to S. 88 of the same Act and the rules made thereunder, O. 21, Rr. 58 to 63, apply to the case and the matter could only be determined by a suit under R. 63 brought in a Civil Court. 15 L. 836=61 I.A. 371=1934 P.C. 217=67 M.L.J. 641 (P.C.).

COURT-FEE.—See 16 A. 308 (F.B.); 193 I.C. 782; 10 B. 610 (F.B.); 17 M.L.J. 618 (P.C.); 13 C. 162; 64 I.C. 49. The value of a suit under O. 21, R. 63, for purposes of jurisdiction, is its value to the plaintiff. If the value of the property is less than the value of the decree, the value of the action to the plaintiff would be not the decretal amount but the market-value of the property. If, however, the value of the decree is less than the value of the property, then the value of the decree affects the value of the suit. If the property has already been sold in execution of the decree before



63-F. Payment made by or levied by execution upon the garnishee in accordance with any order made under these rules shall be a valid discharge to him as against the judgment-debtor, and any other person ordered to appear under these rules, for the amount paid or levied, although such order or the judgment may be set aside or reversed.

63-G. The cost of any application for the attachment of a debt or under the foregoing rules, and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court. Costs awarded to the decree-holder shall unless otherwise directed be retained out of the money recovered by him under the garnishee order and in priority to the amount of his decree.

#### NOTES.

the suit, the value of the suit to the plaintiff is the value of the property which he has lost by reason of the execution proceedings. 43 C.W.N. 609. If an objection made in the executing Court under O. 21, R. 58, is dismissed, the sole remedy of the objector is a suit under O. 21, R. 63, and such a suit falls within Art. 17 of Sch. II of the Court-Fees Act. I.L.R. (1937) Nag. 342=A.I.R. 1937 Nag. 253. In order to bring a case within the purview of O. 21, R. 63, the question as to whether the claim was investigated or not is immaterial. Even if a claim is dismissed for non-prosecution, the claimant is bound to institute a suit under O. 21, R. 63, failing which the order becomes conclusive and final. I.L.R. (1939) 2 Cal. 291=43 C.W.N. 999=A.I.R. 1939 Cal. 620.

**RIGHT TO SUE.**—The proper procedure for a party to adopt, when the objection to his right to attach is made and it is found on enquiry that there has been no valid attachment, is not to institute a suit under R. 63, but to apply to Court for the issue of a fresh warrant of attachment. 156 I. C. 697=1935 R. 186. A receiver appointed by High Court brought a suit against a father and son. The father was exonerated and a decree obtained against the son. The father and the second son put in a claim which was dismissed and thereupon filed a suit under R. 63 without obtaining sanction to sue the receiver. *Held*, that the rule forbidding the bringing of a suit against a Receiver is a mere procedure of Court not resting on any statutory authority, whereas the right to bring a suit under R. 63 was statutory; that statutory right to sue cannot be defeated by any rule of practice; that proceedings under R. 63 being only a continuation of the suit, no sanction was in fact necessary; and that even if sanction was necessary, the sanction by the Sub-Judge was sufficient. 37 L.W. 346=1933 M.W.N. 152=1933 M. 340. Where the occupancy rights held by a judgment-debtor are attached in execution of a decree against him, the landlord of the land in which the occupancy rights are held, is entitled to bring a suit under O. 21, R. 63 for a declaration that the occupancy rights cannot be attached and sold in execution of the decree. 40 P.L.R. 946=A.I.R. 1938 Lah. 677. Where a widow objected to attachment in execution of a decree against her deceased husband on the ground that the attached property was her own and did not form part of the estate

of her husband. *held*, that that did not remove the case from the operation of S. 47, and no separate suit will lie, but that the matter has to be determined in execution proceedings and an appeal will lie in the ordinary course. 58 B. 513=152 I.C. 168=36 Bom.L.R. 608. *See also* 1935 A.L.J. 74=1935 A.W.R. 39=153 I.C. 577=1935 A. 183 (Case of objection by legal representative); 179 I. C. 538. A sale in execution of a decree in a suit based on the personal debt of a Hindu widow, can only convey her life-interest in the property. On her death, the interest of an auction-purchaser of such property, will terminate. If he remains in possession, he does so without any right or title, and his sale need not be set aside. A creditor of the estate whose attachment of such property has been released on objection by the auction-purchaser, can sue for a declaration under O. 21, R. 63. 1937 O.W.N. 1181=A.I.R. 1938 Oudh 35. Where in claim proceedings the objectors have impleaded both the decree-holders and the judgment-debtor but an order is passed on the failure of the judgment-debtor to appear even though he was served, the proceedings would be *ex parte* so far as he is concerned; the order passed in the claim objections is one made against both the judgment-debtor and the decree-holders. That being so, R. 63 gives him right to institute a regular suit for a declaration without having to do anything more. 158 I.C. 825=1935 L. 534. Decree benami—Attachment in execution of decree against real owner—Objection by *benamidar* allowed—Suit by decree-holder for declaration—Maintainability. 41 L.W. 34=1935 M. 140=68 M.L.J. 129. A creditor having attached and brought to sale the one-third share of the judgment-debtor which he had inherited from his mother, the latter's daughter objected under R. 58 on the ground that he was a mortgagee of the whole property from the mother. Her objection was upheld and the share was sold subject to her mortgage. She filed a suit on her mortgage whereupon the creditor objected to the mortgage and also brought a suit under R. 63, for a declaration that the mortgage was collusive and without consideration. It was contended that the creditor firm had no *locus standi* and could not be allowed to challenge the mortgage as being without consideration. *Held*, that the firm by purchasing land at the Court auction succeeded to the rights of the judgment-debtor his mother's property and he being



## NOTES.

the representative of his mother, the firm was also a representative of the mother and therefore had a right to challenge the mortgage and to assert that it was a sham and collusive transaction and without consideration. 161 I.C. 342=1936 R. 2.

FRAME OF SUIT.—Suit under this rule by defeated decree-holder—If and when one under S. 53, T.P.Act. 62 C.L.J. 548. A suit by the judgment-creditor under O. 21, R. 63, C.P.Code, praying for a declaration that a sale-deed, on which the successful claimant based his claim, is void, and that the property covered by it is liable to attachment and sale in execution of his decree, need not necessarily be one on behalf of himself and all other creditors of the judgment-debtor, as falling under S. 53, T.P. Act. The creditor should not be compelled to prove that the sale-deed was made with intent to defeat and delay creditors generally, when he only wants a declaration in a limited form that the transfer is void as against him. 39 Bom.L.R. 917=A.I.R. 1937 Bom. 476. See also 17 Pat. 588=180 I.C. 983=1939 Pat. 138; 1939 A.W.R. (H.C.) 798=1939 A.L.J. 1020=1940 All. 72; 51 L.W. 608=(1940) 1 M.L.J. 872. A judgment-creditor who is defeated at the instance of an intervener in proceedings taken in execution of his decree is not bound necessarily to file a suit under S. 53 of the T.P.Act. He is entitled under R. 63, to bring a suit for a declaration that the intervener-claimant has no title and that he (the decree-holder) has the right to attach the property and bring it to sale in execution of his decree. R. 63 does not say that the suit by the defeated decree-holder must be a representative suit brought by the judgment-creditor for and on behalf of the general body of creditors of the judgment-debtor. The rule is not subject to S. 53 of the T.P.Act. All that the last paragraph of S. 53 (1), T.P.Act, says is that if a creditor (which term includes a decree holder) wants to avoid a transfer on the ground that it has been made with intent to defeat or delay the *creditors* of the transferor, then he must sue on behalf and for the benefit of all the creditors. But it does not say that a creditor who wants to enforce his own right to property as against another creditor or a transferee must bring a representative suit. A suit to establish the decree-holder's priority need not be a representative suit. (Point fully discussed.) I.L.R. (1938) Bom. 445=40 Bom.L.R. 371=A.I.R. 1938 Bom. 289. See also 1937 O.W.N. 1169=1938 Oudh 33. A creditor proceeding under R. 63, who does not know of the existence of other creditors is not bound to bring a representative suit to represent persons of whose existence he is not aware. It is for the defendant who as debtor knows whether he has other cre-

ditors to object that there are other creditors and that a representative suit should be filed. If no such objection is raised by him, the Court is entitled to hold that there are no other creditors and that the plaintiff can sue for himself alone. 15 Luck. 503=1940 O.W.N. 285=A.I.R. 1940 Oudh 200. The terms of R. 63, are wide enough to include a suit based on title; and in order to prove that the claimant has a right to the property in dispute, a consideration of his title as well as of possession will be relevant. The two questions cannot be separated from each other. 1935 M. 596=41 L.W. 726=68 M.L.J. 590. See also 20 N.L.J. 199. In a suit under this rule the attachment is the cause of action, and different purchasers of the attached property can be joined as defendants in the same suit. 27 M. 94; 28 A. 41; 16 B. 615. See also 17 C. 436 (P.C.); 23 B. 266; 4 M. 131; 13 B. 72; 10 B. 659; 17 M. 389; 7 C. 608. An ordinary creditor, much less an attaching decree-holder, need not sue in a representative character to set aside a fraudulent alienation. 42 M. 143=36 M.L.J. 231. Also 59 I.C. 947=43 M. 760 (F.B.); 71 I.C. 20; 133 I.C. 118=1931 L. 430. When a suit is brought under the provisions of R. 63, by an attaching creditor to establish his right to attach and bring to sale certain property, and in order that he may succeed it is necessary to avoid a transfer of the property on the ground that the transfer has been made with *intent to defeat or delay the creditors of the transferor*, the suit must be brought in the form of a representative suit, on behalf of or for the benefit of all the creditors of the transferor, and the provisions of O. 1, R. 8 will be applicable, and the transferee and the judgment-debtors as transferors, will be necessary defendants in such a suit. 12 R. 670=1934 R. 332. See also 1937 Rang. 249; 152 I.C. 555=1936 A.M.L.J. 104. O. 21, R. 63, is clearly intended to apply only to claims and objections which can properly be preferred under R. 58. A mortgagee cannot come to Court under R. 58 and argue that the mortgaged property is not liable to attachment. If a mortgagee who is not in possession of the property files a suit for possession after the dismissal of the objection preferred by him under R. 58, the suit cannot properly be described as one under O. 21, R. 63, but it is simply one for possession on the footing of the alleged mortgage. To such a suit, the rule that the onus of proving title lies on the plaintiff who had raised an unsuccessful objection before the executing Court has no application. 40 P.L.R. 682=A.I.R. 1938 Lah. 760. A plaintiff suing under O. 21, R. 63, is only required to obtain a declaration of his rights or title in so far as it is affected by the order which he seeks to impeach. He is not bound to ask for a conse-



## NOTES.

quential relief. The proviso to S. 42 of the Specific Relief Act does not operate to take away from a party against whom an adverse order is made on a claim petition the special right conferred by O. 21, R. 63 to sue for a declaration. 47 L.W. 724=A.I.R. 1938 Mad. 741=(1938) 1 M.L.J. 803. Suit under O. 21, R. 63—Proper relief—Execution sale held pending suit by defeated claimant—Sale set aside at his instance under O. 21, R. 89—Amendment of plaint to add relief of injunction to restrain decree-holder from withdrawing amount deposited in Court not allowable. See 20 P.L.T. 640. It is not obligatory on a plaintiff in a suit under R. 63 to press the whole of the claim raised by him in the objection under R. 58. If he realises that part of his claim in objection cannot be sustained, he is entitled to omit it when bringing a suit under R. 63. 1936 Pesh. 206.

**PARTIES TO THE SUIT.**—When after a claim is disallowed, the claimant sells his interest in the property to a third person, the rule does not prevent the purchaser from bringing a suit. 26 A. 89. Auction-purchaser in execution of decree can be added as party. 103 I.C. 763=1927 L. 631. See also 1939 Pat. 321; 1940 N.L.J. 604. The auction-purchaser is a necessary party and if there is no suit in which he is a party until more than a year after the dismissal of objection to the attachment, the order dismissing the objection is conclusive in favour of the auction-purchaser. 155 I.C. 272=1935 Pesh. 29. Decree-holder is not a necessary party in a claim suit by a defeated claimant when the purchaser was a third party. 70 I.C. 168=1923 M. 58; 103 I.C. 763=1927 L. 631. Per *Nasim Ali, J.*—Where a claim is allowed the attaching decree-holder is the person against whom the order in the claim case is made. He is, therefore, entitled in a suit under O. 21, R. 63, to establish the right which he claims to the property attached. In such a suit the judgment-debtor may not be a necessary party. But whether he is a proper party in such a suit would depend upon the pleadings. 74 C.L.J. 180. A decree-holder is not a necessary party to a suit under R. 63, O. 21, by an unsuccessful objector. 105 I.C. 799. But see 165 I.C. 252=1936 Pesh. 189, where attached property was sold in execution. To a suit by a defeated claimant against the attaching decree-holders, the claim being based on a sale-deed executed by the judgment-debtor to the claimant, the judgment-debtor is not a necessary party. 40 L.W. 685=1934 M. 587=67 M.L.J. 585. See also 1939 Sind 177=I.L.R. (1939) Kar. 539; 144 I.C. 524=1933 L. 573. So also in the case of decree-holder claiming to attach property purchased *benami* of the judgment-debtor in the name of his wife. 1935 R. 489. See also

1934 R. 302. But he is a proper party to the suit, though he was not party in claim proceedings. 161 I.C. 950=1936 R. 56. A judgment-debtor who throughout contested the claim is a party and can bring the suit under this rule. See 22 I.C. 797=84 P.R. 1914. Also 1 L.W. 772=25 I.C. 700. A purchaser of the attached property from the successful claimant after the order and before a suit under O. 21, R. 63, is an alienee *pendente lite*. Such an alienee is not a necessary party to the suit under O. 21, R. 63; the transfer in favour of such alienee is also void under S. 64. 17 Pat. 588=20 P.L.T. 76=A.I.R. 1939 Pat. 138. Suit against receiver. 1933 M. 340=1933 M. W.N. 152.

**PARTY AGAINST WHOM ORDER IS MADE.**—A plaintiff to whom notice of the claim proceedings has not issued cannot be considered as a party against whom an order has been made. 25 M. 721. Where a claim petition falling within the purview of O. 21, R. 58, objecting to an attachment is dismissed as not pressed, the order is one "against" the claimant even though there has been no investigation of the claim and an adjudication on the merits. It is necessary for such a claimant to file a suit within one year of such order as provided under O. 21, R. 63 if he wishes to reopen the matter. [35 M. L.J. 335; 41 Mad. 985 (F.B.), Rel. on; 48 M.L.J. 616; A.I.R. 1925 Mad. 265; 110 I.C. 511 and (1940) 2 M.L.J. 402, Overr.; 1919 M.W.N. 805; 48 M.L.J. 467; 45 Mad. 827; 68 M.L.J. 518; 58 Mad. 936 and 41 M.L.J. 198, Dist.] (1941) 2 M.L.J. 956 (F.B.).

**THE BURDEN OF PROOF** lies on the unsuccessful party. 13 I.C. 455=22 C.L.J. 380; 60 I.C. 751; 50 I.C. 884=47 P.L.R. 1919; 40 P.L.R. 682=1938 Lah. 760; 77 I.C. 50=1923 N. 334; 35 I.C. 427=19 O.C. 64; 53 I.C. 892; 37 I.C. 767; 14 I.C. 813; 41 M. 205=34 M.L.J. 295; 107 I.C. 782; 113 I.C. 358; 31 P.L.R. 394; 58 C. 813=35 C.W.N. 75=1931 C. 490 (Omission to state value). See also 1927 P. C. 237; 1939 Pat. 321; 1939 Sind 177=I.L.R. (1939) Kar. 539; 1939 Pat. 462; 1939 Lah. 438; 1939 Cal. 578; 1937 Lah. 847; 1937 Rang. 252; 1937 Rang. 362. In a declaratory suit under O. 21, R. 63, the burden of proving good faith in the first instance is on the plaintiff when objections filed by him in execution proceedings have been dismissed on a summary finding of fraud. The position is not altered when objections are dismissed for reasons not affecting the merits of the case. 40 P.L.R. 705; 1933 A. 198=144 I.C. 1002=55 A. 266; 40 L.W. 685=1934 M. 587=67 M.L.J. 585; 1933 L. 855; 144 I.C. 851=1933 R. 129. In cases of a defeated claimant the burden of proving that transfer was in good faith and for consideration lies on him. 162 I.C. 495=1936 L. 72. See also 17 Pat.L.T.



## NOTES.

785=1937 P. 76; 167 I.C. 48=1937 N. 1. In such suit if he once establishes the consideration, good faith follows, as a matter of course, except in cases of exceptional nature. 1937 N. 85. See also 18 N.L.J. 329. In cases under R. 63 the burden of proving validity of the alienation is on the plaintiff. Defendant however cannot escape the burden at some stage or other. If plaintiff produces his deed and swears that it is genuine and for full consideration and defendants have nothing to say to the contrary plaintiff will succeed and where the burden of plaintiff is so light, it is scarcely worth enquiring whether it is more correct to say that the burden is originally on the defendants or upon the plaintiff. But where defendant has something substantial to say to the contrary, the real burden must inevitably fall upon plaintiff to establish the right which he claims. 55 M. 748=137 I.C. 879=1932 M. 302=62 M.L.J. 236=1937 N. 9; 1937 N. 143. Where the judgment debtor has sold his property to another person, the fact that he was seriously embarrassed at that time by pressing creditors and had motive for disposing of the property to persons out of their reach does not prevent the burden from still lying on decree-holder to show that the transaction of sale was not a real transfer. 182 I.C. 748=A.I.R. 1939 Pat. 81. Where the facts are fully established and the inference from them is clear, the question of onus is not material. 1938 O.W.N. 1248=A.I.R. 1938 P.C. 290 (P.C.). Where an order has been made rejecting a claim to attached property, based on a registered sale deed obtained by the claimant, it is not enough for the defeated claimant suing to set aside the claim order, to produce and prove a duly registered deed executed by the owner of the property. He must show, in order to succeed in the suit, that the sale in his favour was a genuine transaction and that he had purchased the property for valuable consideration. That is a fact specially within the plaintiff's knowledge and the burden of proving it must obviously lie on him. The recital as to the passing of consideration in the sale deed cannot be of any evidentiary value by itself against a person who was not a party to the deed. 1940 M.W.N. 557=51 L.W. 34=A.I.R. 1940 Mad. 444. Onus—Gift held to be fraudulent—Fraud not pleaded or raised in issue—Dismissal of suit—Correctness of. 34 P.L.R. 205=1933 L. 550. The onus of proving that the property is the judgment-debtor's lies on plaintiff, and whether or not defendant has a title, the plaintiff must prove the title of the judgment-debtor. 17 B. 94 (99). As to burden of proof in suit by creditor and in suit by claimant, see 157 I.C. 309=16 Pat.L.T. 367=1935 P. 231. Transfer to another creditor after decree but before attach-

ment by itself is no indication of fraud. 100 I.C. 993 (1)=1927 R. 168. But if the plaintiff adduces evidence sufficient to raise a presumption that the alienation to defendant might be fraudulent, then the onus lies upon the defendant to prove *bona fides*. 67 I.C. 876. Proof by unsuccessful claimant is required not only of execution of document but of the passing of consideration and delivery of possession. 4 O.W.N. 794=105 I.C. 208=1927 O. 440. And also that the transaction was genuine. 142 I.C. 112=34 P.L.R. 363=1933 L. 537. See also 32 C.W. N. 28=1927 P.C. 237=53 M.L.J. 388 (P.C.); 113 I.C. 358=1928 M. 1259; 118 I.C. 897=1929 L. 455; 8 P. 890=1926 P. 579. But see 32 L.W. 57. Regarding proof and shifting of onus, see 1926 L. 25; 143 I.C. 419=1933 N. 185. When passing of consideration and transfer of possession is proved, the onus is shifted on the defendant to show that a fraud was intended. 55 I.C. 72; 1926 N. 293. Also 89 I.C. 953 (1); 1937 Rang. 362. The onus of proving *mala fides* and want of consideration on the plaintiff's part is on those who resist the claim. 55 I.C. 205. Plaintiff can also show that there was no attachment or that it was invalid. 1927 M. 450=99 I.C. 989. But see 44 L.W. 728=1936 M. 971=(1937) 1 M.L.J. 133, where it was held, that the fact that the attachment is invalid will not absolve the plaintiff from proving his title to the property.

DEFENCES.—The defendant may impeach a transaction voidable as against him. 55 I.C. 752. A plea of fraudulent transfer is a good defence to a suit by a transferee. 57 I.C. 430=22 Bom.L.R. 743. Also 43 M. 760=36 M.L.J. 350 (F.B.), overruling 41 M. 612=43 I.C. 651 (F.B.) and 34 I.C. 778=30 M.L.J. 565. See also 54 I.C. 798=16 N.L.R. 3. An auction purchaser cannot question the title of the mortgagee when his purchase is subject to the mortgage. 51 I.C. 100=45 P.L.R. 1919. Suit under R. 63 is in essence a continuation of the execution proceedings. Such a suit is for decision of a question of title and there is no reason for holding that a plaintiff may not rely upon points which he had not raised in the summary objection proceedings to begin with but which he urged during these proceedings later on. 166 I.C. 869=1937 Pesh. 13. Right to transferred decree—Plea in defence open. Where a transferee of a decree sues under R. 63 to establish his right thereto, it is open to those impugning the transfer to allege either that the transfer was a sham transaction executed without consideration and not intended to take effect or that it was a transaction executed for a consideration and intended to take effect, but made with a view to defraud the creditors of the transferor by removing the property out of their reach. I.L.R. (1940) Nag. 316=A.I.R. 1938 Nag. 249.

PROCEDURE IN THE SUIT.—The question of title of claimant should be enquired into as on the date of claim. In a suit to set aside claim order, subsequent perfection of title is not a valid defence. 33 M.L.J. 316=42 I.C. 438. It is irregular to admit the depositions



## NOTES.

of parties in the claim investigation. The finding in the suit must be based on the evidence tendered and taken in the suit itself. 22 I.C. 676; 14 W.R. 95. In the suit, though the claim was with reference to the whole of the property, the Court can pass a decree declaring a partial interest. 28 I.C. 576=21 C.L.J. 302. Where certain property is attached and ordered to be sold but before sale a suit is filed under O. 21, R. 63, for a declaration that he has a subsisting and valid mortgage over the property and that the property should be sold subject to his mortgage the Court should enquire into the existence and genuineness of the mortgage set up and should not leave it to the bailiff to make intimation to the bidders that there is a claim that the mortgage existed. 157 I.C. 507=1935 R. 207.

**EFFECT OF DECREE IN THE SUIT.**—The decree in the suit by a decree-holder revives the attachment. 48 I.C. 386=5 O.L.J. 647; 1929 C. 524; 7 O.W.N. 887. A transfer of property pending a suit is *lis pendens*. 38 M. 535=26 M.L.J. 449. The decree that the property could not be sold, renders void all proceedings taken in execution. 20 I.C. 790=18 C.W.N. 910. Where after a claim to attached property under O. 21, R. 58, is rejected the attached property is put up for sale and purchased by the decree-holder and full satisfaction of the decree is entered, and subsequently a suit brought by the defeated claimant under O. 21, R. 63 is decreed, the decree-holder and the judgment-debtor both being parties to such suit, the effect of the decree obtained by the claimant is to set aside the sale, and no formal order to that effect is required. When the order passed in execution proceedings is subsequently set aside, the foundation upon which the sale stands in favour of the decree-holder purchaser disappears and the sale *ipso facto* stands vacated, no formal order by the executing Court being necessary to set aside the sale. the decree-holder auction-purchaser should in such cases be allowed to execute his decree afresh, provided there is a total failure of consideration, that is to say, he loses by the suit the entire property purchased by him in auction. The absence of a formal order of the executing Court setting aside the sale is no bar, and it is the duty of the executing Court in the exercise of its inherent powers to grant relief. 20 Pat. 261. Where suit under this rule to declare a mortgage has been dismissed, fresh suit to enforce the mortgage is barred. 44 M. 268=40 M.L.J. 7. Declaratory suit dismissed on ground of ceasing of attachment due to dismissal of execution proceedings does not decide title to the attached property. 146 I. C. 758=1933 R. 190. Claim petition was subject to the "result of the suit" and that expression included the result of the appeal against the decree in the suit. 7 O.W.N. 213=121 I.C. 902. See also 54 L.W. 45. In a suit to set aside a claim order, the rights of the parties on the date of the attachment or on the date of the order on the claim

petition are the rights which have to be taken into consideration. Where an unsuccessful claimant has not been in possession of the property in dispute which he claims to have purchased, for 12 years on the date of the attachment or on the date of the order dismissing his claim, and has not perfected his title by prescription on either of those dates, he cannot by waiting for some months and then bringing his suit, be permitted to say that on the date of the suit he has completed twelve years and thereby got a title by prescription. It is not possible for the plaintiff to clothe himself with additional rights by waiting for some months and then compel the rightful owner (the judgment-debtor) to lose his right to the property. 48 L.W. 375=A.I.R. 1938 Mad. 857=(1938) 2 M.L.J. 430.

**O. 21, R. 63 (b) and (c): RANGOON AMENDMENT.**—R. 63 (b) of O. 21, (Rangoon High Court) is designed to give the garnishee ample opportunity of disputing his liability to pay the amount or disputing his liability to pay anything or of showing that the amount of the debt is less than that mentioned in the notice. When a garnishee fails to appear in answer to the notice under R. 63 (b) and an order under R. 63 (c) (1) is made, it is the final determination of the question as to the liability of the garnishee to pay the debt and as to the fact that the debt is not less than the amount mentioned in the notice of attachment and hence the garnishee is not entitled to raise those questions thereafter. 1941 Rang.L.R. 177. Until there is a definite order against the garnishee to pay under O. 21, R. 63 (c) (1), there is nothing executable directly against the garnishee as a decree. 1939 Rang.L.R. 694=187 I.C. 105=A.I.R. 1940 Rang. 34.

**O. 21, Rr. 63 and 66: SUMMARY ORDER ON AN OBJECTION TO SALE PROCLAMATION—EFFECT.** The mere question of whether there was a prior charge would not be an objection to the attachment. It is only when an inquiry is held and an order is passed under one of the Rr. 60 or 61, that there is an order which is conclusive under R. 63; and without an inquiry there can be no such conclusive order. Hence a summary order passed on an objection to the sale proclamation does not have any of the effects of an order under R. 63. 1938 A.L.J. 940=A.I.R. 1938 All. 542.

**O. 21, R. 63 (A): LAHORE.**—See 191 I.C. 612. O. 21, R. 63-A contemplates an inquiry only where the judgment-debtor claims a debt from a garnishee. Where money due to a member from Co-operative Society is attached and prohibition order is issued to the Society but the member does not claim any debt from the Co-operative Society but claims to be a shareholder of the Society at the time when the prohibitory order was issued there is no dispute as regards any debt between the judgment-debtor and the alleged garnishee, which can be inquired into under O. 21, R. 63 (A). It follows therefore that the finding given in the proceedings relating to the objection raised by



*Sale generally.*

64. Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

Power to order property attached to be sold and proceeds to be paid to person entitled.

## NOTES.

the judgment-debtor in connection with the attachment of his shares cannot bind the Society. 42 P.L.R. 225=A.I.R. 1939 Lah. 305. There is an implied contract in the case of a mortgage that the mortgagee is to pay the whole of the amount for which the land is mortgaged, and that a suit is maintainable by the mortgagor to recover the unpaid balance of the mortgage-money from the mortgagee. Where money is reserved with the mortgagee in trust for payment to the creditors of the mortgagor, a suit by the mortgagor to recover the money so reserved on default of payment is maintainable and therefore money so left with mortgagee becomes a debt due to the mortgagor and the mortgagee becomes a garnishee within the meaning of R. 63-A. 159 I.C. 763=1935 L. 26. Where the garnishee in the above case objected to the attachment of the money on the ground that the amount had been adjusted in some other account with the mortgagor and there was no money left with him to be attached and his objection was rejected and he filed a suit for declaration that the money left with him had been adjusted and there was no money to be attached. *Held*, that his remedy was to file an appeal from the order of the executing Court and the suit was incompetent under R. 63-A. 159 I.C. 763=1935 L. 26. Attachment of debt due to judgment-debtor—Judgment-debtor's claim against garnishee becoming barred during investigation by Court. *Held*, that it was competent to the Court to order the garnishee to pay the amount in spite of the expiry of limitation after attachment or at any rate during investigation under R. 63 (A). 1937 L. 255. On an application by the decree-holder under R. 63 (A) to secure adjudication as to the indebtedness of other persons to his judgment-debtor, a Court-fee stamp of only one rupee is payable, and the decree-holder cannot be required to pay an *ad valorem* Court-fee on such an application. 17 L. 467=38 P.L.R. 199.

**O. 21, R. 63-H:** (PATNA AMENDMENT).—The new rule of O. 21, R. 63-H does not confer a right of appeal in garnishee matters in cases where no appeal ordinarily lies, *e.g.*, in the execution of a decree of the Court of Small Causes by that Court itself. 22 Pat. L.T. 396=196 I.C. 66.

**O. 21, R. 64.**—This rule does not apply to a money decree. It cannot be sold in execution. Once such a decree is attached the procedure indicated in O. 21, R. 53 should be followed. 13 P.L.T. 612=1932 P. 349. A

debt can be sold under this rule. 35 I.C. 469=10 Bur.L.T. 6. Court cannot sell property not attached. 42 I.C. 259; *also* 9 I.C. 918=13 C.L.J. 243. But sale so held is not void. 151 I.C. 382=1934 R. 188. Writ of attachment giving wrong number—Sale proclamation giving correct number—Validity of sale. 57 C. 1206. Moveable property need not be in the custody of the Court at the time of sale. 28 I.C. 62=1915 M.W.N. 159. Although an order absolute for sale of all the mortgaged property has been passed, the executing Court is not bound to sell the whole of the property. 27 A. at 265. Preliminary decree in suit for unpaid mortgage money—Saleability in execution—Procedure after attachment—O. 21, R. 53 not applicable. 1937 A.W.R. 649=A.I.R. 1937 All. 652. Execution sale, when the decree is for larger amount than what was due, is not vitiated. 14 I.C. 839=15 C.L.J. 423. When property has once been sold in execution it cannot again be sold at the instance of another decree-holder. 12 C. 317. *See also* 41 P.L.R. 305. But *see* 30 C. 559 (F.B.). Court cannot refuse to sell on the ground that a stranger to the suit impeaches the decree. 5 B. 532; 15 B. 98. The material date for determining the status of a defendant in execution as to whether he is an agriculturist or not, under the Dekkan Agriculturists' Relief Act, is the date of the order for sale under R. 64, and not the date of the order subsequently made after notice under R. 66. 152 I.C. 589.

AN APPEAL will lie from an order passed under this rule. 4 C.L.R. 27. Order under Rr. 64 and 66 directing properties to be sold in a particular order—Appeal. 156 I.C. 141=1935 M. 714. Under O. 21, R. 64, C. P. Code, it is not incumbent upon the executing Court to value the property to be sold, except in cases where the Bihar Money Lenders Act applies, and to order a sale of part only of the property, if the proceeds of such part would, in the opinion of the Court, be sufficient to satisfy the decree. The Court has no doubt a discretion to order the sale of part only of the property. Where the Court is not asked to act under O. 21, R. 64, by exercising its discretion to sell part only of the property attached, it is not open to the judgment-debtor to raise that point in second appeal and complain that the executing Court has failed to exercise its discretion and therefore the case should be remanded. The High Court will not in second appeal entertain a new point for the first time, where that involves any further investigation of facts. 22 Pat.L.T. 855.



LOC. AM.—[PATNA.] O. 21, r. 64.—In r. 64 for the words “attached by it” substitute the words “in respect of which it has made an order of attachment.”

Insert the words “which is” between the words “and” and “liable.”

65. Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed.

LOC. AMS.—[NAGPUR.] Rule 65.—In r. 65 of O. 21, the following sentence shall be added, namely:—

“Such officer or person shall be competent to declare the highest bidder as purchaser at the sale, provided that, where the sale is made in, or within the precincts of the Court-house, no such declaration shall be made without the leave of the Court.”

[RANGOON.] In O. 21, the following shall be substituted for r. 65:—

“65. (1) Sales shall be conducted by Bailiff, or Deputy Bailiff, but the duty may be entrusted to a process-server when the property is movable property not exceeding Rs. 50 in value and when, in the opinion of the Court, for reasons recorded in the diary of the case, the Bailiff or Deputy Bailiff cannot personally conduct the sale.

(2) Subject to the terms of the proviso to r. 43 and of r. 74, some one day in each week shall be set apart and regularly observed for holding sales in execution of decrees; and some well-known place in the vicinity of the Court-house or the public bazaar shall be selected for the purpose.

(3) Subject as aforesaid, and unless the Court is of opinion that for any special reason a sale on the spot where the property is attached or situated will be more beneficial to the judgment-debtor, all property, whether movable or immovable, attached in execution of decree shall be sold at the time and place selected.

The day to be set apart, and the place selected for holding the sales, and any changes therein shall be reported for the information of the High Court.

(4) The following scale is laid down as to the amount which may be deducted from the proceeds of the sale of property sold in execution of the decree, as the expenses of sale, and paid to the officer conducting the sale under the orders of the Court as his authorized commission:—

When the proceeds of sale do not exceed Rs. 500—5 per cent.

Where they exceed Rs. 500 and do not exceed Rs. 5,000—5 per cent. on the first Rs. 500 and 2 per cent. on the remainder.

Where they exceed Rs. 5,000—at the above rate on the first Rs. 5,000 and one per cent. on the remainder. The calculation of the commission shall be on the whole amount realized in pursuance of one application for execution.

(5) Subject to the provisions of sub-rule (13) of r. 45-B, no further sum beyond this authorized commission and the cost of conveyance of property to the place of sale shall be deducted from the sale proceeds.

#### NOTES.

O. 21, R. 65.—A sale should ordinarily be conducted at some place within the jurisdiction of the Court ordering the sale. 13 B. 22. In the absence of the Sub-Judge, it is not competent to the District Judge mentioned in decree—Sale not liable to be set aside. 123 I.C. 755. “Judgment-debtor”—Decree against Hindu father and son—Insolvency of father—Official Receiver impleaded in execution—Notice of sale proclamation is to be served on him. 41 L.W. 309.

PROCLAMATION.—The object of the proclamation is to give notice to intending purchaser and not to judgment-debtor. 12 W.R. 488. See also 20 A. 412. Sale proclamation can be issued before objections are disposed of, but sale before the objections are disposed of cannot be held. 43 I.C. 450. Separate proclamations are not necessary, when properties are situate in different villages unless proper notice could not otherwise be given. 9 I.C. 698=13 C.L.J. 192. That property to be sold in execution is the subject-matter of a pending suit by a defeated claimant is a material circumstance for the bidder to

know and must find a place in the sale proclamation. 1931 M.W.N. 1162=61 M.L.J. 683. Where sale proclamation stated that judgment-debtor was entitled to a half share in certain items of family property which formed the subject of an independent suit for partition and subsequently the partition suit ended in a decree. Held, that decree-holder was not bound to have sale proclamation amended so as to perform the duties required by this rule. 12 W.R. 238. After the property is knocked down on a bid, the purchaser will not be permitted to withdraw his bid. 21 C.L.J. 174=19 C.W.N. 633. Sale is complete when officer conducting the sale knocks down the property to the highest bidder. 1931 L. 78. And it is not open to the Court thereafter to offer the property to any person who may be prepared to purchase it for higher amount. (1931 L. 78 and 1933 N. 123, Foll.) 1936 L. 555. In connection with the sale of immovable property subject to an incumbrance, the auction-purchaser is entitled to contest the factum and the validity of the incumbrance. 11 L. 90=120 I.C. 162.



*Note.*—As regards the travelling allowance of Bailiffs going out to sell property on the spot, see r. 43 of the Burma Travelling Allowance Rules.

(6) When a sale of immovable property is set aside under the provisions of r. 92 (2) below, no commission shall be paid to the Bailiff for selling the property.

(7) No officer of a subordinate Court shall receive any larger commission or fee in respect of any sale of property (mortgaged or otherwise) held in execution or in pursuance of any decree or order of the Court directing or authorizing such sale than that allowed by sub-rule (4) above.

(8) The gross proceeds of sales shall be entered in Register II and in Bailiff's Register I and shall be paid into the treasury."

66. (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of sales by public auction. of the intended sale to be made in the language of such Court.

#### NOTES.

O. 21, R. 66.—Per *Sulaiman, J.*—An order under O. 21, R. 66 is not a judicial adjudication of any question arising between the parties to the execution, but merely the issuing of directions as to the mode of proclamation of sale. The approximate estimation of the value of the property cannot ever be regarded as a determination of any question arising between the decree-holder and the judgment-debtor within the meaning of S. 47, C. P. Code, and such an order is not appealable as a decree. 2 Fed.L.J. 183=A.I.R. 1939 F.C. 74=(1939) 2 M.L.J. (Supp.) 45. Court is entitled to presume that the provisions of this rule have been complied with. 9 A. 690. The words 'part of the estate' mean aliquot part of an estate. 11 Bom.L.R. 56. Where a debt is to be sold, and the debtor says that no debt exists, the Court should satisfy itself that a debt exists, before ordering its sale. 4 B. 323. See also 10 M. 194; 28 A. 262. No duty is cast by this rule on the judgment-debtor to help Court by particulars. 105 I.C. 335. But see 27 A.L.J. 619=116 I.C. 448. The obligation of settling a sale proclamation really rests on the Court. It is incumbent on the Court to see that all the particulars required under O. 21, R. 66 are given properly so as to enable intending bidders to know exactly what they are going for. It is very undesirable that properties should be sold in large lots. The Court would do well to group the lands into small and convenient lots after notice to the parties and settle the sale proclamation with proper upset prices and have the properties sold. 47 L.W. 773=A.I.R. 1938 Mad. 720. Under O. 21, R. 66, the executing Court has to insert in the sale proclamation the valuation given by the judgment-debtor, and that valuation has to be inserted as given by the judgment-debtor and must not be altered or corrected by the decree-holder before insertion. Where in execution of a final decree on a mortgage, a number of villages in an estate constituted into a separate *mahal* by collectorate partition are proclaimed for sale as a single block with a single upset price, and the judgment-debtor puts in a separate valuation of each village and prays that the sale should be held village by village, the Court must accept the same and order a sale village by village, and the *mahal* should, for purposes of sale,

be broken up into lots, although the sale is the sale of a single *mahal*. It is not, however, necessary that the proclamation should be separately published in every village affected, but the sale should be directed on the valuation as given by the judgment-debtor for each village, and village by village. 189 I.C. 355=21 Pat.L.T. 108=A.I.R. 1940 Pat. 422. An order inserting the judgment-debtor's claim in the proclamation for sale is contrary to law if the claim is disputed. 189 I.C. 446=A.I.R. 1940 Rang. 153. Decree against Hindu father—Application to execute against interests of sons also—Maintainability. 53 B. 777=31 Bom.L.R. 1115=1929 B. 465. Sale on basis of final decree—Occupancy rights not as to include the specific items of property allotted to the judgment-debtor. 39 L.W. 396=1934 M. 260=66 M.L.J. 464. The failure to issue any proclamation at all does not *ipso facto* vitiate the sale. [21 C. 66 (P.C.), Rel. on.] 151 I.C. 382=1934 R. 188.

NOTICE.—Irregularity in service of Notice—Burden of proof. 145 I.C. 915=1933 P. 640. The provisions under this rule for notice are directory and not mandatory. They are not for the benefit of the judgment-debtor but with a view to ascertain exact rights. 44 I.C. 252. But see 181 I.C. 542=1939 Pesh. 9. Omission to issue notice on a fresh execution application for settlement of terms of proclamation does not constitute an irregularity. 65 I.C. 988=24 O.C. 291; also 90 I.C. 351=1926 O. 76; 1939 Pesh. 9. Omission to give notice of sale to the judgment-debtor renders the sale void. 38 I.C. 98=11 Bur.L.T. 40. But see *contra* 99 I.C. 515=1927 L. 84. So also want of notice to legal representative of judgment-debtor. 49 A. 830=102 I.C. 239=25 A.L.J. 507. See also 145 I.C. 731=1933 A. 654. The fact that the judgment-debtor has not appeared at any previous stage of the proceedings does not absolve the Court from complying with the O. 21, R. 66 (2) which requires a notice to be sent to the judgment-debtor. Omission to give such notice is a material irregularity. 20 N.L.J. 283. An *ex parte* order settling the terms of a proclamation does not operate as *res judicata* in an application for release of property which had been attached without notice to him. 46 M. 768=45 M.L.J. 346. The failure to pass a formal order under O.



(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

(a) the property to be sold ;

(b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government ;

(c) any incumbrance to which the property is liable ;

#### NOTES.

5, R. 19 in respect of service of notice under R. 66 is not a material irregularity: it does not vitiate the sale. 1934 L. 985. "Judgment-debtor"—Decree against Hindu father and son—Insolvency of father—Official Receiver impleaded in execution—Notice of sale proclamation—If to be served on him. 41 L.W. 309=1935 M. 459.

**TIME AND PLACE.**—The time of sale which is required to be set out means the time at which the sale would begin. Bidding ought not therefore to start until the advertised time arrives. 1936 A.M.L.J. 13. No sale can take place except at the time advertised. 16 C. at 798. Date of proclamation is the day on which the public are made known of its subject-matter. Court can fix another date when the due date has already expired. 39 I.C. 715. Non-mention of time of sale is a material irregularity. 51 I.C. 864=15 N. L.R. 125; also 28 I.C. 184=18 O.C. 1; 37 C.W.N. 622=1933 C. 662. A proclamation which does not state the place of sale is irregular. 9 A. 511. See also 5 Bur.L.J. 183. The sale should ordinarily be held at some place within the jurisdiction of the Court ordering the sale. 13 B. 22. A sale held at a time or place different from the one mentioned in the proclamation is not an illegality that invalidates sale *in toto*. It is only an irregularity which only makes the sale voidable at the instance of the debtor, if it has caused substantial loss. 1933 Pesh. 57. Where the judgment-debtor objects to the order of sale on the ground of material defect in the sale proclamation at a time when he was not prevented under law from raising such objection, but the application is dismissed solely on the ground that the remedy under O. 21, R. 90 is open to him and if it is eventually found that that remedy is not available to him under the law, the judgment-debtor is entitled to claim an adjudication upon the objections taken by him at an earlier stage. 177 I.C. 116=A.I.R. 1938 Lah. 65.

**O. 21, R. 66 (2) (a).**—Absence of plan of house does not vitiate sale. 1925 O. 150 (1). Omission to mention that the interest of the judgment-debtor was only one third does not amount to misdescription and does not vitiate sale. 134 I.C. 692=33 Bom.L.R. 750=1931 B. 367. Where after due notice and with his full knowledge, judgment-debtor allows properties to be sold in execution, he is precluded from afterwards impeaching the sale

on the ground that the mortgagee has caused to be sold in execution properties, which were not comprised in the mortgage and which could not therefore be lawfully sold. 40 C.W.N. 428.

**O. 21, R. 66 (2) (b).**—Omission of statement of revenue assessed, in a sale proclamation is an irregularity on which a sale can be set aside. 45 M.L.J. 403=28 C.W.N. 593=75 I.C. 546=1923 P.C. 93 (P.C.). At an execution sale, the mining rights which the judgment-debtor had under a certain document of lease were sold. In the sale proclamation, the boundaries of the area covered by the document were indicated but not its extent. Further no indication was given of the nature of the coal deposits. There was also no extract of the document of lease. As regards valuation of the property, there were contradictory statements. Held, that the sale proclamation did not comply with the terms of O. 21, R. 66 (2). 42 C.W.N. 661.

**O. 21, R. 66 (2) (c).**—It is the duty of Court to obtain from all available sources, a list of existing encumbrances, but the Court does not and cannot guarantee that the list published contains all existing encumbrances or that the incumbrances notified are valid. 27 A. 97 (110) (F.B.). See also 30 C. at 606 (F.B.); 13 M.L.J. 227; 23 I.C. 871=1 O.L.J. 50; 50 I.C. 145=6 O.L.J. 67. Where property is in possession of a third person who has a valid title to the same to the knowledge of decree-holder, failure on the part of the decree-holder to make mention of such person's claim to property brought to sale amounted to neglect of the statutory duty imposed on him. 20 N.L.J. 111=1937 N. 140. Arrears of rates due to the corporation in respect of property are, under the Calcutta Municipal tax, a statutory charge on the premises. It is therefore the duty of the party having the carriage of the execution proceedings to find out any arrears of taxes and to have them mentioned in the proclamation of sale. 40 C.W.N. 41=63 C. 621. It is not necessary that the amount of interest on incumbrances should be calculated actually and the figure given. 150 I.C. 1134=1934 M. 260=66 M.L.J. 464. Non-mention of restrictive clauses in the matter of redemption, in the case of mortgages which were mentioned in the sale proclamation, does not render the sale liable to be set aside. 13 L. W. 444=62 I.C. 735. An omission to



- (d) the amount for the recovery of which the sale is ordered; and  
 (e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

## NOTES.

mention incumbrances in sale proclamation cannot by itself be injurious to judgment-debtor. Moreover that irregularity is distinctly waived by judgment-debtor if he agrees that the previous proclamation of sale should suffice and that there should be no further proclamation of sale. [3 I.A. 230 (P.C.) Ref.] 55 A. 519=1933 A.L.J. 1273=1933 A. 546. Sale proclamation referring to encumbrance—Sale is not made subject to encumbrance—Purchaser not debarred from contesting the encumbrance. 126 I.C. 389. *See also* 11 L. 90; 155 I.C. 10=1935 R. 19; 1936 M. 70. A Court cannot in execution of the decree based on a puisne mortgage order a sale under R. 66 (2) (c) subject to prior mortgagee's decree. It can only notify the prior mortgagee's incumbrance. 132 I.C. 767=1931 O. 157. *See also* 1931 A.L.J. 398=1931 A. 549. With respect to property subject to several incumbrances, Court is not expected to adjudicate on the rights of subrogation claimed by the rival incumbrances; it is enough to mention the fact that claims of subrogation are put forward. Whether or not those rights subsist cannot and should not be decided at that stage. 1933 A. 287=1933 A.L.J. 89=146 I.C. 477.

**O. 21, R. 66 (2) (d).**—Court is entitled to specify in the sale proclamation, and direct execution for, not only the sum due under the decree and interest to the date of the application for execution but also the further interest due from the date of the application to the date of actual sale, though the latter is not expressly included in the application. 36 C.W.N. 404=1932 C. 555.

**O. 21, R. 66 (2) (e).**—It is not obligatory to put down the value of the property in the sale proclamation. 138 I.C. 612=1932 A. 664; I.L.R. (1939) Bom. 389=41 Bom.L.R. 320=1939 Bom. 182. Omission to mention income from the property does not vitiate the sale. 39 I.C. 59=11 P.L.R. 1917; 106 I.C. 138; I.L.R. (1939) Bom. 389=1939 Bom. 182. Value cannot be put by Court before day fixed for hearing of the parties. 3 Pat.L.T. 342=65 I.C. 360. Under-valuation, when resulting in material injury, is a good ground for setting aside a sale. 13 I.C. 337=14 C.L.J. 541; *also* 9 I.C. 698=13 C.L.J. 192; 24 I.C. 468=7 Bur.L.T. 64. Value of property is a mere estimate but it must be a fair estimate. 1 P. 214. *See also* 48 I.C. 141=3 P.L.J. 518; 2 P.L.J. 130=37 I.C. 872; 55 A. 519=1933 A.L.J. 1273=143 I.C. 673=1933 A. 546. A sale can be set aside on the ground that a valuation other than one put by the Court was inserted in the sale proclamation. 73 I.C. 317; *also* 49 I.C. 195=4 P.L.J. 39. Valuation given by both the parties being inserted in the sale proclamation. *See* 83 I.C. 430=1924 C. 589. It cannot be laid

down as a general proposition that Court must enquire and give a definite valuation of the property sought to be sold. Court might in the circumstances of a given case state two separate valuations of the property to be sold as given by the decree-holder and the judgment-debtor as it may not be possible to estimate the value even on an elaborate inquiry. 58 C. 577=132 I.C. 687=35 C.W.N. 142=1931 C. 520. If Court does not consider that value of the property should be mentioned in the proclamation on account of the peculiar nature of the property it may not do it; but if on the other hand it considers that the value is a material piece of information for an intending purchaser it should be put "as fairly and accurately as possible". Except in exceptional cases where it is not possible to ascertain the value or where it may be found that in the circumstances of the case the value need not be ascertained, Court is bound to put a fair and accurate value in the proclamation. Where the valuation put by the parties was not satisfactory and it appeared that the approximate valuation could be otherwise ascertained, it is a case wherein the Court should determine the valuation by summary inquiry and insert the same in the sale proclamation. 35 C.W.N. 907. (Case-law discussed.) (51 M. 655, Disappr.) As to the duty of Court in regard to valuation, *see* 37 C.W.N. 231=60 C. 581=144 I.C. 892=58 C.L.J. 218=1933 C. 511. *Also* 36 C.W.N. 347=1932 C. 576; 37 C.W.N. 622=60 C. 636. The Court is not at liberty to take any imaginary figure, or to state the value of the property at any figure it thinks to be proper; and though the judgment-debtor who objects to the decree-holder's valuation may fail to lead evidence on the point the Court cannot ignore the enquiry or materials directed by it and which are before it. 159 I.C. 358=37 Bom.L.R. 489=1935 B. 331. It must consider all the materials placed before it and must value the property at an adequate and proper figure. Failure to observe this will amount to material irregularity vitiating the sale. (*Ibid.*) Valuation by decree-holder—Objection by judgment-debtor—Court taking evidence and holding valuation—Order for release of part of property and sale of rest only—If bad. 153 I.C. 1024 (1)=1935 P. 143. The estimated value of the property and its income need not be stated. 8 C.W.N. 264. But *see* 8 C.W.N. 257. The property must be described with reasonable accuracy. (*Ibid.*) Omission to mention value of land is not a serious irregularity, unless it has a prejudicial effect. 1922 C. 93; 121 I.C. 360; 1930 N. 191; 58 C. 813=35 C.W.N. 75=1931 C. 490. Cl. (e) does not require the Court to make an investigation into the question as to the value of the property to be sold. 31 C. 922. But



(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of the pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

## NOTES.

*see* 105 I.C. 212=1927 M. 943. In order that a plea of under-valuation should be upheld it must not only be shown that there was under-valuation in fact but also that it prejudiced the judgment-debtor. 32 C.W.N. 309. Lease-hold right in mill—Determination of value. 149 I.C. 1043=1934 L. 146.

O. 21, R. 66 (2), Proviso (N.-W.F.P.) and R. 90.—Proviso to O. 21, R. 66 (2) does not condone the failure of the execution Judge to mention the correct estimate of the value of property proposed to be auctioned. When the decree-holder and judgment-debtor give their respective estimates of the value at two different figures, failure to give both the estimates in the proclamation is serious omission likely to influence the minds of those who propose to buy the property and therefore amounts to material irregularity referred in O. 21, R. 90. 181 I.C. 542=A.I.R. 1939 Pesh. 9.

O. 21, R. 66 (3).—O. 21, R. 66 (3) makes it mandatory that an application by the decree-holder under R. 66 should be given, as it gives advantage to the Court of enabling it to obtain all necessary information required for drawing up a proclamation of sale. Therefore failure of the decree-holder to present an application under O. 21, R. 66 (3) is a material irregularity contemplated by O. 21, R. 90. 181 I.C. 542=A.I.R. 1939 Pesh. 9. Verification by a person acquainted with the facts is enough. 59 I.C. 282=1 Pat.L.T. 647. Non-filing of verified statement is mere irregularity. 105 I.C. 335. But *see* 116 I.C. 65=1929 N. 305. Property of judgment-debtor stated by decree-holder to be ancestral and so found by Collector—Execution transferred to Collector—Contention by decree-holder that property not ancestral—*Res judicata*. 1932 A.L.J. 1118=143 I.C. 522=1933 A. 192.

RIGHT OF PURCHASER.—All that Court sells is the right, title and interest of the judgment-debtor, as these existed at the date of sale and as these could have been honestly disposed of by judgment-debtor himself. 27 A. 684; *also* 20 I.C. 753. Sale of debt due to judgment-debtor—Suit to recover debt—Debtor can prove debt amount to be smaller than what was sold. 29 Bom.L.R. 285=101 I.C. 335=1927 B. 234. A purchaser of immovable property buys at his own risk, unless the sale is vitiated by fraud. 9 Bur.L.T. 169=33 I.C. 1003. But when property is sold subject to a lien, the purchaser cannot question the lien. 47 I.C. 224. As to the validity of a pur-

chase by an undivided brother of the decree-holder in Court auction, *see* 21 L.W. 226=86 I.C. 886 (1). A purchaser cannot question validity of prior mortgages. 24 I.C. 2=1 O.L.J. 175; *also* 45 I.C. 777=5 O.L.J. 114. But where a mortgage is simply notified at the time of sale, but the sale is not subject to mortgage, purchaser can question validity of mortgage. 44 A. 714=20 A.L.J. 722=1922 A. 443. *See also* 36 I.C. 732=3 O.L.J. 422; 28 I.C. 360=2 O.L.J. 140; 18 I.C. 461. But *see* 12 I.C. 855=4 Bur.L.T. 142. The purchaser can contest a mortgage even when it is notified in the proclamation. 43 A. 489=63 I.C. 895; 55 I.C. 354; 25 C.W.N. 942=34 C.L.J. 333. When a sale in which the decree-holder was the purchaser is set aside, the judgment-debtor is entitled to set-off against the decretal amount, the net income derived by the decree-holder. 24 I.C. 468=7 Bur.L.T. 64. When the proclamation is ambiguous, the decree must be looked into to see what was actually sold. 96 I.C. 771=1926 A. 730.

ESTOPPEL.—The mere fact that a mortgage is noted in a sale proclamation does not establish that the property is sold subject to that mortgage, and the auction-purchaser is not therefore estopped from raising the question of the validity of the mortgage. 171 I.C. 233=1937 O.W.N. 944=A.I.R. 1937 Oudh 493. A judgment-creditor is not estopped from raising plea of error in statement of decretal amount in sale proclamation, unless the other party is prejudiced thereby. 12 I.C. 97=10 M.L.T. 94. *See also* 64 I.C. 763=43 A. 703. Failure to serve sale proclamation does not vitiate the sale when judgment-debtor knows of it. 1922 C. 93. A judgment-debtor who was aware that the description in the sale proclamation was defective, and who stands by, cannot question the sale on that ground alone. 12 M. 91; 21 C. 66 (P.C.). *See also* 29 A. 612. A decree-holder cannot, subsequent to sale, set up an encumbrance in his own favour, not set up in execution proceedings. 47 C. 446=24 C.W.N. 269. Omission by decree-holder to specify in sale proclamation the existence of a first charge in his favour in respect of rent decrees does not estop him from enforcing his charge against a subsequent encumbrancer who is not in any way connected with the execution proceedings or otherwise prejudiced by the omission in the sale proclamation. 18 N.L.J. 274. When a judgment-debtor having notice of proceedings once fails to raise an objection, he cannot again challenge the sale on any ground. 13 I.C. 337=14 C.L.J. 541; *also* 4 Pat.L.T.



(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

LOC. AMS.—[LAHORE AND N.-W.F.P.] O. 21, r. 66.—Add the following words to cl. (e) of sub-rule (2) :—

“Provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property ; but the proclamation shall include the estimate, if any, given by either or both of the parties.”

[LAHORE.] After sub-rule (2) of r. 66, add the following as sub-rule (3), and re-number the existing sub-rules (3) and (4) as (4) and (5) respectively :—

“(3) Where the property to be sold is movable property which has been made over to a custodian under sub-clauses (a) or (c) of clause (1) of r. 43 of this order, the Court shall also issue a process by way of notice to the custodian, directing him to produce the property at the place of sale, at a time to be specified therein with a warning that if he fails to comply with the directions, he shall be liable to action under S. 145 of the Code of Civil Procedure.”

(High Court Notification No. 150-R. XI-y-14, dated the 16th May, 1939.)

[MADRAS.] Re-number the existing cl. (e) to sub-rule (2) as (f) and add the following as cl. (e) :—

“the value of the property as stated (i) by the decree-holder and (ii) by the judgment-debtor.”

(Vide Fort St. George Gazette, dated 20th October, 1936, Pt. II, pp. 1394-1396.)

#### NOTES.

721=2 P. 916; 49 M. 333=1926 M. 755=51 M.L.J. 165; *e.g.*, gross under-valuation, 37 C.W.N. 1054; limitation, 37 C.W.N. 752=1933 C. 855; or misdescription of property, 158 I.C. 556=1935 C. 614. Failure to attend at the settlement of proclamation does not estop plea of non-liability to attachment. 46 M. 768=45 M.L.J. 346. When a party does not raise any objection to incorrect sale proclamation, he is estopped from questioning about any irregularity consequent on it. 38 M. 387=25 M.L.J. 198; also 21 N.L.R. 23=88 I.C. 831. Refusal by trial Court to fix a particular order in which property is to be sold is no bar to the executing Court considering the same question. 96 I.C. 492=1926 M. 834=51 M.L.J. 135. Valuation by decree-holder—Objection by judgment-debtor—Court taking evidence and holding valuation—Order for release of part of property and sale of rest only not bad. See 153 I.C. 1024 (1)=1935 P. 143.

REVISION.—An order for issue of proclamation is subject to revision by High Court. 2 P.L.J. 130=1917 P. 105.

APPEAL.—An order under this rule is not appealable under O. 43, R. 1. 59 I.C. 282=1 Pat.L.T. 649. See also 1926 C. 1184; 1937 Rang. 157. As to what kinds of orders under this rule are appealable, see 96 I.C. 492=1926 M. 834=51 M.L.J. 135. An appeal lies against an order disallowing the objection of the judgment-debtor. 30 C. 617. But see 27 M. 259 (F.B.). No appeal lies against an order under sub-R. (4). 36 I.C. 402=10 Bur.L.T. 115. Order settling the order in which properties are to be sold is appealable. 45 M.L.J. 478=1924 M. 365. See also 156 I.C. 141=1935 M. 714. An order fixing upset price is not appealable. 44 M.L.J. 599=1923 M. 619; 114 I.C. 652=1928 M. 1169; 1937 Rang. 157. No appeal lies against an order settling the terms of a sale proclamation. 46 I.C. 564. But see 49 I.C. 539. Order

refusing to notify incumbrances is not appealable. 4 P. 731=6 Pat.L.T. 843. See also 48 A. 260=92 I.C. 644=1926 A. 268. No appeal against an order refusing to re-open valuation fixed in sale proclamation. 6 Pat.L.T. 507=90 I.C. 276; 6 O. W.N. 1085. An order accepting the valuation put upon a property is not appealable. 22 I.C. 548; also 17 I.C. 88=16 C.W.N. 970. Order fixing valuation is not appealable. 38 I.C. 616=2 Pat.L.J. 13. See also 11 I.C. 759=14 C.L.J. 607; 99 I.C. 455; 91 I.C. 819=1926 C. 610; 1932 A.L.J. 859=1932 A. 696. No appeal lies against an order overruling objections as to inadequacy of price and as to the sale of the properties in separate lots. 134 I.C. 833=1931 A.L.J. 1084. An order for issue of sale proclamation when a stay has been ordered at the instance of the judgment-debtor is not appealable. 64 I.C. 547=35 C.L.J. 170. A liquidator is not a representative of the judgment-debtor within the meaning of S. 47. Where a liquidator of a co-operative society applied claiming priority over a mortgage decree and the Court passed an order under O. 21, R. 66 giving priority, *held*, that the order was not appealable. 30 N.L.R. 240=148 I.C. 714=1934 N. 201.

SECOND APPEAL.—If under-valuation and want of notice of sale are the grounds of a petition under R. 90, they properly come under R. 66 and a second appeal is competent. 1925 M.W.N. 701=1925 M. 1142.

STEP-IN-AID.—An oral application for the settlement of terms of proclamation is a step-in-aid of execution. 2 P.L.J. 5=38 I.C. 540.

O. 21, R. 66 (Lahore).—Under O. 21, R. 66, as amended by the Lahore High Court, it is incumbent upon the Court issuing the proclamation to include the estimate of the value of the property, if any, given by either or both the parties. 191 I.C. 612=42 P.L.R. 404=A.I.R. 1940 Lah. 394.



[NAGPUR.] Rule 66.—In cl. (c) of sub-rule (2) of r. 66, *after* the word “property” *insert* the words :—

“including the decree-holder’s estimate of the approximate price.”

[PATNA.] O. 21, r. 66.

Omit the words “shall be drawn up after notice to the decree-holder and the judgment-debtor and” from sub-rule (2) of r. 66, and *add* the following proviso after sub-clause (c) of sub-rule (2) :—

“Provided that no estimate of the value of the property, other than those, if any, made by the decree-holder and judgment-debtor respectively together with a statement that the Court does not vouch for the accuracy of either, shall be inserted in the sale proclamation.”

[RANGOON.] In O. 21, r. 60, the following shall be *added* at the end of sub-rule (2) :—

“Provided that no such notice shall be necessary in the case of immovable property not exceeding Rs. 250 in value.”

Mode of making proclamation.

67. (1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 54, sub-rule (2).

(2) Where the Court so directs, such proclamation shall also be published in the Official Gazette or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given.

LOC. AMS.—[MADRAS.] *Add* the following as sub-rule (4) :—

“(4) Unless the Court so directs it shall not be necessary to send a copy of the proclamation to the judgment-debtor.”

(Vide *Fort St. George Gazette*, dated 20th October, 1936, Part II, pp. 1394-1396.)

[PATNA.] O. 21, r. 67.

*Add* the following words at the end of sub-r. (1) of r. 67 after deleting the full-stop at the end of the sub-rule :—

“and may, if the Court so directs, on the application of the decree-holder, be proclaimed and published simultaneously with the order of attachment.”

68. Save in the case of property of the kind described in the proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immovable property, and of at least fifteen days in the case of movable property, calculated from the date on which the copy of the proclamation has been affixed on the Court-house of the Judge ordering the sale.

Time of sale.

#### NOTES.

O. 21, R. 66 (Patna).—Where the valuations placed on the property by the decree-holder and by the High Court in an earlier proceeding are entered in the sale proclamation by agreement of both parties, it is not open to the judgment-debtor to contend subsequently that the entries regarding valuation in the sale proclamation constitute a substantial irregularity in the proceedings for sale. 185 I.C. 404=21 P. L.T. 541=A.I.R. 1940 Pat. 286.

O. 21, R. 66 (Patna), Proviso.—If repealed by Bihar Money Lenders' Act, S. 16—Repugnancy—Latter section—If void on ground of repugnancy to O. 21, R. 66. 19 Pat.L.T. 760.

O. 21, Rr. 66 and 90, O. 30, R. 3.—Where several judgment-debtors are sued not as partners in the name of their firm but as individuals and the decree directs all of them to pay the decretal amount, notices in

execution under O. 21, R. 66 must be served on all judgment-debtors. Failure to serve such notice on any of them amounts to an obvious breach of O. 21, R. 66, which cannot be cured under O. 30, R. 3 and which therefore amounts to a material irregularity within the meaning of O. 21, R. 90. 181 I.C. 542=A.I.R. 1939 Pesh. 9.

O. 21, R. 67.—Omission to fix a copy of the sale proclamation in the Collector's office does not render the sale *ipso facto* void. 18 C. 422 (F.B.); 12 B. at 370. Failure to publish a sale proclamation by beat of drum, where it is possible to proclaim the sale in that manner, is a material irregularity, though the sale will not be set aside unless loss is proved to have been caused to judgment-debtor. 1933 A.L.J. 73=55 A. 182=1933 A. 747.

O. 21, R. 68.—A sale held in contravention of this rule should, on the application



LOC. AMS.—[ALLAHABAD AND OUDH.] O. 21, r. 68.—For the words "fifteen days" read the words "seven days."

[LAHORE AND N.-W.F.P.] In r. 68 for the word "thirty" read "fifteen" and for the word "fifteen" read "one week."

69. (1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment:

Adjournment or stoppage of sale.

Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the Court.

(2) Where a sale is adjourned under sub-rule (1) for a longer period than seven days, a fresh proclamation under rule 67 shall be made, unless the judgment-debtor consents to waive it.

#### NOTES.

of judgment-debtor or decree-holder, be set aside. 7 A. 289; 21 C. 66 (P.C.). But the sale is not *ipso facto* void. 31 C. 385.

CONSENT.—An application made on the day of sale by judgment-debtor, that a part only of his property may be sold instead of the entirety, cannot be considered as such a "consent" as would do away with the necessity of proclamation being issued, 30 days before the day fixed for sale. 5 C. 259. See 6 C.W.N. at 57.

REVISION.—An order under this rule can be set aside on revision. 5 C. 878.

O. 21, R. 69: SCOPE.—The rule has no application to a case where sale is postponed on the ground that decree has been satisfied. 4 Pat.L.T. 495=75 I.C. 676. Rule applies to sales held in virtue of an order absolute for sale under S. 89 of the T. P. Act (O. 34, R. 5). 19 A. 205; 20 A. 354. But see 31 C. 373. When a sale is adjourned under this rule its provisions must be followed with exactitude. 20 M. 159. When a sale is adjourned the officer conducting the sale must record his reasons for such adjournment. 1932 A.L.J. 357=1932 A. 369. Sale not held on date fixed, but subsequently held on date not advertised—As to validity. See 11 Pat.L.T. 743; 1937 Pat. 386 (Sale commenced on date fixed, not finished on that date, but continued next day). O. 21, R. 69 (1) only provides that where the Court adjourns a sale the Court should specify the day and hour, but it does not provide that the officer making an adjournment should also specify the hour. Further, omission to specify hour is not a material irregularity. 4 A.W. R. 1465=1935 A. 182=153 I.C. 410. See also I.L.R. (1939) 1 Cal. 530=1939 Cal. 369. The failure to comply with the provisions of O. 21, R. 69 would not alone render a Court sale a nullity, but it would be necessary for a person who is aggrieved to treat such non-compliance as a material irregularity which he must urge in a properly constituted application under O. 21, R. 90. If, therefore, the judgment-debtors themselves take no steps to have the sale set aside on the ground of non-compliance with O. 21, R. 69, it is not open to the Court to treat the sale as a mere nullity. 67 C.L.J.

96. Sale could be adjourned on application by third party, although the rule does not specifically refer to such a case. 156 I.C. 492=1935 M.W.N. 200=41 L.W. 192=1935 M. 295. Condition imposed on third party applicant for adjournment of sale to deposit money—Legality. (*Ibid.*)

ADJOURNMENT.—Bidding by decree-holder—Sale kept open for some days to get higher bids—Does not amount to adjournment but is a continuous sale and no fresh proclamation is necessary. 6 P. 432=104 I.C. 215=8 Pat.L.T. 796=1927 P. 312. See also 1928 L. 699=115 I.C. 541; I.L.R. (1939) 1 Cal. 530=43 C.W.N. 539=1939 Cal. 369. Sale should be adjourned to a specified day and hour and omission to specify this is a material irregularity. 31 C. 815 (818); 29 A. 196 (P.C.); 7 C. 34. See also 13 I.C. 337=14 C.L.J. 541; 49 A. 402=25 A.L.J. 302=1927 A. 241. Omission to specify hour is not material irregularity. 153 I.C. 410=4 A.W.R. 1465=1935 A. 182. But see 19 N.L.J. 103; 1937 M. W. N. 1223. But it would not be material irregularity where debtor has agreed to forego proclamation or notice, and hour of sale is not mentioned in adjournment order. 55 A. 519=1933 A.L.J. 1273=143 I.C. 673=1933 A. 546; 1937 M.W.N. 1223. Adjournment *sine die* is irregular and sale is liable to be set aside. 41 I.C. 68=3 Pat.L.W. 357. As to whether a sale can be adjourned to a holiday, see 3 A. 333. When Court adjourns a sale, but the information not reaching Nazir in time, sale is concluded, the sale is void. 12 A. 96; 12 M.L.J. 97; 1935 L. 694. See 17 C. 152. But see 1930 L. 17. Where execution sale is not conducted within precincts of Court-house the officer conducting it has a discretion to adjourn the sale to next day. 107 I.C. 274.

O. 21, R. 69 (2).—To adjourn an execution sale from time to time beyond the period of seven days is not anything more than an irregularity. 117 I.C. 727=1929 M. 624. Non-issue of fresh proclamation under R. 69 (2) is a mere irregularity and in the absence of proof of substantial injury, sale cannot be set aside. 38 I.A. 200=39 C. 26=16 C.W.N. 1 (P.C.). Also 43 A. 433=19 A.L.J. 262; 2 Luck. 490=100 I.C. 787=4 O.W.N. 273. But see 25 I.C. 17. Even though judgment-debtor consents,



(3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

LOC. AMS.—[ALLAHABAD.] For r. 69 (2) substitute the following:—

"(2) Where a sale has been once adjourned under sub-rule (1), a fresh proclamation under r. 67 shall be made, unless the judgment-debtor consents to waive it:

Provided that where the adjournment is for a period not longer than 14 days from the date originally fixed for sale, no fresh proclamation shall be necessary:

Provided also that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under r. 66."

[BOMBAY.] In sub-rule (2) of r. 69 of O. 21 "thirty days" shall be substituted for "seven days."

[CALCUTTA.] O. 21, r. 69 (2).—Substitute the words "one calendar month" for the words "seven days."

[LAHORE.] In sub-r. (2) of r. 69 "thirty days" shall be substituted for "seven days."

[MADRAS.] Substitute the following for sub-r. (2):—

"(2) Where a sale is adjourned under sub-r. (1) for a longer period than thirty days, a fresh proclamation under r. 67 shall be made, unless the judgment-debtor consents to waive it." (Vide *Fort St. George Gazette*, dated 20th October, 1936, Pt. II, pp. 1394-1396.)

[NAGPUR.] In sub-r. (2) of r. 69, for the words "seven days" substitute the words "fifteen days."

[N.-W.F.P.] In sub-r. (2), for the word "seven," substitute the word "thirty" and add the following proviso:—"Provided that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under r. 66."

[ODISHA.] In r. 69 (2) for the word "seven" read the word "fourteen" and to the existing proviso, substitute the following proviso:—

"Provided that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under r. 66."

#### NOTES.

Court must issue a fresh proclamation in case judgment-creditor requires it. 24 M. at 316. A fresh proclamation is essential. 2 Bur.L.J. 54=1923 R. 154. A waiver of fresh proclamation on postponement of sale does not amount to waiver of objections to the previous one. 14 C.L.J. 346=16 C. W.N. 704. The waiver of the necessity for a fresh proclamation necessarily implies a waiver of objection to any defect appearing on the face of the sale proclamation. But the waiver of any necessity for a fresh sale proclamation would not imply a waiver of the right to object to any irregularities in the attachment. 1938 P.W.N. 612=A. I.R. 1938 P.C. 230 (P.C.). The provisions of R. 69 (2) are modified in the Central Provinces by R. 10 of the rules in the Revenue Book Circular, Vol. 2-III, framed by the Local Government; R. 10 (2) of the said rules makes it clear that the final bid is not accepted and the purchaser is therefore not declared until the proceedings are adjourned to, and the bid approved by the Collector. Till the Collector accepts the bid, it is only an offer. 20 N.L.J. 80.

NAGPUR AMENDMENT.—In a Collector's sale, it is the Collector who has to accept the bid though it may be the Tahsildar who holds the sale. The period of seven days in O. 21, R. 69 (2) has been extended to 15 days in Nagpur, and the fact that the Collector accepts the bid beyond 7 days of the sale does not make such acceptance illegal as beyond time and does not render a fresh proclamation of sale neces-

sary. An order of acceptance within 15 days is in time. 1938 N.L.J. 10.

O. 21, R. 69 (3).—A bid may be retracted at any time before the hammer is down. 14 M. 235. The sale of a third lot is not vitiated by irregularity under sub-R. (3) when money due under the decree is paid only after knocking down of the first two lots. 26 I.C. 273=1914 M. W.N. 873. A payment made under this rule cannot be called voluntary payment. 18 W.R. 503. When sale is so held, the person holding the equity of redemption can, at any time before sale, pay the decretal sum and costs and stop execution proceedings. 26 A. 28; 31 C. 863; 11 C.W.N. 495. Notice to the clerk in the Collector's office is not sufficient notice to the Collector that the amount has been paid into Court. It is the officer conducting the sale who has to be satisfied as to that or to whom the full amount must be tendered. 1935 L. 694.

O. 21, Rr. 69 and 90.—An execution sale could not be held on the date specified in the sale proclamation. On that date the Court stayed the sale until further orders and directed the matter to be put up before it on a later date, when the Court vacated the stay order and fixed a date for sale. As the bid was too low on the date so fixed, the sale was held on the following day. *Held*, that the sale was not a nullity out and out, but that there was undoubtedly a material irregularity which would entitle the judgment-debtor to get the sale set aside in an appropriate proceeding under O. 21, R. 90. 45 C.W.N. 987.



[PATNA.] O. 21, r. 69.

In r. 69 (2) for the word "seven" read "fourteen" and add the following proviso:—

"Provided that the Court may dispense with the consent of any judgment-debtor who has not appeared in the proceedings."

[RANGOON.] In r. 69 (2) for the words "seven days" the words "thirty days" shall be substituted.

Saving of certain sales.

70. Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector.

71. Any deficiency of price which may happen on a re-sale by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

#### NOTES.

O. 21, R. 71: SCOPE.—*See* 1940 Mad. 566=(1940) 1 M.L.J. 537. Intended to minimise hardship from purchaser's default. It applies unless defaulting purchaser would be substantially prejudiced. Omission of time and place of sale, and date of re-sale are mere irregularities. 21 L. W. 232=87 I.C. 1=1925 M. 631. Decree-holder misleading defaulting purchaser—Suppression of existence of encumbrance—Re-sale—Property purchased by decree-holder—Application to recover deficiency from defaulting purchaser—Not maintainable. 6 O.W.N. 407=118 I.C. 833=1929 O. 294. Rule is not exhaustive. Other remedies are also open. 50 I.C. 59=1919 P. 210. Court and not the Collector has jurisdiction to order recovery of the deficiency of price from defaulting purchaser, even where property was sold by Collector. 32 Bom.L. R. 750=134 I.C. 692. Judgment-creditor is not bound to proceed under this rule, and may proceed against other property belonging to judgment-debtor. 8 C. 291. *See also* 21 W.R. 149 and 2 B. 562. Provisions of this rule extend to all sales, whether of movable or immovable property and also to re-sales held under Rr. 77, 84 and 86. 7 C. 337. Also to sales under the Provincial Insolvency Act. 62 I.C. 307=17 N.L. R. 49. Also when there is default, either in the initial deposit under R. 84 or of the balance under R. 85. 44 A. 266=20 A.L. J. 105 (F.B.). *See also* 1937 A.L.J. 495=1937 All. 556. No deficiency of price, which may happen on a re-sale by reason of purchaser's default can be claimed from him unless his bid has been finally accepted by Court. 118 I.C. 901=1929 L. 673. As to the effect of permission to bid given to decree-holder, when a heavy upset price was fixed, *see* 83 I.C. 379=1924 B. 515. Only decree-holder or judgment-debtor can apply under this rule. Attachment of the deposit by defaulting decree-holder enures for the benefit of all who are entitled to rateable distribution. 49 M. 570=97 I.C. 86=1926 M. 872.

RE-SALE.—Loss arising on a re-sale con-

templated by R. 71 is not limited to a default in the payment of the whole purchase money; it includes a default in the payment of the 25 per cent. deposit required under R. 84. 141 I.C. 367=29 N.L.R. 52=1933 N. 198. At an execution sale the deficiency on re-sale by reason of purchaser's default was not certified by the officer holding the sale in accordance with Form No. 31 in App. E of the Code. *Held*, that the absence of such a certificate would not prevent decree-holder from recovering the deficiency arising on re-sale. (*Ibid.*) Re-sale contemplated by this rule must be of the same property that was first sold, and under the same description. 16 C. at 58; 16 W.R. 14. Property re-sold must be substantially the same, and any difference will not matter, if that would occur in the ordinary course of things, or was brought about by the first purchaser's default. 41 M. 474=34 M.L.J. 156. It must be held forthwith and no fresh proclamation is necessary. Auction-purchaser is not liable to pay deficiency when the re-sale is after six months. 32 I. C. 907. *See also* 28 O.C. 327=1925 O. 397; 1929 L. 744; 1937 Lah. 924; 51 L.W. 739=1940 Mad. 566=(1940) 1 M.L.J. 537.

DEFAULTING PURCHASER.—A purchaser of property who fails to pay the deposit directed to be paid by R. 84, is a defaulting purchaser. 5 B. 575. Decree-holder may himself be the defaulting purchaser. 12 M. 454. Purchaser is liable only for the deficiency of price and the expenses attending re-sale and is not liable to pay interest. 9 W.R. 500; 3 W.R. 3; 16 W.R. 14; 14 M. 454. The real and not the ostensible purchaser is liable. 20 W.R. 80; 12 W.R. 236. The decree-holder who can recover the deficiency in price is not any decree-holder of the judgment-debtor or any decree-holder who is entitled to share rateably under S. 73 but the decree-holder who brings the property to sale. (49 M. 570, *Foll.*) 163 I.C. 175 (2)=1936 O.W.N. 559=1936 O. 277. A suit by the purchaser lies to set aside an order to make good the deficiency. 12 I.C. 360=7 N.L.R. 134; *also* 19 A. 22. *See contra* 29 O.C. 18=1925 O. 360. An



Decree-holder not to bid for or buy property without permission.

72. (1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

#### NOTES.

order under this rule is one under S. 47. A separate suit does not lie. 87 I.C. 284=1925 O. 360 (2).

AN APPEAL and a second appeal will lie against an order passed under this rule. 25 C. 99. See also 18 M. 439; 23 N.L.R. 14=100 I.C. 691 (2)=1927 N. 112. No second appeal lies when the decree is for less than Rs. 500. 59 I.C. 192=45 B. 223.

O. 21, Rr. 71, 86 and 87.—Where there has to be a re-sale as the result of the default of the decree-holder under O. 21, R. 86, the decree-holder has to apply for a re-sale, which under O. 21, R. 87 has to be made after the issue of a fresh proclamation. The Code contains no provision as to when the application for a re-sale shall be made; the decree-holder is therefore entitled to make the application at any time within three years. Art. 181 of the Lim. Act applies to such an application. If there is a deficiency in the re-sale, the auction-purchaser is responsible for the deficit under R. 71 of O. 21. Under O. 21, R. 71, the liability of the defaulting purchaser is unqualified and hence it cannot be said that the decree-holder is bound to apply for re-sale within a reasonable time of the default in payment of the balance of price under R. 85. In any case, where a decree-holder takes prompt steps for the securing of an order of re-sale, but the re-sale does not take place early because of erroneous orders passed by the Court, not in a judicial capacity, but in pursuance of a wrong administrative practice, *e.g.*, striking off an application for statistical reasons, the decree-holder cannot be held responsible for the delay in re-sale, so as to disentitle him to an order calling upon the defaulting purchaser to pay the deficit. 51 L.W. 739=A.I.R. 1940 Mad. 566=(1940) 1 M.L.J. 537.

O. 21, R. 72: SCOPE.—The rule does not apply to purchases made before its enactment. 8 Bom. L. R. 873. Leave contemplated by this rule should be very cautiously given. 16 C. 132; 7 C. 346. Price mentioned in sale proclamation—Object of—Decree-holder not bound to bid up to that amount. 150 I.C. 759=15 Pat.L. T. 552=1934 P. 345. An order for a set-off under this rule can be made only after sale has taken place. 133 I.C. 737=33 Bom.L.R. 503. But see 145 I.C. 957=38 L.W. 579=1933 M. 804=65 M.L.J. 569. Permission to bid and order to set-off decree-debt is subject to the rights of other decree-holders, having right to rateable distribution. 59 I.C. 86=12 L.W. 328; 1930 C. 781; 1933 A. 666=1933 A.L.J. 1102. Where a valid order has been passed by a Court granting permission to decree-holder to set-off decretal amount against purchase-money, another Court of a superior grade before

whom execution against the same property is pending has no power under S. 63 to cancel that permission. 55 B. 473=133 I. C. 817=1931 B. 350. See also 1937 Cal. 55. Persons with rights under S. 73 not existing on date of sale or within fifteen days thereafter—Order under this rule is not subject to S. 73. 1931 M. 103=130 I. C. 458. When decree-holder has been given permission to bid and to set-off the amount of his bid and when his bid is less than the decree amount, the whole of the set-off must be deemed as made on the date of sale and the whole of the amount must be deemed to have been received or realised *eo instanti* the sale is made. In such a case S. 73 will give no benefit to other decree-holders who apply for rateable distribution after the conclusion of the sale, however soon after its conclusion their application may be made. 145 I.C. 957=38 L.W. 579=65 M. L.J. 569. Decree awarding interest until date of realisation—Decree-holder granted permission to bid and set-off—"Date of realisation"—Meaning of—He has right to interest up to not after date of sale. (1939) 1 M.L.J. 466=49 L.W. 440. Purchase by a decree-holder is subject to the final result of the litigation between him and judgment-debtor. 27 M. 98. Delay by the decree-holder purchaser in deposit of money is not a material irregularity and the sale is not vitiated. 2 Bur.L.J. 166=1924 R. 81. Court can refuse to confirm a sale on failure to fulfil conditions subject to which permission to bid was given. 1 P. 235=69 I.C. 872; also 15 I.C. 888=10 O.C. 86. Decree-holder, allowed to purchase in full satisfaction of decree, must pay poundage. 27 A.L.J. 243=118 I.C. 378=1929 A. 266 (1). If Court permitted a decree-holder to bid at the sale and consequently allowed him to set-off the purchase-money towards his decree, it is open to the Court afterwards on a good case being made out to withdraw that order and order him to deposit the purchase-money in cash for rateable distribution. Such an order to refund can be enforced by process in execution. The purchase-money is in such a case in the power and at the disposal of Court within the meaning of S. 73. 134 I.C. 616=1931 P. 405. See also 10 P. 830; 1937 Nag. 383. Executing Court has power under this rule to impose a condition to the permission given to decree-holder to bid, namely, that he must bid up to the decretal amount. But when his bid does not go up to that amount, executing Court, though it can refuse his bid, has no power to dismiss the execution case. Proper course is either to put the property again then and there for sale or to direct the decree-holder to take steps for the issue of a fresh proclamation. 39 C.W.N. 1293. A purchase made by a



- (2) Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

Where decree-holder purchases, amount of decree may be taken as payment.

- (3) Where a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder.

LOC. AMS.—[ALLAHABAD.] In Allahabad *delete* sub-rr. (1) and (3) of r. 72 and *read* sub-r. (2) as r. 72; and in the rules so read, *substitute* for the words "with such permission," "property sold."

[BOMBAY.] After r. 72 of O. 21, the following shall be *inserted* :—

"72-A. If leave to bid is granted to the mortgagee of immovable property a reserve price as regards him shall be fixed (unless the Court shall otherwise think fit) at a sum not less than the amount then due for principal, interest and costs in case the property is sold in one lot, and not less in respect of each lot (in case the property is sold in lots) than such figure as shall appear to be properly attributable to it in relation to the amount aforesaid."

#### NOTES.

decree-holder in violation of O. 21, R. 72, is no doubt a fraud upon the Court, but such purchase is only voidable and not void; in other words it is valid until set aside on an application under Cl. (3) of O. 21, R. 72. If no such application is filed within the time limited, the purchaser is entitled to realise his rights under the sale; and it is not open to the judgment-debtor to plead O. 21, R. 72 in bar of a suit for possession irrespective of limitation and of the Court which tries that suit. 1941 M.W.N. 988=(1941) 2 M.L.J. 943.

O. 21, R. 72 (2).—An order under R. 72 (2), allowing a decree-holder to set-off the amount of his decree against the purchase-money is mere machinery which does not affect the rights of third parties who are entitled to rateable distribution. He cannot set-off against a portion of the proceeds of the sale which belongs to other parties. 37 Bom.L.R. 78=159 I.C. 505=1935 B. 176=59 B. 310. Right of set-off—When to be allowed—Attachment of same property under decree of another Court effected prior to attachment under decree under execution—When a bar. 1937 C. 55. *See also* 166 I.C. 873=17 Pat.L.T. 847=1937 P. 50; 40 P.L.R. 544; 38 N.L.J. 180. Decree-holder was allowed by Court to bid and to set-off the purchase price against his decree. Before sale was held, judgment-debtor applied for insolvency. Later on he was adjudicated. Official Receiver without challenging validity of the sale applied that purchaser should submit purchase price to the Official Receiver. *Held*, that the Court could not go behind its previous order by ordering the purchaser to deposit the purchase-money with the Official Receiver. 159 I.C. 244=1935 M. 907. Where a decree-holder was given leave to bid on condition that he does not bid for any amount less than the upset price, actually as a

matter of fact bids for a much smaller amount and the bid is accepted, the sale cannot be allowed to stand. To do so would be to deprive R. 72 (1) of its value. The conditions cannot be disregarded. 1938 N. L.J. 180. The decretal amount is set-off against the purchase price automatically by operation of law and no order of the Court is necessary in order that the respective amounts may be set-off against each other. The Court executing the decree has only to enter up satisfaction of the decree in whole or in part after the setting off has taken place. 1935 L. 690 (57 M. 38=68 M.L.J. 569, Foll.). Hence when a decree-holder has been given permission to bid and set-off, and when the amount of the successful bid is less than the decretal amount, the whole of the set-off must be deemed as made on the date of sale, and the whole of the amount must be deemed to have been received or realised *eo instanti* the sale is made. (*Ibid.*) *See also* 1939 Lah. 210.

O. 21, R. 72 (3).—The sons of a judgment-debtor are not persons interested in the sale of ancestral property held in execution of a money-decree against their father so as to be entitled to apply under this rule to set aside a sale. 13 M.L.J. 231 at 235. *See also* 11 M. 356 (359); 16 M. 287; 22 B. 271; 5 B. 130; 10 C. 757; 14 M. 498; 11 C. 731. Purchase by a benamidar or decree-holder is similarly only voidable. 44 B. 352=56 I.C. 349=22 Bom.L.R. 296; *also* 27 C.W.N. 208=37 C.L.J. 403; 47 C. 377=24 C.W.N. 229 (F.B.). When no express permission was given but the decree-holder was permitted to bid throughout, permission can be inferred; and without proof of loss the sale cannot be set aside. 6 P. 432=104 I.C. 215=1927 P. 312. Purchase by the decree-holder without permission is not void altogether but only liable to be set aside on application



[N.-W.F.P.] For sub-r. (1), substitute the following :—

“ 72. (1) The holder of a decree, in execution of which the property is sold, shall be competent to bid for or purchase the property without express permission of the Court, provided that the Court may on application of the judgment-debtor and for sufficient cause debar him from so bidding or purchasing.”

In sub-r. (2) for the words “ with such permission ” substitute the words “ the property.”  
Cancel sub-r. (3).

[OUDH.] Substitute for sub-r. (1) of r. 72.—“ The holder of a decree, in execution of which property is sold, shall be competent to bid for, or purchase the property, provided that the judgment-debtor may by application, supported by an affidavit, apply to the Court to debar the decree-holder from purchasing the property; and the Court may, on such application, either debar the decree-holder from purchasing the property, or grant permission to do so on such terms as may seem just.”

In sub-r. (2) for the words “ with such permission ” read the words “ the property sold.” Cancel sub-r. (3).

[PATNA.] O. 21, r. 72.—In r. 72 (1) substitute the following for sub-r. (1) :—

“(i) No holder of a decree in execution of which property is sold shall be precluded from bidding for or purchasing the property unless an express order to that effect is made by the Court.”

(ii) In sub-r. (2) for the words “ with such permission ” substitute the words “ the property.”

(iii) Substitute the following for sub-r. (3) :—

“(3) Where notwithstanding an order made under sub-r. (1) a decree-holder purchases the property by himself or through another person the Court shall, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale; and the cost of such application and order and any deficiency of price which may happen on the re-sale and all expenses attending it shall be in the discretion of the Court.”

[RANGOON.] R. 72 (2). For the words “ with such permission ” the words “ the property ” shall be substituted.

R. 72 (1) and (3) shall be cancelled and the figure and brackets “ (2) ” occurring at the beginning of sub-r. (2) shall be deleted.

73. No officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.

Restriction on bidding or purchase by officers.

*Sale of movable property.*

Sale of agricultural produce.

74. (1) Where the property to be sold is agricultural produce, the sale shall be held,—

(a) if such produce is a growing crop, on or near the land on which such crop has grown, or

(b) if such produce has been cut or gathered, at or near the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited:

#### NOTES.

and upon cause shown. 49 I.A. 312=1 P. 733=44 M.L.J. 718 (P.C.); also 39 I.C. 3=41 B. 357; 101 I.C. 89 (2). Proof of substantial loss is necessary to set aside a purchase by the decree-holder without permission. 13 L.W. 616=62 I.C. 854.

APPEAL.—An order refusing leave to bid is not appealable. 38 C. 717=15 C.W.N. 862=38 I.A. 126 (P.C.). See also 1939 Lah. 210. No second appeal lies. 21 C. 789.

O. 21, R. 72-A (Bom.).—Applicability to original side, Bombay High Court. 52 B. 459=1928 B. 123. Omission to fix reserve price—Sale whether liable to be set aside. 32 Bom.L.R. 436.

O. 21, R. 72 (N.W.F. Province).—In N.W.F. Province, no permission is, of course, necessary for the decree-holder to bid at an auction in view of R. 72, as applicable to that province. 165 I.C. 554 (Pesh.).

O. 21, Rr. 72 and 73.—A mortgagee decree-holder was appointed receiver of certain mortgaged properties. Prior to such appointment he had obtained leave to bid at the execution sale, but he did not obtain any

such leave as receiver. At the sale held in execution he purchased the properties in respect of which he had been appointed receiver. Held, (1) that leave given to a decree-holder as such cannot be taken to give him leave to bid when he was subsequently appointed receiver as the two capacities were entirely distinct; (2) that a receiver, being in a fiduciary position and having special opportunities of knowledge should not be allowed to figure as a purchaser at an auction as that would place him in a position in which his interest as a buyer would conflict with his duties as receiver; (3) that the principle that he should not be allowed to purchase should be enforced by imposing an absolute prohibition and not with reference to the merits of individual cases; and (4) that consequently the sale should be set aside. 41 L.W. 737=1935 M. 421=68 M. L. J. 597.

O. 21, Rr. 72 and 84.—A decree-holder auction-purchaser should generally be allowed to set-off the decretal amount against the purchase-money. 40 P.L.R. 544 (1).

O. 21, R. 73.—Pleaders of parties are



Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage.

(2) Where, on the produce being put up for sale,—

(a) a fair price, in the estimation of the person holding the sale, is not offered for it, and

(b) the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till the next day or, if a market is held at the place of sale, the next market-day, the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce.

75. (1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing.

(2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered, and the purchaser shall be entitled to enter on the land, and to do all that is necessary for the purpose of tending and cutting or gathering it.

LOC. AMS.—[CALCUTTA.] O. 21, r. 75 (2).

(a) Insert the following words in sub-r. (2), r. 75, O. 21, after the words “where the crop from its nature does not admit of being stored.”

“or can be sold to greater advantage in an unripe state (e.g. as green wheat).”

(b) Cancel the word “and” between the words “tending” and “cutting” in sub-r. (2) and substitute therefor the word “or”.

[LAHORE AND N.-W.F.P.] In O. 21, r. 75, sub-r. (2) after the word “stored” add the words “or can be sold to greater advantage in an unripe state.”

[MADRAS.] Substitute the following for the existing rule :—

“75. (1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, unless the Court decides to proceed under the provisions of sub-r. (2) hereunder, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing.

(2) Where the crop from its nature does not admit of being stored, or can be sold to greater advantage in an unripe state, it may be sold before it is cut and gathered or in such unripe state, and the purchaser shall be entitled to enter on the land, and do all that is necessary for the purpose of tending and cutting or gathering it.”

(Vide *Fort St. George Gazette*, dated 20th October, 1936, Pt. II, pp. 1394-1396.)

[NAGPUR.] Rule 75.—In sub-r. (2) of r. 75, after the words “being stored” insert the words “or, where it appears to the Court that the crop can be sold to greater advantage in an unripe state.”

[OUDH.] O. 21, r. 75 (2).—In Oudh after the words “being stored” add “or where it appears to the Court that the crop can be sold to a greater advantage in an unripe state.”

[PATNA.] Substitute the following for r. 75 :—

“75. Where the property to be sold is a growing crop which can be sold to greater advantage in an unripe or unripe state, it may be sold unripe, and the purchaser shall be entitled to enter on the land to do all that is necessary for the purpose of tending and reaping it. In all other cases the day of sale shall be so fixed as to admit of the crop ripening and being reaped, before the sale.”

76. Where the property to be sold is a negotiable instrument or a share in a corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker.

Negotiable instruments and shares in corporations.

#### NOTES.

not debarred from purchasing property sold in execution. 10 M. 111. But see 116 I. C. 65. Nor their clerks. 49 A. 292=25 A.L.J. 173=1927 A. 76. But where the

pleader is instructed to purchase for his client, see 15 M. 98.

O. 21, R. 76.—The Court is not bound to sell through a broker. 8 W.R. 415.



77. (1) Where movable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property shall forthwith be resold.

(2) On payment of the purchase-money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute.

(3) Where the movable property to be sold is a share in goods belonging to the judgment-debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner.

78. No irregularity in publishing or conducting the sale of movable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.

79. (1) Where the property sold is movable property of which actual seizure has been made, it shall be delivered to the purchaser.

(2) Where the property sold is movable property in the possession of some person other than the judgment-debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

(3) Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser.

80. (1) Where the execution of a document or the endorsement of the party

#### NOTES.

O. 21, R. 77.—The rule applies to the sale of movable property other than a negotiable instrument or stock. 4 C. 946. The officer conducting the sale has discretion to allow the purchase-money to be paid at a reasonable time after sale. 4 N.W.P.H. C.R. 37. The word "forthwith" indicates that no fresh proclamation is necessary. 12 M. 454. A suit will lie to set aside the sale if the title is guaranteed. 2 B. 258.

O. 21, R. 78.—There is no provision in the case for setting aside a sale of movable property. 49 I.C. 140=12 P.R. 1919. See also 1927 A. 41; 115 I.C. 70. Money is not "movable property". 1 R. 360=1924 R. 21. A sale of movable property is void, where at the time of the actual sale, the judgment-debtor is dead, and his legal representatives are not brought on the record. 8 M.L.J. 288. Effect of sale, where the attachment has not been duly made. See 5 A. 86; 2 B. 258 and 8 M.L.J. 288. Where the article sold was not of the particular description as

offered and brought, the buyer can reject them and recover the money paid. 54 I.C. 315. There is no warranty of title in sales of movables. 2 R. 202=97 I.C. 1029=1926 R. 214. No appeal lies against an order confirming a sale of movable or immovable properties. 115 I.C. 70=30 Punj.L.R. 421. O. 21, R. 72 provides that the decree-holder can himself bid for and purchase the property unless debarred by an order of Court. Where therefore the officer in charge of the sale proceedings dishonestly sent away the decree-holder in order that he should not be in a position to raise the bids, there is a serious irregularity in the conduct of the sale resulting in loss to the decree-holder. 148 I.C. 132=11 O.W.N. 116=1934 O. 94 (2).

O. 21, R. 80.—Court can cancel a previous endorsement as well under this rule. 12 I.C. 913=4 Bur.L.T. 138. The rule is only permissive and not obligatory. 111 I.C. 225=1928 M.W.N. 442=1928 M. 571.



Transfer of negotiable instruments and shares.

in whose name a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party.

(2) Such execution or endorsement may be in the following form, namely :—

*A. B. by C. D., Judge of the Court of (or as the case may be), in a suit by E. F. against A. B.*

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same ; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself.

81. In the case of any movable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct ; and such property shall vest accordingly.

Vesting order in case of other property.

LOC. AM.—[RANGOON.] In O. 21, the following shall be inserted as r. 81-A :—

“ 81-A. Whenever guns or other arms in respect of which licences have to be taken by purchasers under the Indian Arms Act, 1878, are sold by public auction in execution of decrees, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act.”

#### *Sale of immovable property.*

What Courts may order sales.

82. Sales of immovable property in execution of decrees may be ordered by any Court other than a Court of Small Causes.

83. (1) Where an order for the sale of immovable property has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immovable property of the judgment-debtor, the Court may, on his application, postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount.

Postponement of sale to enable judgment-debtor to raise amount of decree.

#### NOTES.

O. 21, R. 81.—A mortgagee of movables cannot follow the movable property into the hands of the auction-purchaser. 1925 C. 164. On this rule, see also 92 I.C. 370=1925 R. 303.

O. 21, R. 82.—Sale of immovable property by a Court of Small Causes confers no title on purchaser. 17 W.R. 309. See also 7 M. 592; 8 M. 8. Court of Small Causes must proceed under S. 39 in all cases where execution is sought against the immovable property of judgment-debtor. 7 M. 592; see also 8 M. 8.

O. 21, R. 83.—See 52 L.W. 862=(1940) 2 M.L.J. 1038. Sub-rule (3) is new and follows the ruling in 6 M.L.J. 187. See also 33 C. 335. Provisions of this rule are inapplicable to a decree for sale in a mortgage suit. 55 I.C. 816=5 L.L.J. 67. Extension of time for redemption to enable mortgagor to raise amount by private sale is prohibited by the Code and no appeal lies from a refusal order. 46 M.L.J. 71=1924 M. 234. There should be a reasonable probability of

the debt being discharged within a reasonably short period. 21 W.R. 146. In 15 W. R. 322 six months' time was given. Sanction must be given by the Court which passed the order for sale. The sanction of any other Court is of no use. 23 B. 287. Where a property is purchased on the basis of Court's certificate granted before an attachment by another decree-holder, purchaser gets a good title. No formal confirmation is necessary. Order to pay the money to the creditor amounts to confirmation. 21 I.C. 210. But see 40 L.W. 720=1934 M. 727=67 M.L.J. 741. See also 19 B. 539. Guardian of a minor also cannot alienate property of the minor without the sanction of Court. To have such a transfer set aside, guardian must return the consideration. 36 C.L.J. 326=49 C. 911. Where decree was against two divided brothers, and the elder alone obtained permission to sell by private sale, he could not sell the younger's share as well. The younger on payment of half the purchase-money could get back his half-share from the purchaser. 11 L.W. 213=52 I.C. 956.



(2) In such case the Court shall grant a certificate to the judgment-debtor authorizing him within a period to be mentioned therein, and notwithstanding anything contained in section 64, to make the proposed mortgage, lease or sale :

Provided that all monies payable under such mortgage, lease or sale shall be paid, not to the judgment-debtor, but save in so far as a decree-holder is entitled to set-off such money under the provisions of rule 72, into Court :

Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court.

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage of, or charge on, such property.

84. (1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold.

(2) Where the decree-holder is the purchaser and is entitled to set-off the purchase-money under rule 72, the Court may dispense with the requirements of this rule.

#### NOTES.

Grant of qualified permission to judgment-debtor—Subsequent cancellation—Rights of prospective purchaser. 151 I.C. 528=1934 Pesh. 76. Where there are several decree-holders and attachments, the Court should, while granting permission under R. 83, order the judgment-debtor to deposit entire sale proceeds in Court. 1935 L. 481.

APPEAL.—Order under O. 21, R. 83 is not appealable. 109 I.C. 524.

O. 21, R. 84.—SCOPE.—The rule does not prevent judgment-creditor from proceeding against other properties belonging to his debtor. 8 C. 291. The conditions of this rule are indispensable, and there is no sale where they are not followed. 5 A. 316. See also 16 C. 33 and 14 M. 227.

CONSTRUCTION OF SECTION.—Cl. 2, R. 84 must be construed in such a way as to be consistent with R. 72, Cl. (2) and with the proviso to R. 85 of the same order. 159 I. C. 228=42 L.W. 564=1935 M. 893. Where the second part of R. 84 is put into operation, the first part ceases to apply, and hence the use of the word "immediately" in the first part cannot be relied upon in order to ascertain the precise meaning of the second part. The second part must be interpreted according to the plain meaning of the words contained in it alone. There is nothing in those words precluding the Court from passing an order with retrospective effect. Hence where an auction-purchaser delays in applying under this second part, he should not be allowed the privilege which it empowers the Court to extend. But where the auction-purchaser applied to the Court immediately upon the very same day as the auction and the subsequent delay of four days was not due to the action of the auction-purchaser, but to the proceedings of the Court. Held, that the Court could dispense with the deposit under R. 84 (2). 157 I.C. 748=1935 Pesh. 123.

C. C. M.—134

DEPOSIT.—The deposit is to be made only after the bid is accepted and the person bidding declared to be the purchaser. No deposit can be required from intending bidders. 9 M.I.A. 328; 118 I.C. 901. An offer may be retracted at any time before it is accepted. 14 M. 235. Sale is complete not on the acceptance of the deposit by the officer conducting the sale, but when an order accepting the bid is made by the presiding officer. 2 P. 548=76 I.C. 113; 1929 L. 673; 6 R. 609=114 I.C. 522. But see 1931 L. 78. See on this point also 9 R. 608 (overruling 6 R. 609) and 1932 L. 525. But see 148 I.C. 1082=1934 Pesh. 25. Where Judge refuses to accept the bid because he has got a higher bid it is open to him to order a re-sale and original bidder is not entitled to notice in that re-sale. 58 C. 788. If the deposit is not made under this rule, the sale is not null and void. It is a mere irregularity. 67 I.C. 427; 144 I.C. 314=10 O. W.N. 440=1933 O. 345. See also 150 I.C. 733=1934 P. 329. But see 9 I. C. 66=15 C.W.N. 350. The omission to pay 25 per cent. of the sale money amounts only to an irregularity and a sale can be set aside on this ground only if it is proved that substantial injury has been caused by it. 176 I.C. 609=A.I.R. 1938 Pesh. 36. The officer conducting sale cannot extend time for payment of deposit and failure to deposit immediately annuls sale. 30 I.C. 230=2 O.L.J. 216. But see 67 I.C. 427; 140 I.C. 98=1932 P. 342. Decree-holder can withdraw the deposit only after confirmation of sale and is entitled to interest. 25 I.C. 859. Deposit compulsory unless dispensed with by Court. 116 I.C. 212=1929 L. 492. As to effect of permission to bid and set off dispensing with the deposit of 25 per cent. See 1939 Lah. 210. Where a bid is made on behalf of a temple, which not being a juristic person cannot either sue or be sued, and a default is made in the payment of the 25 per cent. and a re-



LOC. AM.—[OUDH.] O. 21, r. 84 (2).—The Court shall not dispense with the requirements of this rule in a case in which there is an application for rateable distribution of assets.

85. The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property:

Time for payment in full of purchase-money. Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72.

LOC. AMS.—[MADRAS.] Substitute the following for the existing rule:—

Time for payment in full, purchase-money and of stamp certificate. “85. The full amount of purchase-money payable and amount required for the general stamp for the certificate under r. 94 shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property:

Provided that in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under r. 72.”

#### NOTES.

sale is held, the liability in respect of the deficit is not that of the bidder personally, but only as a representative of the temple and hence is recoverable out of the temple funds. 1939 N.L.J. 504=I.L.R. (1941) Nag. 485=A.I.R. 1939 Nag. 269.

BID UNDER MISAPPREHENSION—RESTORATION OF DEPOSIT—POWER OF COURT.—Where a person bids at an execution sale for a certain property under a misapprehension that he is bidding for another property and deposits 25 per cent. of the price, it is open to Court on his application to pass an order, before the sale is sanctioned by it, that the sale should not be enforced and to direct the restoration of the deposit. 1935 A.W.R. 29=1935 A.L.J. 249=1935 A. 204.

RE-SALE.—See 1937 A.W.R. 426. Any one who is interested in having the property re-sold can move Court for the purpose. He need not necessarily be the decree-holder. 138 I.C. 103=1932 A.L.J. 501. The word ‘forthwith’ indicates that no fresh proclamation is necessary. 12 M. 454. An auction sale is complete when the final bid is accepted by the Sale Amin who conducts it, and to make it binding on the parties, it is not necessary to obtain the permission of the Court ordering the sale. The deposit of 25 per cent. has to be paid to the person conducting the sale, ‘immediately’ after a person is declared to be the purchaser. If it is not so paid the property shall ‘forthwith’ be resold. That word in R. 84 governs the time at which the resale is to be held and an officer is justified in holding a resale the same day and is not bound to wait for the payment of 25 per cent. If there is any deficiency by reason of the purchaser’s default it can be recovered from him. 1939 N.L.J. 504=A.I.R. 1939 Nag. 269=I.L.R. (1941) Nag. 485. As to whether the sale can be adjourned, see 16 C. 33 (38); 12 M. 454; 107 I.C. 274. When property is put up again forthwith and sold under this rule, it is re-sold within the meaning of R. 71. 12 M. 454. If the re-sale is held after a fresh proclamation, the sale is not held “forthwith” and the bidder cannot be held liable for the deficiency. 107 I.C. 274=1928 L. 249. *Contra*

1930 M. 761=59 M.L.J. 267 (F.B.). Defaulting purchaser is not absolved from liability for want of bidders at re-sale. 95 I.C. 865 (2)=1926 M. 739=51 M. L. J. 658. Where the highest bidder dies, to require the next higher bidder to deposit the money is illegal and open to revision. 42 M. 776=37 M.L.J. 274. In a re-sale the officer conducting the sale need not commence from the next highest bid below that made by the defaulter. 1 W.R. Mis. 11. See 7 C. 337. Default of purchaser in payment of deposit—No certificate by officer holding sale in form prescribed—Right of decree-holder to recover deficiency. 141 I. C. 367=29 N.L.R. 52=1933 N. 123. According to O. 21, R. 72, as applicable to N. W.F. Province, no permission to bid is necessary. But this does not impliedly dispense with the requirement of this rule which requires 25 per cent. deposit. 165 I.C. 554 (Pesh.). The sale is not completed until such deposit is made; for, if such a deposit is not made, it is the duty of the officer conducting the sale to put the property up to auction again immediately. His action in doing so is not really a resale of the property but a continuation of the previous auction (*ibid*).

APPEAL.—An order setting aside sale on default to deposit purchase-money is not appealable. 58 I.C. 597. See also 41 P.L. R. 568=1939 Lah. 210; 1937 Pesh. 64.

O. 21, R. 85.—The words “into Court” have been added to remove the distinction which was drawn in 20 B. 745 between days on which the Court and those on which the Court’s office, respectively, is closed or open. When the time for payment expires during the recess, the money may be paid on the day the Court re-opens. 13 M.L.J. 271; 116 I.C. 65=1929 N. 305. Rules 85 has no application to a case where the purchaser had duly deposited the price but had withdrawn it on the sale being set aside. 1938 N.L.J. 207. The sending of a postal money order by the purchaser does not satisfy the rule. He is bound to see that the money reaches the Court in time. 22 B. 415; 7 M. 211. See 7 C. 337. The fifteen days’ time does not apply on confirmation of sale by appellate Court to re-payment of money.



[NAGPUR.] Rule 85.—Add the following explanation:—

“Explanation.—When an amount is tendered on any day after 1 P.M., but paid into Court on the next working day between 11 A.M. and 1 P.M., the payment shall be deemed to have been made on the day on which the tender is made.”

[PATNA.] In r. 85 of O. 21 for the words beginning with “the full amount” and ending with “sale of property” the following is substituted:—

“The purchaser shall pay into Court the full amount of the purchase-money and shall also tender the stamp necessary for the certificate referred to in r. 94 before the Court closes on the fifteenth day from the sale of the property.”

[BOMBAY.] The following shall be added as r. 85-A after r. 85 of O. 21:—

“85-A. In cases where execution has been transferred to the Collector, for the purposes of rr. 84 and 85, the purchaser shall be deemed to be entitled to a set-off under r. 72 if he produces a certificate to that effect from the Court executing the decree.”

86. In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.

LOC. AM.—[PATNA.] O. 21, r. 86.—Insert the words “or tender of stamp” between the words “payment” and “within.”

#### LEG. REF.

<sup>1</sup> This amendment shall have effect from 1st January, 1938.

#### NOTES.

which had been withdrawn on sale being set aside by the lower Court's order. 42 I.C. 552=1917 M.W.N. 861. Court has no jurisdiction to extend the time when default is made in depositing the balance of the purchase-money within 15 days as required by R. 85. Court ought to order re-sale of the property and the only discretion is as regards the forfeiture of the deposit of 25 per cent. 57 A. 658=153 I. C. 910=1935 A. 243=1935 A.W.R. 28=1935 A.L.J. 167. Extension of time can be granted with consent of parties. 100 I.C. 800=1927 L. 337. See also 122 I.C. 561. Yet when no objection was made when it was extended and the sale confirmed and money drawn out, the sale cannot be set aside on account of want of consent. 43 M.L.J. 477=69 I.C. 1001=1923 M. 48. See also 35 C.W.N. 877. The property is liable to be re-sold when the decree-holder purchaser does not deposit the balance after deducting the decree amount. 51 I.C. 316. Amount of bid less or equal to amount sought to be set-off—Procedure. 1930 M.W.N. 568. Joint purchasers—Balance money paid by one enures for the benefit of the other as well. 51 C. 992=1926 C. 719; 1925 C. 164=81 I.C. 1029. Tender in Court of balance on 15th day—Payment into Treasury on next day—Tender amounted to payment. 148 I.C. 348=1934 A.L.J. 71=1934 A. 817. In Collector's sales, the non-payment of three-fourths of the sale price within the time limited by R. 85, is a mere irregularity and does not automatically involve the holding of a sale afresh. 20 N.L.J. 80.

O. 21, Rr. 85 and 86.—The “publishing” of the sale has reference to all proceedings that take place till the sale is actually held. Any proceedings that take place after the deposit of 25 per

cent. of the purchase money has been made cannot be regarded as falling within the meaning of the words “publishing” or “conducting the sale”. The failure to deposit 75 per cent. of the sale price within a fortnight as required by O. 21, R. 85, does not therefore amount to a material irregularity in publishing or conducting a sale within the meaning of O. 21, R. 90. When default is made by the auction-purchaser in paying into Court full amount of the purchase money within the time allowed by O. 21, R. 85 the Court has no jurisdiction to extend the time but must order a re-sale under R. 86. The only discretion given by R. 86 is in the matter of forfeiture of the deposit of 25 per cent. made by the auction-purchaser, and not in the matter of re-sale. I.L.R. (1938) Lah. 97=40 P.L.R. 509 & 1004=A.I.R. 1938 Lah. 198. See also (1938) 2 M.L.J. 833.

O. 21 (Mad. H.C.), Rr. 85 and 86.—Where default is committed in respect of the cost of the general stamp to be affixed to the sale certificate only the initial deposit of 25 per cent. can in any case be forfeited. The whole amount cannot be forfeited. 48 L. W. 416=A.I.R. 1938 Mad. 905=(1938) 2 M.L.J. 529.

O. 21, R. 86.—Judgment-debtor not entitled to have sale set aside under this rule, when no prejudice was caused to him, and failure of deposit was due to mistake of Court. 144 I.C. 699=1933 R. 104. The deposit alone can be forfeited and not the right which the decree-holder has under the decree. 7 W.R. 110. The words “if the Court thinks fit” are inserted to remove the hardship caused in certain circumstances, vide 25 M. 535; 95 I.C. 46=1926 A. 509. See also 1937 Sind 311. O. 21, R. 8 makes it obligatory on the Court to re-sell the property in case default is made in payment of the balance of the purchase money as required by O. 21, R. 85. The discretion vested in the Court is only as regards the forfeiture of the deposit. 1938 M.W.N. 1031=(1938) 2 M.L.J. 833; see



87. Every re-sale of immovable property, in default of payment of the purchase-money, within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale.

LOC. AM.—[MADRAS.] O. 21, r. 87.—*Substitute* the following for the existing rule:—

87. Every re-sale of immovable property, in default of the payment of the amounts mentioned in r. 85 within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale."

88. Where the property sold is a share of undivided immovable property Bid of co-sharer to have and two or more persons, of whom one is a co-sharer, preference. respectively bid the same sum for such property or or any lot, the bid shall be deemed to be the bid of the co-sharer.

#### NOTES.

*also* 1938 Lah. 198. If a purchaser makes default of payment of the balance of the purchase-money, he forfeits all claim to the property purchased, whether the deposit made by him under O. 21, R. 85, C. P. Code, be forfeited or not, and the auction sale at which he purchased becomes a nullity. 1941 Cal. 85=72 C.L.J. 129. Decree-holder himself, even though the purchaser at the re-sale, can apply to attach the deposit made by the first defaulting purchaser. 48 M. L.J. 335=86 I.C. 373=1925 P.C. 61 (P.C.). The deposit should be refunded on good grounds shown for failure to pay the balance. 59 I.C. 705=17 N.L.R. 15. Even apart from this rule Court can order re-sale on failure to fulfil conditions subject to which decree-holder was permitted to bid. 1 P. 235=69 I.C. 872. Purchaser paying 25 per cent. of purchase-money and not paying balance in time—Judgment-debtor paying off amount of decree and 5 per cent. under R. 89—Forfeiture of 25 per cent. deposit—Not proper—Purchaser has no right to 5 per cent. under R. 89. 151 I.C. 310=11 O.W.N. 1132=1934 O. 429. In execution of his money decree, A purchased the property, and deposited the amount of the purchase price minus the amount of the decree into Court. Prior to the sale, B another decree-holder had also applied for execution, and a second sale was held and B purchased the property. The Court thereupon passed an order confirming the sale in favour of A cancelling that in favour of B and directing A to pay the entire purchase price in cash. On default by A, the Court further ordered that B was entitled to recover the amount by execution. *Held*, that the order was erroneous. As between two rival decree-holders against the same judgment-debtors, the Court had no authority to order that one decree-holder should pay another. The correct order should be to annul the sale and direct the re-sale of the property with a view to enable all persons entitled to rateable distribution to share in the proceeds. 142 I.C. 577=1933 A.L.J. 336=1933 A. 337. Re-sale under O. 21, Rr. 86 and 87—Application for—Limitation—Duty of decree-holder—Limitation Act, Art. 181 applies. (1940) 1 M. L. J. 537=51 L. W. 739=1940 Mad. 566.

O. 21, R. 87.—*See* 12 M. 454. There is

no illegality in not mentioning time and place of re-sale in the sale proclamation, if no deficiency results. 87 I.C. 1=1925 M. 631.

O. 21, R. 88: SCOPE.—The ordinary law of pre-emption is inapplicable to sales in execution of decrees, and hence this rule which affords a remedy. 13 A. 224 (228). *See also* 27 A. 670 (677). O. 21, R. 88 is intended to safeguard the rights of the co-sharers in undivided immovable property. The executing Court is to act judicially and not arbitrarily and particularly when the law gives a co-sharer a right of pre-emption, it is necessary for the Court to interpret the rule in such a manner as will protect that right and not in a manner as will have the effect of depriving co-sharers of their right. 1940 N.L.J. 453=A.I.R. 1940 Nag. 337. The object of the rule is to enable a co-sharer to keep out strangers. 26 I.C. 95=12 A.L.J. 1148. A pre-emption suit will not lie against such a bidder. (*Ibid.*) The requirements of the rule are satisfied if the co-sharer asserts his right of pre-emption when bidding for the same amount 36 I.C. 654=3 O.L.J. 405.

WHO ARE CO-SHARERS.—Members of a joint Hindu family, other than that member who is recorded in the Collector's register as sharer in the *mehal* are co-sharers. 7 A. 184. A Hindu widow holding by inheritance her deceased husband's share in a village is also a co-sharer. 1 A. 452. But possession by her for life of a share in a village, in lieu of maintenance, does not make her a co-sharer. 6 A. 17. *See also* 7 A. 860. BID THE SUM.—There must be a distinct bid by the co-sharer in the ordinary manner of offering bids. 3 A. 827. *See also* 2 A. 850.

ILLUSTRATIVE CASES.—The conditions of pre-emption under Mahomedan Law do not apply to claims under this rule. 6 N.-W. P. 289. If claimant has fulfilled the conditions of sale and his rights are clear, Court executing the decree is bound to give effect to the right. 6 N.W.P. 272; 7 N.W.P. 97. *See also* 1 A. 272 and 3 A. 112; 1 A. 277; 6 N.W.P. 289. A person claiming to be a co-sharer cannot object to confirmation of sale in favour of the person recorded as auction-purchaser. 5 A. 42. Under Oudh Civil Rules, R. 211, sale officer has no right to decide as to claims and objections. 145 I.C. 281=10 O.W.N. 816=1933 O. 401.



89. (1) Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court,—

## NOTES.

**APPEAL.**—No appeal lies against an order passed under this rule. 3 A. 674; 5 A. 42. Also from an order refusing to restore to file an application under this rule, which has been dismissed for default. 29 A. 596.

**O. 21, R. 89: SCOPE.**—See 58 I.A. 50 = 35 C.W.N. 81 = 60 M.L.J. 423 (P.C.). The intention of R. 89 of O. 21, C. P. Code, is to provide a simple procedure where at the last moment a judgment-debtor may come and deposit without condition the full decretal sum and five per cent. penalty and save his property. There is to be no room for argument or doubt or question or enquiry. It is not for the Court to enquire where the judgment-debtor got the money. He may get it from a purchaser of his property after the sale, it matters not; the Court will not inquire, but the judgment-debtor must not deposit the money under protest, he cannot impose conditions. I.L.R. (1940) Kar. 360 = A.I.R. 1940 Sind 181. Proceedings under this rule are execution proceedings. O. 9 does not apply. 28 Bom.L.R. 668 = 50 B. 457 = 96 I.C. 411 = 1926 B. 377. Provisions of R. 89, are to be strictly complied with. 106 I.C. 568. See also 42 M.L.J. 71. Object of the rule is to prevent sales for inadequate prices. 40 B. 557 = 18 Bom.L.R. 571. Right conferred by this rule is not an absolute right which can be enforced by suit against any particular person. 18 C. 481. Rule must be strictly construed. One judgment-debtor, is not entitled to take advantage of any deposit made by his co-judgment-debtor, independently made. 42 M.L.J. 71 = 65 I.C. 893. Also 39 M. 429 = 28 M.L.J. 262. But see 22 I.C. 53. Rule applies to cases where attachment was made prior to the date on which this rule became law. 18 M. 477; 22 C. 767 (F.B.); to the sale of a tenure in execution of a decree for its own arrears, 23 C. 393; to sales in enforcement of decrees on an award by arbitrators in a partition suit, 27 C.W.N. 466 = 1923 C. 582; to sales in mortgage decrees and to sales on the Original Side of Calcutta High Court, 46 C. 69 = 24 C.W.N. 1032. As to High Courts generally, see 59 I.C. 432 = 24 C.W.N. 536; I.L.R. (1937) 2 Cal. 606 = 41 C.W.N. 998. See also 41 M.L.J. 465 = 68 I.C. 916; 25 M. 244 (F.B.); 25 B. 104; 28 A. 778; 25 C. 703 (F.B.); 56 C. 477 = 1929 C. 574. Costs of suit—Mortgage suit on the Original Side, High Court—Application for setting aside sale—Item of costs whether need be paid approximately. 56 C. 477 = 1929 C. 574. Rule not applicable to sales under Public Demands Recovery Act. 18 C.L.J. 628 = 18 C.W.N. 766; nor to execution pro-

ceedings taken by a Collector, 25 A. 167. But see 31 B. 207; 13 M.L.J. 221. "Court" means a Civil Court and not of the sale officer when sale proceedings take place. 100 I.C. 726 (1). The word "property" means tangible property sold whether or not persons other than the judgment-debtor have any interest, and it does not mean the right, title and interest of the judgment-debtor alone. 54 M.L.J. 455 = 51 M. 246 = 1928 M. 399; 159 I.C. 1044 (2) = 1936 O.W.N. 48 = 1936 O. 128. The interest of a mortgagee in a usufructuary mortgage is immovable property within the meaning of O. 21, R. 89. (27 M.L.J. 239, Diss. from.) 122 I.C. 409 = 1930 A. 110. A house, apart from the ground on which it stands (which belongs to an outsider) is immovable property. 15 R.D. 155 = 12 L.R. 38 (Rev.). Payment under protest or subject to conditions—Not recognised under the rule—Court cannot order decree-holder to furnish security before receiving payment. 1930 M.W.N. 524 = 1930 M. 921; 35 C.W.N. 1056.

**WHO CAN APPLY.**—The expression "by virtue of a title acquired before purchase" does not qualify "any person owning such property". So a purchaser from the judgment debtor after sale can apply under this rule. 24 M.L.J. 205 = 18 I.C. 579; 40 B. 557 = 37 I.C. 211; 44 M. 554 = 40 M.L.J. 497 (F.B.); 54 I.C. 753; 22 I.C. 193 = 38 M.L.J. 775; 52 I.C. 344; 4 P.L.J. 340 = 51 I.C. 873; 148 I.C. 1082 = 1934 Pesh. 25. See contra 1922 L. 302; 42 A. 7 = 52 I.C. 331; 26 C.W.N. 149 = 49 C. 454; 1940 Sind 181; 34 A. 186 = 13 I.C. 134; 9 I.C. 745 = 14 O.C. 33; 98 I.C. 739 = 1927 M. 151; 24 L.W. 759; 48 A. 188 = 93 I.C. 24 = 1926 A. 204 (F.B.). A third party who has acquired an interest in the property sold by reason of a contract of sale made by the judgment-debtor pending attachment is competent to apply to set aside the sale under O. 21, R. 89. Such a person is not seeking to enforce any claim against the auction-purchaser to his detriment, and S. 44, C. P. Code, should not be invoked to disentitle the applicant to apply. He having acquired an interest in the property by virtue of the contract of sale should be allowed to deposit the amount required under O. 21, R. 89, if he applies within 30 days of the sale. It cannot be said that he has no *locus standi* to apply. 191 I.C. 689 = 7 B.R. 240. In an application to set aside a sale by the Registrar held under a decree on the original side of the Calcutta High Court the duty of the High Court is to apply the provisions of O. 21, R. 89 so far as the rules in Chapter XXVII, Original Side Rules and Orders will permit. 1941 Cal. 159. A



## NOTES.

*lessee* can apply under O. 21, R. 89, though property is sold subject to lease. 51 M. 770=54 M.L.J. 445=1928 M. 1191. A *transferee under an unregistered document* by the judgment-debtor after sale is not prevented from applying under this rule. 42 M. 503=49 I.C. 806. But *see* 22 I.C. 193=38 M. 775. The *judgment-debtor* can apply even though the deposit money was raised by sale of his equity of redemption to his mortgagees. 86 I.C. 732=1925 O. 349 (2). Also a judgment-debtor who has effected a private sale of his property during the pendency of the attachment proceedings. 25 B. 531. A *transferee* after attachment can apply. 26 C.L.J. 127=36 I.C. 510. *Quære*.—If a transferee before attachment is entitled to make a deposit. 34 L.W. 399=1931 M. 753. Also a mortgagee after attachment. 100 I.C. 82=1927 M. 445=52 M.L.J. 157. A *mortgagor* has an interest and he can apply. 33 A. 481=10 I.C. 863. A prior mortgagee who was not a party to the suit and when the sale was subject to a mortgage not stating amount or priority, can apply. 28 O.C. 221=1925 O. 429. A mortgagee who has purchased the equity of redemption in one portion can apply. 2 P. 715=74 I.C. 102. Also a mortgagee. 21 M. 416. Also a prior mortgagee. 53 I. C. 958=27 M.L.J. 130; 27 I.C. 831=13 A.L.J. 271; 12 I.C. 783=178 P.W.R. 1911. But *see* 33 A. 481=10 I.C. 863. A usufructuary mortgagee depositing is not a volunteer. 20 A.L.J. 42=1923 A. 127; also 25 O.C. 78=1922 O. 146. A *benamidar* can apply. 29 C. 1 at 6. A permanent *under-tenure-holder* under the E.B. and Assam Tenancy Amendment Act has an interest in the property to set aside sale in a rent decree. 52 I.C. 237=23 C.W.N. 597. Lessee can apply. 27 L.W. 307=54 M.L.J. 445. A purchaser of a portion of an occupancy holding can apply whether his interest is valid against the landlord or not. 8 C. W.N. 232. *See also* 8 C.W.N. 55; 31 C.W.N. 1050=1927 C. 817=55 C. 108. A *dar-mokararidar* can apply. 32 C. 107. Also an *under-raiyat*. 11 C.W.N. 742. Where in a suit the mother has acted as guardian for a minor party and subsequently the minor's property is sold in execution of a decree against the minor and the father of the minor deposits the decretal amount which is accepted by the Court and the sale is set aside, nothing flagrant has happened as to call for the revisional interference of the Board in the matter. The tender by the father is not such a deviation from the routine as would raise a suspicion in the mind of the Court that the tenderer was not doing it in the interests of the minor. 1940 A.W.R. (B.R.) 17=1940 A.L.J. 12 (Supp.). A member of a *joint Hindu family* can apply if the share of another

member is sold. 1928 M.W.N. 101 (1)=51 M. 246=109 I.C. 297=54 M.L.J. 455. Also a decree-holder who is also a purchaser on the ground that the decree has been adjusted, without the concurrence of the judgment-debtor. 104 I.C. 753. A man is not debarred from defending his action under R. 89 because he desisted from his action under O. 21, R. 58. 25 L.W. 106=99 I.C. 893=1927 M. 327. The expression "owning such property by virtue of title acquired before such sale" applies as well to long-standing title as one recently derived from judgment-debtor. (*Ibid.*)

**WHO CANNOT APPLY.**—A person who purchases property before it is attached, and whose claim is rejected, and who files a suit under R. 63 cannot apply. 7 C.W.N. 243; 28 A. 84; 30 C. 214. *See also* 30 B. 575; 30 M. 507; 17 M.L.J. 129; 34 L.W. 399. A purchaser of the property from the judgment-debtor subsequent to the auction sale cannot maintain an application under O. 21, R. 89, while the rule may be so construed as to recognise in the judgment-debtor, who has sold his property subsequent to the auction-sale, a sufficient interest to allow him to apply under the rule, it does not follow that the rule can be so construed as to permit the subsequent purchaser himself to apply to the Court to set aside the sale. I.L.R. (1940) Kar. 360=A.I.R. 1940 Sind 181. *See also* 177 I.C. 952=1938 Sind 177. The person applying should have an existing interest on the date of the application. 17 C.W.N. 1207=22 I.C. 192=15 Cr.L.J. 48=41 C. 305. A person whose title is not affected by the sale cannot apply. 15 C.L.J. 83=10 I.C. 880=16 C.W.N. 904; 175 I.C. 566=1938 Pat. 233. Nor a decree-holder who attaches before sale. 28 I.C. 948=13 A.L.J. 401. Nor an attaching creditor. 6 C.W.N. 57. *See also* 51 C. 495; 55 B. 239. Nor a person in whose favour there is an agreement to sell. 17 L.W. 680=1923 M. 659. Though application is by judgment-debtor tender of amount cannot be made by a person who acquires an interest in the property after the auction sale. 1936 O.W.N. 344=161 I.C. 424. Nor by a person who is neither an attorney, general or special, nor a Vakil or Mukhtar, for the owner of the immovable property sold. (*Ibid.*) A second mortgagee when the sale is on decree for the prior one, cannot apply under this rule. 31 I.C. 37=9 S.L.R. 86. A mortgagee of non-transferable occupancy holding cannot apply. 29 I.C. 916; also 22 C.L.J. 108=20 C.W.N. 40. A mortgagee after sale cannot apply. 39 M.L.J. 84=55 I. C. 856 (F.B.). It was held that a person whose interest was not sold and cannot have passed under the sale could not apply, and a *puisne* mortgagee could not apply. 25 M. 244. *See also* 26 M. 332. A person expecting to get title and possession in a



## NOTES.

pending litigation cannot apply. 39 A. 700 = 41 I.C. 889. A part purchaser before sale cannot apply on the ground that the decree amount has been paid by himself and other purchasers of the rest of the property. 52 I.C. 641. Nor a person who has obtained a decree for specific performance of a contract of sale, when he has not executed his decree. 161 I.C. 26 = 1936 P. 119. An interim receiver of the debtor's property appointed under S. 20 of the Provincial Insolvency Act is entitled to apply under O. 21, R. 89, to set aside a sale of immovable property in execution of a decree against the debtor, and when the order appointing the interim receiver expressly empowers him to act under O. 21, R. 89, to set aside the sale, the appointment divests the debtor of all control over the property and the interim receiver becomes, as it were, his statutory agent to do all acts which he would be entitled to do if he were not so disabled. 1937 M.W.N. 262 = 45 L.W. 771 = A.I.R. 1937 Mad. 589. See also 50 L.W. 239. Right to apply under—Under-*raiyat* without right of occupancy—Sale of holding for arrears of rent—Sub-tenant of under-*raiyat*—Right to have sale set aside. 39 C.W.N. 652.

FORM OF APPLICATION.—It need not be in writing. 63 I.C. 140; 13 I.C. 404 = 9 A.L.J. 12; 14 M.L.T. 534 = 22 I.C. 291. But mere deposit does not amount to an application. 66 I.C. 44 = 1922 M. 83; also 9 I.C. 33; 43 B. 735 = 53 I.C. 135; 32 I.C. 45. Lodgment schedule does not amount to an application. 95 I.C. 128 (1) = 1926 M. 620; at least an oral application is necessary. 32 I.C. 783 = 3 L.W. 174; 86 I.C. 498 (1) = 1925 M. 909. In a written application no specific prayer to set aside sale is necessary. 4 P.L.T. 295 = 58 I.C. 629; 34 P.L.R. 233 = 141 I.C. 421 = 1933 L. 210; 133 I.C. 407 = 1931 A. 756. See also I.L.R. 1939 All. 403 = 1939 All. 241; 5 Cut.L.T. 27 = 18 Pat. 210; 43 C.W.N. 252 = 1939 Cal. 153; (1937) 1 M.L.J. 658; 1941 A.W.R. (H.C.) 278 (Refund of deposit under S. 144 by way of restitution). As to defective application, see 1925 N. 17. When a prior application to pay decree amount after attachment is dismissed, it does not operate as *res judicata* to an application under this rule. 44 M.L.J. 325 = 1923 M. 487 (2). An application to set aside sale is not invalid because of the absence of prayer to that effect. 106 I.C. 333. See also 57 C. 676; 58 C. 510 (Application by mortgagee to set aside mortgage sale under decree of High Court on the original side). Agreement between decree-holder purchasers and judgment-debtor on date of sale—Part payment of decree amount—Time fixed for payment of balance—Joint application to Court praying that on payment by fixed date sale to be

set aside and in default sale be confirmed—Effect—Time, if of essence of contract—Non-payment on fixed date—Order confirming sale. Held, (1) that though the parties agreed to substitute an agreed procedure for the procedure prescribed by law, it was nevertheless in essence, though not in form, one falling under O. 21, and that the application filed by the parties on the date of sale might be treated as an application under R. 89, and the order confirming the sale was therefore appealable under O. 43, R. 1 (j); even if there be no appeal, High Court could interfere in revision if the order were shown to be wrong, as a question of jurisdiction was involved; (2) that the contract between the parties clearly showed that time was of the essence of the contract and that on the expiry of time, fixed the sale automatically became confirmed, no order of the Court being necessary for the purpose and there was nothing left which could be set aside after that date. 16 P. 202 = 17 Pat.L.T. 940 = 1937 P. 113 (F.B.). Execution sale of property pending suit under O. 21, R. 63, by defeated claimant—Plaintiff getting sale set aside by deposit of decree amount—Application to amend plaint by adding prayer to restrain decree-holder from withdrawing amount deposited in Court not competent. 20 Pat.L.T. 640.

PARTIES TO THE APPLICATION.—Purchaser and decree-holder are necessary parties to an application under rule. 15 A. 407. But see 4 P.L.T. 491 = 2 P. 800; also 1923 C. 394. Auction-purchaser and decree-holder who are already on record need not be specifically mentioned and impleaded. 27 A.L.J. 769 = 119 I.C. 103 = 1929 A. 593; 1930 N. 5; 1930 A. 167. In an application to set aside a sale under R. 92 read with R. 89 which is otherwise in order and in time, the omission to implead the auction-purchaser till after the expiry of 30 days allowed for the application is not fatal to it. (37 B. 387, Foll.) 52 M. 861 = 1929 M. 763 = 57 M.L.J. 310.

LIMITATION.—The fact that the deposit is not made within 30 days of the sale makes no difference, where the deposit cannot be so made on account of the Court being closed. Where it is made on the reopening day, it is in time by virtue of S. 10 of the General Clauses Act. 1940 Mad. 427 = (1940) 1 M.L.J. 629 (F.B.). See also 1940 Sind 181. Application under R. 89—Limitation—Starting point—Sale by Qurq Amin—Acceptance by Court on later date—Limitation runs from later date. 1940 Oudh 261 = 1940 O.W.N. 381. Deposit of decree amount and compensation within 30 days—Sufficiency—Application to set aside sale not presented—Effect—Sale cannot be set aside—No revision lies from order refusing to set aside sale. 18 Pat. 210 = 186 I.C. 143 = A.I.R. 1940 Pat. 87.



## NOTES.

FORUM.—Though sale was in execution by a Revenue Court, application under this rule must be made in Civil Court. 44 B. 50=54 I.C. 670. *See also* 40 Bom.L.R. 152=1938 Bom. 209. O. 21, R. 89, C.P. Code, does apply to execution of Revenue Court decrees. 1939 R.D. 204 (1)=1939 A.W.R. (B.R.) 202.

DEPOSIT "FOR PAYMENT TO THE DECREE-HOLDER".—The words mean that the decree-holder is the person solely entitled to the money paid into Court. 30 C. 252. But *see contra* 1933 N. 347. If the decree-holder be the purchaser he is entitled to the 5 per cent. on the purchase-money. 26 C. 449 (F.B.); 22 M. 286; 10 M.L.J. 228; 1933 A.L.J. 78=145 I.C. 872=1933 A. 292=55 A. 203. If the decree is joint in favour of two, but one alone gets permission and is purchaser, he alone is entitled to the profits. 6 P. 386=103 I.C. 724 (2)=1927 P. 288. A mere payment of the sale proceeds into Court does not satisfy the requirements of the rule. 23 B. 723; 8 C.W.N. 355; 7 Bom.L.R. 263. As to what amounts to a valid deposit, *see* 1 P. L.J. 459=35 I.C. 779; 35 C.W.N. 1056. There is nothing in O. 21, R. 89 which makes it necessary for the judgment-debtor to pay in the poundage fee as a condition precedent to the sale being set aside. After the sale is set aside the judgment-debtor can be made to reimburse the auction-purchaser for any costs and the poundage fee he has properly paid in connection with the sale. 176 I.C. 749=68 C.L.J. 27=A.I.R. 1938 Cal. 523. Sale of properties in several lots—Judgment-debtor tendering purchase-money of some properties alone with five per cent. compensation—No valid deposit. 9 Pat. 310=1930 P. 318. *See also* 55 A. 123=1932 A.L.J. 1107=1933 A. 155. The deposit must be in Civil Court and not in the treasury. 40 A. 425=45 I.C. 773. But *see* 131 I.C. 596=1931 A. 303. A deposit by a stranger other than a *vakil* or attorney is not valid. 12 I.C. 404=9 A.L.J. 12. A deposit under R. 89 is a voluntary deposit and the person making the deposit cannot maintain a suit to have the sale set aside and for refund of the money deposited. 7 P. 30. But *see* 57 B. 601=35 Bom.L.R. 462=1933 B. 239. Execution sale—Subsequent private sale by judgment-debtor to purchasers in execution of items purchased by them—Purchasers willing to allow judgment-debtor to use moneys deposited by them as his—Amount sufficient to cover decree debt and poundage. *Held*, that the moneys deposited by them are in the custody of the Court till final orders are passed by the Court with respect to the sale, they cannot operate upon it to enable the judgment-debtor to use the same for the purpose of setting aside the sale under R. 89. The rule cannot be said to be complied with and

the sale cannot therefore be set aside. 45 L.W. 88=1937 M. 270=(1937) 1 M.L.J. 264. Deposit by auction-purchaser under sale, before confirmation, cannot be taken advantages of by any person to support his application under this rule. 31 I.C. 913. "Amount specified in the sale proclamation," meaning of. *See* 96 I.C. 77=1926 M. 765=50 M.L.J. 580. The term cannot be taken to include the amount due to the same decree-holder by the same judgment-debtor under another decree in respect of which the decree-holder is allowed to claim rateable distribution subsequently. A proclamation of sale is the only document to which publicity is intended to be given under the rules. 156 I.C. 965=37 P.L.R. 298=1935 L. 423. *Krishnaswami Aiyengar, J.*—O. 21, R. 89 cannot be construed as contemplating payment in cash and in cash only. What is done by consent of parties as a substitute for the deposit is to be regarded as its equivalent in every respect and judged by the same principles as those applicable to a deposit. By such consent what is not in fact a payment in cash is turned into a deposit within the meaning of the rule to be acted upon by the Court in all respects as if it were a payment in cash. I.L.R. (1940) Mad. 699=A.I.R. 1940 Mad. 427=(1940) 1 M.L.J. 629 (F.B.). Any payment or adjustment made by the judgment-debtor which satisfies the decree-holder is a payment within the meaning of R. 89, O. 21. Where the decree-holder is paid most of the amount due to him by the judgment-debtor assigning a mortgage in his favour out of Court, and a small balance due to him is deposited by the judgment-debtor into Court at the time he makes the application to Court for setting aside the sale, that would be sufficient compliance with O. 21, R. 89. 1940 Mad. 427=(1940) 1 M.L.J. 629 (F.B.). Amount mentioned in sale proclamation less than decretal amount—Judgment-debtor cannot take advantage of such mistake. 1934 L. 790. Deposit under—Sum paid is smaller than that mentioned in sale proclamation—Validity. 31 Bom.L.R. 433=117 I.C. 527=1929 B. 215. *See also* 46 L.W. 922=1938 M.W.N. 15. 'Any amount' means what actually was received by the decree-holder and does not include sale proceeds. 25 Bom. L.R. 446=73 I.C. 454. No cash payment is necessary—Agreement to set-off decretal amounts to payment. 14 I.C. 326=1912 M.W.N. 756; *also* 24 M.L.J. 205=18 I.C. 579. *See also* (1940) 1 M.L.J. 629 (F.B.). It is open to the decree-holder to waive the whole of the decree amount or to accept a lesser amount or to receive anything which is an adequate equivalent of the amount owing to him. 42 L.W. 692=1935 M. 1050. Where, therefore, the decree-holder agrees to accept from the judgment-debtor a mortgage in satisfaction of the amount due to him under the decree, the judgment-



(a) for payment to the purchaser, a sum equal to five per cent. of the purchase-money, and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

#### NOTES.

debtor applying to set aside the sale need not deposit any portion of the decree amount at all; it is enough if he deposits only the five per cent. under R. 89 (1) (a). (*Ibid.*) See also 177 I. C. 336=1938 Cal. 252. It is not for the auction-purchaser to insist that there must be an actual receipt of cash or deposit of the entire amount. He receives his five per cent. and has no grievance, and he cannot be heard to say that it is not open to the decree-holder to waive the decree-amount or accept any adequate equivalent. (*Ibid.*) Money paid to decree-holder privately is equivalent to deposit. 1933 N. 349. See also 1934 N. 21=150 I.C. 611; 39 C.W.N. 829=61 C.L.J. 313. Payments may have been made to decree-holder before sale. 39 C.W.N. 829=61 C.L.J. 313. A mere compromise or admission of decree-holder would not be sufficient. 55 A. 697=1933 A.L.J. 1004=1933 A. 510. Payment by cheque insufficient. 27 I.C. 656=8 Bur.L. T. 80. Where a short amount was paid, having been misled by an officer of Court, on payment of balance sale should be set aside. 22 I.C. 842. See also 18 C. 481; 33 C.W.N. 1170. But see 13 P. 641. Where a sum less than the sum due is deposited owing to a *bona fide* mistake in calculating the amount, see 26 C. 449 (F.B.); also 21 A.L.J. 162=1923 A. 315; 6 R. 492=113 I.C. 810 (2). Bengal Patni Regulation, S. 14-A (b)—Relative scope—Deposit to set aside sale—Interest—Calculation of. 61 C.L.J. 39. An order setting aside sale and entering satisfaction when the amount was deposited, is valid and not *ultra vires*, merely because the creditor did not include interest in the execution petition. 41 C.L.J. 391=1925 C. 948. But see 13 P. 641=151 I.C. 618=1934 P. 336. The extent of deposit is the amount of decree in execution of which the sale was made, and not those of other decree-holders claiming rateable distribution. 17 I.C. 920=23 M.L.J. 585; also 37 B. 387=15 Bom. L.R. 244; 14 L. 55=34 P.L.R. 273=143 I.C. 768=1933 L. 226. Money once paid to set aside sale cannot be recovered from decree-holder after sale on the ground that judgment-debtor had no saleable interest in the property. 45 B. 1094=23 Bom.L.R. 455. See also 13 I.C. 144=16 C.L.J. 156. But (irrespective of the applicability of R. 89) a third party purchaser before attachment, if he subsequently succeeds in his suit for declaration of his right to the property is entitled to refund of the deposit from the decree-holder auction-purchaser under S. 72, Contract Act. 34 L.W. 399=1931 M. 753. When the mortgagor pays the amount, it has the effect of redeeming the properties. 60 I.C. 560=7 O.L.J. 620. The acceptance by a

landlord of a deposit from a transferee means a recognition of the transferee as tenant. 36 I.C. 701. Deposit must not be made subject to any condition or under protest. 58 M. 972=42 L.W. 307=158 I.C. 207=1935 M. 842=69 M.L.J. 349 (F.B.). Where a conditional deposit was made, but the condition was withdrawn before an application to draw the money was filed, it was held that the deposit was a valid one. 2 P. 534=72 I.C. 907. Two deposits by both the judgment-debtor and a mortgagee after sale, each depositing a portion of sale amount and two applications by them, can be treated as one proceeding and the sale be set aside. 49 A. 839=25 A.L.J. 576=102 I.C. 471=1927 A. 561. Sale set aside—Purchaser is entitled to interest and costs besides the 5 per cent. deposited under R. 89. 57 C. 676. A judgment-debtor who wishes to take advantage of R. 89 must strictly comply with the same by paying all amounts as directed by the rule. Hence a deposit of merely 5 per cent. without the sum mentioned in Cl. (b) for payment to the decree-holder is not sufficient even though the decree in execution of which the sale has been held has been set aside. (39 M. 429, Foll.) (Case-law reviewed.) 56 M. 808=1933 M. 598=65 M.L.J. 253.

O. 21, R. 89 (1) (b).—An amount which has been deposited in Court cannot be said to have been received within the meaning of this section. Received cannot mean "virtually or constructively received". 1933 M. 265=36 L.W. 967=141 I.C. 167. The words "less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder" in O. 21, R. 89, refer to a payment made to the decree-holder out of Court and not to the withdrawal by the decree-holder of the sale proceeds deposited in Court by the auction-purchaser. I.L.R. (1938) Nag. 456=1938 Nag. 54. Under O. 21, R. 89, the person who seeks to set aside a sale must deposit the amount of the decree unless the decree-holder may have received any sum. The decree-holder cannot be said to have notionally received a sum equal to the amount for which he (the decree-holder) purchased one of the properties, and a deposit of a sum less than that amount would not, therefore, be sufficient. 188 I.C. 467=A.I.R. 1940 Pat. 612. R. 89 has to be strictly construed and even a mistake cannot be availed of as justifying a departure from the requirements of the rule. The judgment-debtor cannot be allowed to take credit for any amount which he might have deposited in Court behind the back and without the consent of the judgment-creditor and which the judgment-creditor has refused to accept. The only deduction allowed by the rule is the amount



(2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

#### NOTES.

which since the date of the proclamation of sale has been actually received by the decree-holder. 177 I.C. 952=A.I.R. 1938 Sind 177. *See also* 1932 A.L.J. 1107=55 A. 123=143 I.C. 127=1933 A. 155; 55 A. 200=145 I.C. 872=1933 A.L.J. 78=1933 A. 292.

O. 21, R. 89 (2).—When an application under R. 90 is dismissed for default, the applicant is not precluded from applying under this rule. 43 I.C. 340=20 O.C. 339; 106 I.C. 568; 116 I.C. 490. Where an application under R. 90 is made before the sale is concluded, its existence is no bar to an application under this rule. 1926 A. 754. An applicant under this rule cannot impugn the sale on grounds set out in R. 90. 28 C. 78. When a judgment-debtor is allowed to apply under this rule, the Court cannot entertain objections to the sale. 21 A.L.J. 340=1923 A. 503. *See also* 47 A. 850=1925 A. 778. Where an application is made under R. 89, the Court is bound to pass an order setting aside the sale; and it ought not, after the deposit has been made, to entertain an application under R. 90. 58 M. 972=42 L.W. 307=1935 M. 842=69 M.L.J. 349 (F.B.). Where therefore two applications are made, one by the judgment-debtor's mortgagee under R. 89, making the necessary deposit, and another by the judgment-debtor under R. 90, and both are allowed by the Court on the same day and the sale is set aside, the decree-holder is entitled to payment out of the decree amount deposited by the mortgagee, and he cannot be refused payment on the ground that the sale was set aside under R. 90 or that the deposit was made by the mortgagee under R. 89, under protest. (*Ibid.*)

LIMITATION.—*See* 87 I.C. 722=1925 O. 411. *See also* 28 Bom.L.R. 510=95 I.C. 549 (1)=1926 B. 335. Deposit is condition precedent to an application. It is the deposit which must be within time. 33 I.C. 996=3 L.W. 271. But *see also* 66 I.C. 44=1922 M. 83; 48 M.L.J. 405; 87 I.C. 722. Whole amount must be deposited within 30 days. 1925 N. 30. Where the circumstances of the case show that the applicant is ready to deposit the sum required, the Court can entertain the application always provided that the applicant has an interest by virtue of title. But the application and the deposit have both to be made within 30 days. 161 I.C. 26=1936 P. 119. As to what is to be taken as the date of sale for purpose of limitation, *see* 29 C. 626. *See also* 1926 B. 335; 9 Luck. 393=147 I.C. 1077=11 O.W.N. 18=1934 O. 25. Application for setting aside sale—Deposit of sale price and five per cent.—Sufficiency—One anna in the rupee to cover costs if need be deposited in time. 118 I.C. 805. Time begins to run from the day when the purchaser was declared and was ordered to deposit 25 per

cent. 30 A. 65=10 A.L.J. 475. Time runs from the date of deposit under R. 84. (*Ibid.*) It matters not if the sale is even confirmed if the deposit is in time. 27 I.C. 656=8 Bur. L.T. 80. The Court has no power to extend time. 36 I.C. 809; 1926 L. 639; 1928 R. 286; 1933 R. 8. If it can do so with the consent of parties, *see* 36 I.C. 809. Even with the consent of parties time cannot be extended. 39 I.C. 664=2 P.L.J. 164. But *see* 157 I.C. 803=1935 O.W.N. 975. Delay not due to any act of the person depositing but to the officer of the Court is to be excused. 10 I.C. 51=13 C.L.J. 467; 52 I.C. 161=17 A.L.J. 991; 15 C.L.J. 83=10 I.C. 889=16 C.W.N. 904; 9 N.L.J. 57=96 I.C. 376 (1)=1926 N. 331; 36 P.L.R. 101=1934 L. 875. Also due to the delay of the treasury. 37 A. 591=13 A.L.J. 793. The application too, not merely the deposit, must be within time. 66 I.C. 44=1922 M. 83; 161 I.C. 26=1936 Pesh. 119. *Also* 48 M.L.J. 405=1925 M. 639; 87 I.C. 722=1925 O. 411. But *see* 33 I.C. 996. Where a decree-holder whose decree is fully satisfied fails to enter up satisfaction of the decree and proceeds to execute his decree fraudulently and the property is sold in Court auction and where the owner deposits the amount due under O. 21, R. 89, and gets the sale set aside, on a question whether such an owner can recover the money from such a decree-holder. *Held*, that the owner's right to recover back the money paid under compulsion of execution which amounts to 'coercion' within the meaning of S. 72 of the Contract Act, is a statutory right. The liability is one in tort and the owner could recover back the money so paid. *Held, further*, that the fact that the payment was made under O. 21, R. 89 could not affect the question. 47 L.W. 118=1938 Mad. 493=(1938) 1 M.L.J. 829.

APPEAL.—No appeal lies against an order setting aside a sale. 27 A. 263. But *see* 31 B. 207; 6 C.W.N. 57; 30 M. 507; 5 C.L.J. 204. But against an order refusing to set aside, an appeal lies. 12 I.C. 169=12 M.L.T. 380. *See also* 36 I.C. 809. Appeal against order dismissing application under this rule—Failure to implead auction-purchaser—Appeal whether liable to be dismissed. 9 P. 310=1930 P. 318. *See also* 142 I.C. 623=34 P.L.R. 8=1933 L. 324. No appeal lies on an order refusing stay, when the sale itself was not confirmed. 3 R. 132=1925 R. 217. No second appeal lies under this rule. 44 B. 472=56 I.C. 597. *See also* 38 C. 339=15 C.W. N. 844; 17 I.C. 884=8 N.L.R. 177; 36 I.C. 769; 33 C.W.N. 1170. Order refusing to pay to decree-holder amount deposited under this rule is not one under S. 47 and is not appealable. 58 M. 972 (F.B.) (noted *supra*).  
REVIEW.—Whether restoration of an application under this rule to set aside order of dismissal for default, if possible, is doubtful.



LOC. AMS.—[ALLAHABAD AND OUDH.] R. 89 (1).—For the words “any person . . . such sale” in sub-r. (1), *substitute* “the judgment-debtor, or any person deriving title through the judgment-debtor, or any person holding an interest in the property.”

[CALCUTTA.] O. 21, r. 89 (1):—

In sub-r. (1), r. 89, O. 21, *cancel* the words “either owning such property, or holding an interest therein by virtue of a title acquired before such sale” and *substitute* the words “whose interest is affected by such sale (provided that such interest has not been voluntarily acquired by him after such sale).”

[LAHORE.] In sub-r. (1) of this rule for the words “any person . . . acquired before such sale,” *substitute* the words “any person claiming any interest in the property sold at the time of the sale or at the time of making the application under this rule or acting for or in the interest of such a person.”

[MADRAS.] *Substitute* the following for sub-r. (1):—

“(1) Where immovable property has been sold in execution of a decree, the judgment-debtor, or any person deriving title from the judgment-debtor, or any person holding an interest in the property may apply to have the sale set aside on his depositing in Court—

(a) for payment to the purchaser, a sum equal to 5 per cent. of the purchase-money, and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of that proclamation of sale, have been received by the decree-holder;

Provided that where the immovable property sold is liable to discharge a portion of the decree debt the payment under Cl. (b) of this sub-rule need not exceed such amount as under the decree the owner of the property sold is liable to pay.”

(Vide *Fort St. George Gazette*, dated 20th October, 1936, Part. II, pp. 1394-1396.)

[NAGPUR.] Rule 89.—In sub-rule (1) for the words “any person either owning such property or holding an interest therein by virtue of a title acquired before such sale” *substitute* the words “any person claiming any interest in the property sold at the time of the sale or at the time of the petition, or acting for, or in the interest of, such person.”

#### NOTES.

But a review petition lies. 22 M.L.J. 148=12 I.C. 351.

REVISION.—Revision lies when the lower Court improperly refuses to set aside sale. 21 A.L.J. 162=1923 A. 315. But *see* 40 A. 425=16 A.L.J. 433. *See also* 118 I.C. 805; 152 I.C. 259=15 Pat.L.T. 511=1934 P. 540; 18 Pat. 210. If a Court considers on the merits an application under O. 21, R. 89, there is no failure to exercise jurisdiction even if the prayer is rejected. The exercise of jurisdiction would then be a consideration of the application made and the decision on it whether the relief claimed was granted or not. 1941 R.D. 555=1941 A.W.R. (H.C.) 327=1941 O.W.N. 835.

O. 21, R. 89 (Lahore H. C. Amendment): RIGHT TO APPLY UNDER—INTEREST AT TIME OF APPLICATION—SUFFICIENCY.—Under R. 89, as amended by the Lahore High Court in 1932, it is not necessary that the applicant desiring to have a sale set aside, should either own the property or hold an interest therein prior to the sale. It is sufficient if he claims an interest in such property at the time of making the application under the rule. 1935 L. 51. A person who has obtained a mortgage of the property after attachment can come forward under R. 89, as amended by the Lahore High Court, and by making the necessary payments save the property and prevent its sale from taking place. 1936 L. 561.

O. 21, R. 89 (Nagpur).—Provisions of the nature of R. 89 (2) must be construed with reference to the usual rules that the singular includes the plural, the male the female, and in all cases where the law allows devolution, the assignee or other person on whom the

rights in question have devolved has to be substituted, as far as may be, for the original owner of the interest, subject of course to any express or implied prohibition to the contrary. Although this rule finds no place in the General Clauses Act, yet it is a principle of general application nevertheless. The difficulty usually lies in determining when the law permits of devolution, and not in applying this principle once that is ascertained. 1937 N. 161. Sale by judgment-debtor after application by him under O. 21, R. 90—Purchaser depositing amount under O. 21, R. 89 and applying for sale being set aside—Maintainability—Procedure. (*Ibid.*)

O. 21, Rr. 89 and 90.—A sale in execution can only be set aside if the ground mentioned in R. 89, 90 or R. 91 of O. 21, be established as the case may be. If no such application is made, the Court has no option but to confirm the sale. If any such application is made and the ground mentioned in those rules be not established, the onus being on him who applies for reversal of the sale, the Court has no option but to confirm the sale under O. 21, R. 92. 1938 Cal. 798. But *see* 1938 All. 89. While R. 89 of O. 21, C. P. Code, does indeed provide for a last minute indulgence to the judgment-debtor, that rule must be strictly complied with. Sub-R. (2), for instance has to be strictly complied with and the judgment-debtor cannot prosecute two remedies at one and the same time. Two simultaneous applications under R. 89 and R. 90 cannot be made or prosecuted. R. 89 prohibits not only the making or prosecution of an application under it unless a previous application under R. 90 has been withdrawn but it also excludes an application already made. Where an application is made under



[N.-W.F.P.] In sub-rule (1) for the words "either owning . . . before such sale," substitute "either claiming any interest in such property at the time of sale or at the time of application, or acting for or in the interest of such person."

[PATNA.] O. 21, r. 89.—In sub-rule (1) of r. 89 for the words "any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale" substitute the words "the judgment-debtor or any person deriving title through the judgment-debtor, or any person holding an interest in the property at the date of the application under this rule."

90. (1) Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it :

Application to set aside sale on ground of irregularity or fraud.

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

#### NOTES.

Rr. 89 and 90, and subsequently the prayer for relief under R. 90 is abandoned, the application under R. 89 can be deemed to have been made only on the date on which the prayer for relief under R. 90 is abandoned. And if that date is beyond 30 days of the date of sale, it must be held to be barred by limitation. I.L.R. (1940) Kar. 360=1940 Sind 181. See also 177 I.C. 952=1938 Sind 177. It cannot be said that in no circumstances can a Court refuse to confirm a sale upon grounds other than those mentioned in Rr. 89, 90 and 91 of O. 21, C. P. Code. If it is brought to the notice of the Court that the execution application on which the sale is held was obviously barred by limitation under S. 48, C. P. Code, the Court is entitled to refuse to confirm the sale on being satisfied that the application is barred. It is the duty of the Court to see that the application is within time, and when the matter is brought to its notice before it finally disposes of the proceedings, the Court must take notice of it and is justified in giving effect to it. 1937 A.L.J. 1349=A.I.R. 1938 All. 89.

O. 21, Rr. 89 and 92.—Where prior to the confirmation of an execution sale the judgment-debtor is adjudicated insolvent and the decree-holder fails to prove his debt in insolvency and the judgment-debtor obtains his discharge in due course, the failure of the decree-holder to prove his debts in insolvency could not have the effect of setting aside the sale. 1941 O.A. 539.

O. 21, R. 90: SCOPE OF RULE.—The scope of Rr. 90 and 91 is entirely different. The words "material irregularity" in R. 90 governed as they are by the words "in publishing or conducting it" refer only to an irregularity in the procedure to be followed before a property is put up to sale and R. 91 comes into operation in those cases where in spite of the prescribed procedure having been regularly followed, property has been sold in which the judgment-debtor had no saleable interest. 12 P. 665=14 P.L.T. 388=1933 P. 435 (S.B.). Objections relating to the failure to deposit 25 per cent. of the purchase money in the first instance and the balance of the purchase money later and the accept-

ance of an improper bid, come within the purview of R. 90. 38 P.L.R. 839=163 I.C. 765=1936 L. 969. R. 90 does not refer only to an irregularity or fraud in publishing or conducting the auction-sale. The decree-holder is also responsible for any irregularity or fraud occurring in the sale proclamation which is itself prepared from the sale statement for which the decree-holder himself is responsible. 20 N.L.J. 111=1937 N. 140. Proceedings under this rule also come within the scope of S. 47. 34 I.C. 829=30 M.L.J. 611; but are not proceedings in execution. 62 I.C. 608=6 P.L.J. 253. But see 87 I.C. 413=1925 M. 1142. In order to entitle the judgment-debtor to have the sale set aside, it has to be established that there has been some illegality or irregularity in the publication and conduct of the sale which has resulted in the property being sold at an inadequate price to the prejudice of the judgment-debtor. 193 I.C. 124. Order 9 does not apply, but an application dismissed for default can be restored under S. 151. 1931 A.L.J. 622=1931 A. 594. See also 53 C. 679=1926 C. 773. The addition of words "or fraud" takes the case out of S. 47 and brings it under this rule. 4 L. 243. A sale can be partially set aside under this rule. 44 C.L.J. 167=98 I.C. 206=1926 C. 1219. R. 90 of O. 21 which taken with the three sub-rules of R. 92 gives the general ground on which the executing Court, and that Court alone is specifically empowered and required to set aside a sale, is confined to "the ground of a material irregularity or fraud in publishing or conducting it." As regards material irregularities or fraud committed otherwise than in publishing or conducting an execution sale, fraud would, generally speaking, make the sale voidable only, and if the question should arise in the conditions laid down in S. 47, C. P. Code, it would be under this section, and under this section alone, that the sale would be set aside. A.I.R. 1941 Pat. 566. Where, in an application to set aside sale on the ground of fraud and substantial injury, these allegations are found against, it is the duty of the Court to confirm the sale. 58 I.A. 50=1931 P.C. 33=60 M.L.J. 423 (P.C.). Before a sale can be set aside on the ground of irre-



## NOTES.

gularity, a connection must be established between the irregularity and the loss to the judgment-debtor on account of the sale of the property at a low price. 158 I.C. 167 = 1935 L. 390. Decree directing possession of land by removal of materials of a house standing on it—House attached by decree-holder for costs and house was not detached and house was sold. *Held*, house was immovable property under R. 90. 124 I.C. 48; 15 R.D. 155. Before setting aside a sale on the ground of irregularity under R. 90, Court must give decree-holder an opportunity to show that no substantial injury had resulted; and when Court decides the application and orders the sale to be set aside in the absence of evidence which the parties wish to adduce, the order cannot stand. 152 I.C. 259 = 15 P. L.T. 511 = 1934 P. 540. Where a Court directs an enquiry as to the value of the property to be sold in execution, it cannot ignore the result of such an enquiry and take any imaginary figure or state the value of the property in the sale proclamation at any figure it thinks proper. It would be an irregularity. 37 Bom.L.R. 489 = 159 I.C. 358 = 1935 B. 331. Where after dismissing the applications under O. 21, R. 90 made by some of the judgment-debtors, the Court passes an order setting aside the sale on an application by another judgment-debtor under the same rule, the order will take effect only so far as the share and interest of that judgment-debtor are concerned and the sale will stand confirmed so far as the share and interest of the other judgment-debtors are concerned. 41 C.W.N. 224. Sale of holding under rent decree—Purchase by judgment-debtor—Application to set aside by mortgagee of part of holding—No finding of fraud or irregularity—Powers of Court to set aside sale under S. 173, B. T. Act. 154 I.C. 721 = 16 P.L.T. 216 = 1935 P. 210. Application under this rule is not maintainable after application and deposit made under O. 21, R. 89. 69 M.L.J. 349 = 58 M. 972 = 42 L.W. 307 = 158 I.C. 207 = 1935 M. 842 (F.B.). Proceedings under this rule—Compromise—Payment of money under, whether proper tender. 157 I.C. 31.

MEANING OF TERMS—DECREE-HOLDER.—This expression is not limited to the decree-holder at whose instance the property was first attached. 10 M. 57. The "interest" contemplated is interest at the time of sale and not at the time of application. 87 I.C. 94. The use of the plural "interests" in O. 21, R. 90 obviously means more than one interest which may be of the same kind or different kinds, which may be held by one or more persons. The "interests" may be interests in the property as that of a mortgagee or lessee, or it may be pecuniary interest in respect of property as that of the decree-holder. I.L.R. (1939) Nag. 357 = 1939 N.L.J. 238 = A.I.R. 1939 Nag. 179. It is now settled that the word "interests" as used in O. 21, R. 90 are not limited to proprietary or possessory interests in the property itself but extends to other kinds of

interests pecuniary or otherwise which is in any way affected by the sale. But whatever the nature of the interest might be, it must be in existence at the time when the sale takes place and must be prejudicially affected by it and if it is created after the sale, it is inconceivable how it can be affected by the sale, and give the person a right to set it aside. Consequently a person who purchases the property from the judgment-debtor after the execution sale has no *locus standi* to make an application under O. 21, R. 90. I.L.R. (1939) 1 Cal. 273 = 43 C.W.N. 189 = 68 C.L.J. 516 = A.I.R. 1939 Cal. 146. The expression "whose interests are affected by the sale" in O. 21, R. 90, C. P. Code, must be construed in their ordinary sense, and it is too much to say that merely because a person is adjudicated insolvent his interests are not adversely affected by the sale of property that belonged to him before adjudication. 51 L.W. 600 = A.I.R. 1940 Mad. 569 = (1940) 1 M.L.J. 711. A person who has obtained an attachment before judgment is, by virtue of the attachment itself, a "person whose interests are affected by the sale" within the meaning of O. 21, R. 90, where the property attached by him is later sold in execution of a decree obtained by another person. The fact that he has not obtained a decree in his suit at the date of the application does not make any difference. The words "person whose interests are affected by the sale" are not restricted to persons having a proprietary or possessory title in the property, but are intended to apply also to persons whose pecuniary interests are affected by the sale. Where a person, therefore, obtains an order for attachment before judgment and in due course obtains a decree, but before the date of such decree the attached properties are sold in execution of a decree obtained by another creditor, the former attaching creditor is a person entitled to apply under O. 21, R. 90, though the decree in his suit is obtained after the sale. I.L.R. (1939) Mad. 374 = 49 L.W. 110 = A.I.R. 1939 Mad. 250 = (1939) 1 M. L. J. 163 (F.B.). A decree-holder who attaches the property after it has been sold in execution of another decree and pending confirmation of sale is not a person whose interests are affected by the sale so as to give him a right to apply under O. 21, R. 90 to set aside the sale. In order to entitle a person to apply under O. 21, R. 90, he must be damnified by the actual sale, and nothing that the applicant himself does after the sale can give him a higher right than he had at the time of the sale. If at the time of the sale he has no *locus standi* to apply to have the sale set aside, he cannot, by attaching the property after the Court sale, acquire any right to apply. 1939 M.W.N. 297 = 49 L.W. 458 = 1939 Mad. 501 = (1939) 1 M.L.J. 608. Persons claiming by title adverse to and paramount to that of the judgment-debtor are not persons whose interests are affected



## NOTES.

by the sale within the meaning of O. 21, R. 90, C. P. Code, and such persons are not therefore entitled to maintain an application under O. 21, R. 90 to set aside the sale. (1941) 2 M.L.J. 63. "Interest" means interest in the property sold. The general creditors expecting a higher dividend have not such an interest as is contemplated by the rule. 39 I.C. 932=10 S.L.R. 189. But *see contra* 103 I.C. 499=1927 M. 783=53 M.L.J. 229; 1928 M.W.N. 216.

**APPLICABILITY.**—The subsequent setting aside of an *ex parte* decree, after sale in pursuance of the decree, does not affect the title of the purchaser. 38 C. 622=15 C. W.N. 875. Rule does not apply when a sale of one decree sold in execution of another is sought to be set aside. 64 I.C. 388. The rule applies when the ground of setting aside sale is fraud. 1 L.W. 1033=26 I.C. 369. *Also* 66 I.C. 220. Fraud after publication of sale proclamation is covered by this rule. 48 I.C. 560=3 P.L.J. 645. Question of jurisdiction cannot be raised in an application under this rule. 3 A.L.J. 140. Nor that decree was partly satisfied, which can be raised only by a separate application under S. 47. 152 I.C. 1014=1934 P. 664. *See also* 18 A. 141 (144). An application for setting aside a sale and for re-sale under O. 21, R. 86 on the ground that the decree-holder purchaser has defaulted to pay into Court the surplus sale price after deducting the decree amount due to him, cannot be regarded as an application under O. 21, R. 90. 22 Pat.L.T. 313. Where after dismissing the applications under R. 90, made by some of the judgment-debtors, the Court passes an order setting aside the sale on an application by another judgment-debtor under the same rule, the order will take effect only so far as the share and interest of that judgment-debtor are concerned, and the sale will stand confirmed so far as the share and interest of the other judgment-debtors are concerned. 41 C.W.N. 224. When sale is held in different lots, and irregularity and loss is proved only as regards the sale of some lots, the sale of the other lots must be confirmed. 59 M. 438=43 L.W. 32=1936 M. 121. When setting aside the sale, the Court has power to order interest on the purchase-money as well to be paid to the purchaser. 48 I.A. 24=40 M.L.J. 141=25 C.W.N. 366 (P.C.). An objection that the property attached and sold is not by law saleable, cannot be entertained under this rule. *See* 1938 N.L.J. 389=1938 Nag. 558; 7 A. 641; 7 A. 365; 21 B. 463; 6 M. 237; 20 C. 8 (P.C.); 7 C. 63; 24 M. 311 (315). *See also* 6 C.W.N. 42; 6 C.W.N. 48 (57); 30 C. 152; 8 C. 932; 25 M. 244 (F.B.); 6 C.W.N. 5; 1 P.L.T. 742=57 I.C. 261. An objection that a minor was not properly represented does not come under this rule. 9 I.C. 252=9 M.L.T. 260. But *see contra* 64 I.C. 25=35 C.L.J. 9. *Also* 29 I.C. 211. The rule applies to Receivers appointed by Court. 6 Bom.L.R. 1140.

When Receiver applies to have the sale set aside it is not open to judgment-debtor to file an independent application for the same purpose. 37 C.W.N. 146. An application to set aside a sale held by a Collector cannot be entertained under this rule. 11 A. 94 (F.B.). This rule will not apply if the sale itself is a nullity. 35 I.C. 404. A sale held even on the face of an injunction to stop it, is a nullity. 88 I.C. 532=1925 O. 424. Where judgment-debtor did not until after the sale had been completed put forth the plea that he was an agriculturist, *held*, that the plea could not be allowed to be raised. 32 Bom.L.R. 436. Where the date fixed for sale was a holiday and the sale was held the next day the sale is not a nullity. 37 C.W.N. 146. O. 21, R. 90, C. P. Code, does not apply to sales in execution of decrees for rent passed under the Madras Estates Land Act. The rule is not made applicable to such sales by S. 192 of the Estates Land Act. S. 132 of the Estates Land Act, by making the provisions of Ch. VI of the Act applicable to the execution by a Revenue Court of any decree for arrears of rent, provides a complete Code of Procedure, and S. 192 which applies the provisions of the C. P. Code to proceedings under the Act, must be read subject to S. 132. 52 L.W. 505=1940 M. W. N. 976=1941 Mad. 72=(1940) 2 M.L.J. 584. *See also* 49 L.W. 649=(1939) 2 M.L.J. 130. Sale of a decree by liquidators of a company during the winding up to the highest bidder—Decree assigned in his favour—Sanction of Court got—Irregularity in contract of sale alleged. (1937) 2 M.L.J. 926.

**INVALID SALES.**—*See* 10 C. 410; 7 A. 676; 12 A. 96; 16 A. 5; 11 A. 333; 21 A. 311; 10 A. 506; 1941 Pat. 566. Where decree-holder himself is the auction-purchaser, it is open to judgment-debtor to assail the validity of the sale on grounds apart from those specified in R. 90, *e.g.*, that the sale of ancestral property which ought under the G. O. to have been conducted by the Collector, having been conducted by the Amin of Civil Court, was without jurisdiction. 143 I.C. 122=1932 A.L.J. 1118=1933 A. 192. Where the deposit of 25 per cent. of the purchase-money is not made by auction-purchaser at the time of sale but three days after it, and it is accepted by the Court it is a mere irregularity and cannot vitiate the sale. 171 I.C. 932=A.I.R. 1937 Lah. 113. Sale conducted at a time and place other than that notified, is not a sale at all. 7 A. 676; 50 L.W. 867. But *see also* 187 I.C. 584; 1940 Cal. 265 *cited infra*. A sale which is held on a day on which it has been expressly proclaimed that it shall not take place is not a valid sale at all. Where an execution sale is held on a day which was not a day on which it had been advertised to take place or a day to which it had been adjourned, the sale is vitiated by illegality and is altogether null and void. In such a case, in order to set aside the sale on the ground of illegality, it is not necessary for the Court



## NOTES.

to hold that the judgment-debtor has been materially prejudiced by the sale. 50 L.W. 687. So also is sale held before the expiration of the 30 days required by R. 68, and without the consent of the judgment-debtor. 11 A. 333; 21 C. 66=20 I.A. 176 (P.C.); 1933 L. 186=145 I.C. 125. But see 68 I.C. 363=2 P. 207. Effect of sale held without the property being attached. 5 A. 86; 21 A. 311; 10 A. 506. See also 32 C. 296 at 314; 68 I.C. 843=1923 N. 18; 18 C. 188; 34 C. 787; 1 R. 533=1924 R. 124; 21 I.C. 46; 36 I.C. 292. Where a person is not aware of the sale proclamation and false representations are made to him by the bailiff as to the nature and interest put to sale and he purchases the property relying on those representations, the sale must be set aside. 164 I.C. 202=1936 R. 327. A summary rejection of an application under this rule without an investigation is improper and will not be sustained. 85 I.C. 779=1925 N. 289. An omission by the officer conducting an execution sale to record the bid of a bidder is an irregularity; but when there is nothing to show that the judgment-debtor suffered substantial injury on account of such omission and there is not even any allegation that intending purchasers were dishonestly sent away by the decree-holder or the sale officer or any one else, the sale will not be set aside. 11 O.W.N. 1618=153 I.C. 853=1935 O. 154.

NOTICE.—When no notice is given under R. 150 of the Civil Rules of Practice (M.), the sale is void. 16 M.L.T. 353. Also when no notice is given under O. 21, R. 22. 91 I.C. 711=1926 C. 539; 146 I.C. 681=1933 Pesh. 71; but not mere irregularity in the service of notice. 13 P. 467=149 I.C. 828=15 P.L.T. 273=1934 P. 274; nor error in giving wrong address in the notice, specially when it is the same address as in the plaint, for the decree-holder has not acted *mala fide*. (*Ibid.*) The provisions of O. 5, R. 19 are imperative and when there is no declaration that the service is due service, the service cannot be held to have been duly effected at all. 156 I.C. 699=42 L.W. 39=1935 M. 438. Application for setting aside—Receiver not in possession—Whether entitled to notice. 7 R. 425=1929 R. 311. The Code does not lay down that the parties who would be affected by an order setting aside a sale under R. 90, should be formally impleaded as parties to the application made for the purpose. It is sufficient if notice is issued to them before the sale is set aside. 62 C. 286=157 I.C. 637=39 C.W.N. 186=1935 C. 502.

DISMISSAL FOR DEFAULT.—Where the applicant fails to appear in support of his application under O. 21, R. 90, it is open to the Court acting under its inherent powers to dismiss the application for default. A.I.R. 1938 Mad. 495=(1938) 1 M.L.J. 255.

LIMITATION.—When an application to set aside a sale in execution is time barred, the Court has no jurisdiction to set aside the

sale. (1926 L. 379, Rel. on.) 1935 L. 972. The application must be made within 30 days of the date of sale. The period might be extended under S. 18 of the Limitation Act on the ground of fraud. 14 C. 679. See also 1926 C. 229; 30 C. at 153; but not under S. 4 of the Limitation Act. 92 I.C. 839. Whether benefit of S. 6, Limitation Act, is available to application under this rule. 1935 P. 450. See 29 C. 626, as to what day is to be taken as the "date of sale". Time runs not from the date of sale but from the date of knowledge of fraud. 60 I.C. 801=48 C. 119. But see 48 I.C. 970. Also 60 I.C. 529 (P.). It is sufficient if the application is in time. It does not matter if the particulars of the irregularities are filed more than 30 days after sale. 48 A. 286=24 A.L.J. 286=1926 A. 305. Where a void sale is sought to be set aside, then the application would not be under R. 90, but will be deemed to be an application made in execution governed by S. 47, to which Art. 181, Limitation Act, would be applicable. 151 I.C. 244=1934 A.L.J. 859=1934 A. 314. Where the real purchaser was included as a party after 30 days, while the application was within time against the ostensible purchaser, the application is within time, if the applicant did not know of the existence of a real purchaser at the time of the application. 76 I.C. 507=1923 A. 462. As to whether an application by a *bona fide* purchaser on the ground of fraud is barred, see 27 C.W.N. 587=1923 C. 538. When a purchaser can apply, see 38 M.L.J. 228=55 I.C. 333; 47 A. 479=1925 A. 459. Also 18 N.L.R. 98=1922 N. 113; 5 Pat.L.T. 41=74 I.C. 760 (2); 107 I.C. 494. But see 47 C.L.J. 62, *contra*. Dismissal of prior application under this rule is not a bar to an application under O. 34, R. 5 before confirmation of sale. 38 C.W.N. 924=152 I.C. 1059=1934 C. 822.

FORM OF APPLICATION.—A formal array of parties is not an absolute necessity in an application under this rule. 25 I.C. 907=17 O.C. 306. See also 7 Pat.L.T. 532=1926 P.H.C.C. 83=94 I.C. 31=1926 P. 266. It is not the duty of the judgment-debtor to name in his application all the auction-purchasers. 49 A. 788=25 A.L.J. 524=102 I.C. 126=1927 A. 513. Separate applications by different judgment-debtors can be consolidated and heard together and the whole sale set aside. 14 C.L.J. 346=16 C.W.N. 704. The Court cannot set aside a sale upon other grounds not pleaded by the applicant. 21 A. 140. See also 53 I.C. 794. Absence of application bars defence of invalidity of sale in a suit by non-transferable occupancy tenant. 28 C.W.N. 821=1925 C. 81.

PARTIES TO THE APPLICATION.—The decree-holder is a necessary party to an application under this rule. 15 A. 407. A beneficial owner is not a necessary party. 29 A. 682. The purchaser is a necessary party. 1891 A. W. N. 121. Also 50 I.C. 5; 8 L.R. 199 (Rev.); but see *contra* in 39 C.



## NOTES.

687=16 C.W.N. 570. See also 62 I.C. 61=2 Pat.L.T. 386. Auction-purchaser is not a necessary party. 107 I.C. 494=1928 L. 413. An application to set aside the sale was made under R. 90 but that was refused and sale was confirmed. An appeal was preferred against this order but the auction-purchaser was not made a respondent. Afterwards he was sought to be impleaded as a respondent but the time fixed for filing the appeal had expired. Held, that as the auction-purchaser was a necessary party and was not impleaded within time, the appeal should be dismissed. 163 I.C. 698=1936 L. 478. When there is a specific provision in O. 21, R. 90, enabling a decree-holder to apply to set aside a sale, his application can only be under R. 90 of O. 21, and S. 47, C. P. Code, could not possibly apply to it. The fact that the auction-purchaser was not made a party to that application could not in any way affect the question as it could not have the effect of converting the application into one under S. 47. 1939 N.L.J. 344=A.I.R. 1939 Nag. 241.

WHO CAN APPLY.—(1) The *decree-holder*, (2) any person entitled to share in a *rateable distribution* of assets, and (3) any person whose interests are affected by the sale. Under S. 146 any person claiming under any of the persons aforesaid can also apply. 3 A. 554 (559) (F.B.). See also 1927 M. 67; 17 Pat.L.T. 847; 1938 M.W.N. 1225=(1938) 2 M.L.J. 940. Authorised *vakil* of the judgment-debtor can apply. 1926 L. 514. As to whether an *attaching creditor* can apply, see 84 I.C. 119=1924 C. 386. See also 51 M.L.J. 661. An attaching decree-holder can apply. 47 A. 479; 133 I.C. 426=1931 A.L.J. 880. Other *co-sharer landlords* can apply under this rule when a defaulting tenure is sold. 50 I.C. 329=23 C.W.N. 619. A co-sharer landlord who claims pre-emption under the Bengal Tenancy Act, in respect of property sold in execution of a money-decree can apply. 151 I.C. 1088=59 C.L.J. 417=1934 C. 795. Where there is only one house which is sold and the irregularity in the conduct of the sale could not be apportioned and it is such an irregularity as to amount to an illegality, the sale cannot be set aside in part and it is immaterial in such a case whether both judgment-debtors objected or not. 1939 N.L.J. 319=A.I.R. 1939 Nag. 258. The words "whose interests are affected" are wide enough to include pecuniary interests. *Mortgagee* entitled to claim surplus proceeds of a rent-sale in satisfaction of his debt can apply under this rule. 126 I.C. 295=1930 P. 451. See also 154 I.C. 721=16 Pat.L.T. 216=1935 P. 210. *Mortgagee* of item (2) can apply to set aside sale of item (1) on the ground that owing to fraud and collusion item (1) had been sold for a low price with the result that item (2) had been ordered to be put up for sale. 1933 A.L.J. 3=1933 A. 54=55 A. 121. See also 154 I.C. 721=16 Pat.L.T. 216. When a *minor* was

not represented by a *guardian ad litem* in execution proceedings, his mother can apply to have the sale set aside as *natural guardian*. 40 C. 635=40 I.A. 140=25 M.L.J. 140 (P.C.). See also 21 Pat.L.T. 864=1940 Pat. 62. Whether the *auction-purchaser* himself may apply, see 105 I.C. 465=1927 R. 301=5 R. 516; overruled by 6 R. 621=114 I.C. 538 (1) *contra*. See also 1928 C. 828=49 C.L.J. 207; 132 I.C. 525=1931 L. 630; 3 Pat. L.J. 516; 1929 R. 33; 134 I.C. 373=1931 S. 107. Auction-purchaser can apply. 20 N.L.J. 111=1937 N. 140. See also 1939 N.L.J. 238=1939 Nag. 179. An auction-purchaser is not competent to apply to set aside the sale under R. 90 on the ground that an encumbrance existing on the property was not disclosed in the proclamation of sale and that he was unaware of it. 60 B. 750=38 Bom.L.R. 589=1936 B. 311. Also a person who has purchased the property at a prior execution sale, may apply, such prior sale not having been confirmed. 8 C. 367; 12 P. 665=14 Pat.L.T. 388=1933 P. 435 (S.B.). Even a defaulting auction-purchaser. 37 C.W.N. 766=146 I.C. 879=1933 C. 815. A purchaser from the judgment-debtor prior to attachment. 15 C. 488 (F.B.). Person purchasing property after attachment but before sale. 146 I.C. 339=37 C.W.N. 912=1933 C. 788. Also a person who obtains an order for attachment before judgment, and subsequently obtains a decree in his suit prior to an execution sale of the property of the judgment-debtor at the instance of another decree-holder. 40 C.W.N. 1338=63 C.L.J. 560; 37 L. W. 581=1933 M. 455=64 M.L.J. 605; 146 I.C. 918=1933 P. 445; 152 I.C. 219=38 C.W.N. 182=1934 C. 477. Application to set aside sale by one of several judgment-debtors—Fraudulent suppression of processes and sale for under-value proved—Setting aside sale enures to the benefit of other judgment-debtors also. 32 C.W.N. 519. A person claiming to be a co-sharer in undivided immovable property. 5 A. 42. The *judgment-debtor* who sold the property prior to execution sale can apply where the properties are sold as his. 22 L.W. 872=92 I. C. 597 (1)=1926 M. 217. Judgment-debtor not appearing though served to settle terms of proclamation of sale—Still he is not estopped from applying to set aside sale. 1930 N. 191. But see 130 I.C. 265=1931 P. 63; 131 I.C. 721=1931 Rang. 179; 1925 C. 552=79 I.C. 369; 21 I.C. 780. A judgment-debtor who owns only a share in one of the several lots of property sold in execution is a "person whose interests are affected by the sale". If the other lots are wrongly sold for a lower amount, the burden on the applicant's share would to that extent be increased. Hence he can challenge the sale of the whole property including lots with which he is not concerned. 58 B. 564=36 Bom.L.R. 681=1934 B. 348. See also 145 I.C. 884=1933 A.L.J. 3=1933 A. 54. The following persons were also held entitled to apply:—A *mortgagee* who holds a



## NOTES.

mortgage on the property sold. 13 C. 346. See also 41 C.W.N. 1246. A person claiming to be the *beneficial owner* of property which has been sold as the property of the ostensible owner. 20 C. 418. See also 19 M. 167. A person claiming to be a purchaser of a tenure prior to attachment. 22 C. 802. The *real owner* of property that has been sold in execution of a decree against the benamidar. 6 M.L.J. 24. A *transferee* of a portion of non-transferable occupancy holding can apply to set aside a rent sale by the entire body of landlords. 23 I.C. 839=19 C.W.N. 326. An *interim Receiver* appointed under S. 20, Provincial Insolvency Act, can apply under O. 21, R. 90, C. P. Code. 1928 M.W.N. 216. See also 1935 M.W.N. 258=41 L.W. 309 (Official Receiver in Insolvency). Judgment-debtor who was adjudged insolvent before sale. 145 I.C. 855=1933 M. 694=65 M.L.J. 359. Adjudged insolvent after sale. 146 I.C. 521=1933 M. 851=65 M.L.J. 719 (F.B.)—But not when Receiver applies. 37 C.W.N. 146=144 I.C. 779=1933 C. 486. See also 58 B. 564=36 Bom.L.R. 681. Decree against Hindu father and sons—Insolvency of father—Sale in execution of shares of sons—Application by Official Receiver to set aside sale—*Held*, that the Official Receiver was competent to make the application, because he was "a person whose interests are affected by the sale", under R. 90, as the sale of the sons' shares affected the interests of the general body of creditors whom the Receiver represented; and that notice of the settlement of the sale proclamation ought to have been given to the Receiver under R. 66, and the omission to do so was a material irregularity. 157 I.C. 251=41 L.W. 309=1935 M. 459. A mortgagor judgment-debtor is entitled to maintain an application under O. 21, R. 90, for setting aside the sale in execution of the mortgage decree, although a receiver has been appointed by Court in respect of the mortgaged properties. 41 C.W.N. 1246. A mortgagee purchaser of an entire non-transferable holding can apply this rule to set aside a sale in execution of a subsequent rent decree. 31 I.C. 359=22 C. W. N. 143. See also 86 I.C. 612=1925 C. 925; 6 P.L.T. 295=1925 P. 461. A *Hindu reversioner* can apply. 4 P.L.J. 360=1919 P. 303=51 I.C. 359. See also 1926 M. 959. As the entire ancestral property including the interest of the sons can be sold in execution of a decree obtained against a Hindu father, the interest of the sons is affected by the sale and they are competent to apply to set aside the sale. 14 P. 436=16 P.L.T. 680=1935 P. 205. See also 54 L.W. 365=(1941) 2 M.L.J. 550 (Sale of interest of Hindu co-parcener in joint family property—Want of specification of interest, does not invalidate sale proclamation). Irregularity in the conduct of sale—Person bidding is not estopped from challenging the irregularity. 118 I.C. 901=1929 L. 673. *Quære*.—If a person claiming C. C. M.—136

occupancy right can have the sale set aside. 35 C.W.N. 31=1931 C. 425; 132 I.C. 111=1931 P. 217.

WHO CANNOT APPLY.—A stranger cannot apply. 1927 C. 82=97 I.C. 757 (2). A *judgment-debtor duly served* cannot apply under this rule. 1925 C. 552. But see also 1930 N. 191; 130 I.C. 265; 1931 R. 179; 21 I.C. 780. Nor a person claiming by *title paramount* to that of judgment-debtor. 1 Bur.L.J. 234=70 I.C. 900. Nor an *adjudged insolvent* whose property has vested in the Receiver. 35 I.C. 530. Nor a person obtaining an *attachment before judgment*. 16 C.L.J. 566=17 C.W.N. 80. Also 42 C. L.J. 37=1925 C. 1103. *A fortiori* a person obtaining an attachment before judgment of properties other than those sold, 27 M. L.J. 302=1914 M. W. N. 871. A person who has filed a declaratory suit regarding the property ordered to be sold cannot apply under this rule, while his suit is pending. 38 A. 358=34 I.C. 272. The holder of a Kudivaram interest in land has no *locus standi* to apply under O. 21, R. 90, to set aside a sale where it is of the melwaram interest only. (1941) 1 M.L.J. 831. A person not a party to a mortgage suit cannot apply. 20 I.C. 16. A decree-holder for money against the mortgagor cannot set aside a mortgage sale. 1925 S. 101. Objection to a purchase without leave of Court cannot be raised by strangers to the suit. 17 I.C. 126. Judgment-debtors or *sham alienees* from them who knew but kept quiet at the time of sale that the property was not attached or that the property was not within the Court's jurisdiction, are estopped from objecting to the sale. 24 M.L.J. 70=18 I.C. 498. Non-appearance of judgment-debtors after notice at the time of fixing of terms of sale proclamation will bar them from raising objections later on. 22 I.C. 780. Where judgment-debtor has knowledge of irregularities and stands by without raising any objection at the time, he will not be permitted to take advantage of them in an application under this rule. 32 I.C. 990. Where purchaser is the decree-holder himself, he will be deemed to have notice of the charges to which the property is subject. 57 I.C. 1004=48 C. 93. Where a judgment-debtor having knowledge of irregularities gave an undertaking not to question the sale later, he will be bound by his undertaking. 47 I.C. 831; 9 I.C. 698=13 C.L.J. 192. The rights of purchaser cannot be affected by any compromise between judgment-debtor and decree-holder. 88 I.C. 534 (2)=1925 O. 693. Direction to sell subject to mortgage—Sale proclamation not mentioning the charge—Mortgagee bidding with notice of decree-holder's application—Mortgagee if estopped. 118 I.C. 901=1929 L. 673. Material irregularity—Sale in execution of later decree of property attached in execution of prior decree—Court allowing decree-holder to set-off sale price—Propriety—If sale liable to be set aside at the instance of prior attaching decree-holder. 17 Pat.L.T. 847.



## NOTES.

**MATERIAL IRREGULARITY.**—The word “irregularity” is wide enough to include an illegality; 11 A. 342; and connotes want of conformity to some recognized rule of procedure. 5 M.L.J. 70. O. 21, R. 90 does not refer only to an irregularity or fraud in publishing or conducting the auction-sale. The decree-holder is also responsible for any irregularity or fraud occurring in the sale proclamation which is itself prepared from the sale statement for which the decree-holder himself is responsible. 20 N.L.J. 111=A.I.R. 1937 Nag. 140. Irregularities appearing during the course of investigation as well as those alleged in the application are to be taken into consideration. 103 I.C. 532=1927 N. 319. Sale in contravention of terms of decree is a material irregularity. 33 I.C. 692=(1916) 1 M.W.N. 256. Villages to be sold in one lot, but proclamation showing each village separately as for sale. 56 M. 356=144 I.C. 414=37 L.W. 188=1933 M. 225=64 M.L.J. 539. Where on account of defective plan, bidders are misled, 148 I.C. 135=35 P.L.R. 309=1934 L. 413. Omission to mention rent payable in respect of one of the lots in the sale proclamation. 147 I.C. 629=1934 P. 186. The fact of a sale being held before the period of 30 days has elapsed as required by O. 21, R. 68 although a material irregularity does not make the sale a nullity without proof of substantial injury thereby to the judgment-debtor (21 C. 66, Foll.) 1935 L. 962. *See also* 39 P.L.R. (J. & K.) 127 (non-compliance with O. 21, R. 66). Sale proclamation giving two valuations. 152 I.C. 259=15 P.L.T. 511=1934 P. 540. Gross under-valuation of the properties in the sale proclamation is a material irregularity. 157 I.C. 251=41 L. W. 309=1935 M. 459; 1937 P.W.N. 205=1937 Pat. 493. Want of notice under O. 21, R. 22, does not make the sale void, but only voidable. 159 I.C. 299=60 C.L.J. 584=39 C. W.N. 510=1935 C. 356. *See also* 175 I.C. 919=1928 Pat. 289; 48 L.W. 586. The omission to issue or serve the notice contemplated by O. 21, R. 22, C.P. Code, is not a mere irregularity in publishing and conducting a sale falling under O. 21, R. 90. There can be no sale without such notice, and if a sale is held under such circumstances, it is a nullity being a case of no sale at all in the eye of law. A separate suit therefore lies to declare the sale void and ineffective. 194 I.C. 372=22 Pat.L.T. 520. Non-compliance with provisions of O. 21, R. 84. 144 I.C. 314=10 O.W.N. 440=1933 O. 345. Irregularity in service of notice of attachment. 37 C.W.N. 1164. Non-compliance with provisions of O. 21, R. 66. 145 I.C. 915=1933 P. 640. *See also* 39 P.L.R. (J. & K.) 127; 20 N.L.J. 283. The fact that no notice was issued under R. 66, though a material irregularity does not of itself vitiate the sale. (1927 L. 84, Foll.) 1935 L. 962. Omission in adjournment of sale

to specify hour. *See* 1935 A. 182=4 A.W. R. 1465. But *see* 1935 L. 992. In order that there may be an illegality proved there must be shown some breach of a definite rule of law. 30 L.W. 995=117 I.C. 705=1929 M. 275. There is no basis for making a distinction between a material irregularity and an illegality in the conduct of a sale. In one sense whatever is irregular is also illegal. 5 M.L.J. 70. As to irregularities in conducting the sale, *see* 7 A. 641. Sale will be set aside if there is (a) collusion between judgment-debtors and decree-holders, (b) when the value of property is grossly inadequate, and (c) when price fetched is very low. 6 Pat.L.T. 295=1925 P. 461. When it has been agreed to between the parties that a sale of certain properties in execution of a decree shall be free of encumbrances, it is a material irregularity that a statement to the contrary in the sale proclamation should be allowed to stand without any correction either in the proclamation or verbally made at the sale and the sale should be set aside under R. 90. 157 I.C. 982=1935 M.W.N. 496=1935 M. 607. The holding of an execution sale fixed for a particular date in the following date because it could not be held earlier, when the scales are held in due order, is not illegal and void. It is not even a material irregularity. 17 Pat.L.T. 712; 167 I.C. 63=1937 P. 104. The holding of a sale before the time fixed is not merely an irregularity but an illegality which in itself renders the sale void. An irregularity which renders impossible the publicity which affords one main security for the fairness of public sales must be deemed to be an illegality. Holding the sale at a time earlier than that advertised would result in the intending bidders arriving too late. Such a sale can be set aside under O. 21, R. 90, by the Court itself, even if the objection is not raised by the applicant himself. 1939 N.L.J. 319=A.I.R. 1939 Nag. 258. Where the auctioneer conducting an execution sale, arbitrarily closes the auction either before or as soon as it is 4 o'clock although a bidder is willing to purchase the property for a much larger sum than the price realized, and although the bid for the larger sum even if made after 4 o'clock is made immediately after bid for which the property is knocked down, it amounts to a material irregularity in conducting the sale. 1936 L. 555. Where according to the sale proclamation the sale was to commence at 10 o'clock and the officer who was to conduct the sale reaches the spot at 12 o'clock with the result that the intending bidders depart after waiting, the sale cannot be said to have been properly and regularly conducted. When the intending bidders depart, it follows that there was no proper competition in bidding and the property would naturally be sold at an inadequate price. 38 P.L.R. 515.

**WHAT ARE IRREGULARITIES.**—On proof of irregularities sale must be set aside, though



## NOTES.

the property would be worth less than the decree amount, and the decree-holder had since allowed the decree to be barred by limitation. 15 I.C. 728=16 C.W.N. 1022, *overlooking the rules* laid down for the preparation of sale proclamation. 133 I.C. 529=1931 A.L.J. 849. An omission in a sale proclamation must be very material one. 53 I.C. 143. The *question of valuation* can be raised in an application under this rule, though it has been decided at the time of settlement of proclamation. 105 I.C. 689 (2)=6 P. 588. Where the sale proclamation mentions only annual net income but not an adequate price, there is material irregularity. 21 I.C. 592. *See also* 27 A.L.J. 1228=1929 A. 948. So also an *under-statement of the value* of the property in the sale proclamation, calculated to mislead bidders. 20 A. 412 (P.C.); 23 M. 568; 1935 M.W.N. 258=41 L.W. 309; 56 C.L.J. 570=1933 C. 339. *See also* 52 I.C. 23; 14 C.L.J. 346=11 I.C. 438=16 C.W.N. 704; 38 M. 387=25 M.L.J. 198; 47 L.W. 773=1938 Mad. 720; 1937 P.W.N. 205=1937 Pat. 493; 1938 Lah. 152; 33 I.C. 946; 16 I.C. 974=16 C.L.J. 98; 11 I.C. 295=15 C.W.N. 965; 44 I.C. 412; 33 C.W.N. 848=1929 C. 818; 1929 L. 441; 159 I.C. 358=37 Bom.L.R. 489=1935 B. 331. So also a misstatement of value knowingly made. 52 I.C. 23. *See also* 42 I.C. 394; 105 I.C. 153; 1938 N.L.J. 262 (Value not given and non-existing mortgage shown to exist). So also *omission of land revenue* in a sale proclamation. 40 M.L.J. 403=28 C.W.N. 593=75 I.C. 546=1923 P.C. 93 (P.C.). Omission to state the amount of revenue assessed in the sale proclamation. 9 C. 656 (P.C.). But *see also* 7 C. 723; 23 M. 628. *Omission to state the hour of sale*. 24 C. 295; 49 A. 402=25 A.L.J. 302=1927 A. 241; 1935 L. 992. The omission to issue a sale proclamation and to specify the time and place of sale by means of the proclamation as prescribed by O. 21, R. 65, is a material irregularity within the meaning of O. 21, R. 90. 1937 A.L.J. 288=A.I.R. 1937 All. 407. Agreement by judgment-debtor to forego proclamation or notice amounts to waiver of irregularity. 55 A. 519=1933 A.L.J. 1273=143 I.C. 673=1933 A. 546; 1935 P. 483. *See also* 1937 L. 113. Where the Court omitted to fix a *reserve price* and the property was sold for a lesser amount than the decree amount, *held*, that the sale must be set aside. 32 Bom.L.R. 436. *See also* 1938 M.W.N. 1225=(1938) 2 M.L.J. 940 (Reduction of upset price during conduct of sale without notice to judgment-debtor). Also *publication of the proclamation at a distance* of half a mile from the property. 6 C.W.N. 44. Also *delay in deposit* under R. 84. 9 I.C. 66=15 C.W.N. 350; 14 M. 228; 9 A. 511; 16 C. 33; 28 A. 238. *Want of notice* under R. 66 is an irregularity. 4 L. 243=1923 L. 592; *also* 18 I.C. 715; 99

I.C. 515; 118 I.C. 49. Insufficient notice of sale, resulting in a low price is an irregularity. 144 P.L.R. 1914=25 I.C. 51; *also omission to issue fresh proclamation* on adjournment of sale. 100 I.C. 787=2 Luck. 490. Also omission to affix the sale proclamation to some conspicuous place on the property attached. 7 C. 466; 1929 A. 948. Omission to affix the *sale notice* in the Collector's office as required by R. 67. 8 C. 935. *See also* 46 M. 736=45 M.L.J. 263. Omission to have the *drum beaten* as required by R. 54. 10 B. 504; *also* 67 I.C. 752; 1933 A.L.J. 73=1933 A. 747=55 A. 182. Omission to state the *place of sale*. 9 M. 511; 5 Bur.L.J. 183=100 I.C. 74=1927 R. 84. But *see* 41 M.L.J. 465=68 I.C. 916. Where the Naib Tahsildar holding a sale adjourns it to another date, but informs no one but the decree-holder about the adjournment and does not specify the hour to which the sale is adjourned, that amounts to a material irregularity. The order of adjournment must be announced to all persons who have attended the sale and not merely to the decree-holder. 20 N.L.J. 283.

O. 21, Rr. 90 and 69.—O. 21, R. 69, no doubt directs the sale officer to record his reasons for the adjournment of the sale. But his failure to record his reasons would not amount to a material irregularity, for it cannot be said to go to the root of the matter. I.L.R. (1938) Nag. 436=A.I.R. 1938 Nag. 107. *See also* 18 Pat.L.T. 326. The failure of the sale officer to specify the exact hour to which the sale is adjourned would amount to a material irregularity. When the Code directs a specific hour to be named, it is not fulfilling its directions to say in a vague way that the sale will be "resumed in an hour or so". But this is not enough to justify setting aside the sale unless the applicant has sustained substantial injury by reason of such irregularity. I.L.R. (1938) Nag. 436=A.I.R. 1938 Nag. 107. *See also* 177 I.C. 138. Adjournment of sale—Omission to specify day and hour—Material irregularity. 124 I.C. 721=1930 A. 542. Also when the proclamation is made on the spot only five days before the date fixed for sale. 7 C. at 40. But *see* 4 A. 300; *also* 48 I.C. 611. Also the holding of the sale on a date other than that notified in the proclamation. 156 P.L.R. 1915=30 I.C. 524; *also* 65 I.C. 746=35 C.L.J. 140. Altering date of sale without notice. 27 A.L.J. 1228=1929 A. 948. Material irregularity—Decree-holder with leave to bid—Bid of—Refusal to accept, is material irregularity in conduct of sale. 1929 O. 26. Permission to bid given to decree-holder—Condition subsequently added that decree-holder must pay in cash half of purchase money—Decree-holder abstaining from offering bid—Property sold at inadequate price—Sale set aside. 43 C.W.N. 245. The *absence of attachment* prior to the sale of immovable property in execution of a decree is a material irregularity. 21 A. 311.



## NOTES.

See also 10 A. 506; 5 A. 86; 58 B. 564=36 Bom.L.R. 681=1934 B. 348. But see 9 C. 918=13 C.L.J. 243; I.L.R. (1938) Lah. 582. Raising of attachment due to judgment-debtor's insolvency—Subsequent annulment of adjudication—Sale without fresh attachment. *Held*, that the omission to re-attach the property did not invalidate the sale, and that it amounted to no more than a mere irregularity. 165 I.C. 86=38 Bom.L.R. 719=1936 B. 315. Grounds for setting aside sale—Want of service of notice under O. 21, R. 22. 51 C.L.J. 197=1930 C. 348 (2). Omission to state whether the sale is subject to mortgages is a proper ground for setting aside the sale. 50 I.C. 384=21 Bom.L.R. 281. See also 20 N.L.J. 181. Where the sale is held at a different place from that advertised. 39 M.L.J. 188=44 M. 35; 152 I.C. 1017=1934 P. 659=11 P.L.T. 743. But see 1933 Pesh. 57. Sale held before the expiry of 30 days. 20 I.A. 176; 1933 L. 186. Also the *absence of specification of incumbrances* and the statement of a very low value. 6 C.W.N. 386. See also 20 N.L.J. 181=6 C.W.N. 56; 18 N.L.R. 98=65 I.C. 875; 16 N.L.J. 111; 1935 L. 962. Also a mistake in the dimensions of the property. 96 I.C. 196=1926 L. 587. Mistake in the boundaries. 1933 L. 1031. Selling half house when sale proclamation is for whole, is material irregularity. 1930 L. 15. A sale, free of mortgages but advertised subject to mortgage is a material irregularity. 9 I.C. 383. Sale can be set aside where the legal representatives of a deceased judgment-debtor was not brought on record. 23 C.W.N. 608=29 C.L.J. 411. See also 18 C.W.N. 1266=20 C.L.J. 341; 18 C.L.J. 628=18 C.W.N. 766; 23 I.C. 251=26 M.L.J. 267; 6 Pat.L.T. 67=1925 P. 384. Where a minor son of a deceased judgment-debtor was not brought on record, it is a material irregularity. 19 I.C. 120. See also 1940 Pat. 62. Where the execution application in which the sale was held was barred by limitation. 105 I.C. 545=1927 O. 488. Where the deposit of 25 per cent. of the purchase-money is not made by auction-purchaser at the time of sale but three days after it, and it is accepted by the Court it is a mere irregularity and cannot vitiate the sale. 1937 L. 113. Suppression of processes in connection with sale. 108 I.C. 33=47 C.L.J. 351=32 C.W.N. 519. Mortgage suit—Sale held under Chap. XXVII of the Calcutta Oigh Court Rules—Subsequent disclosure of prior subsisting attachment—Purchaser whether can give up title and take back deposit. 33 C.W.N. 177=118 I.C. 887 (2)=1929 C. 207. Where the sale is held in separate lots the Court may set aside the sale in respect of some only of the lots, but that can be done only when the irregularity and the injury to the objector can be allotted to one part only of the sale. Where on the other hand the irregularity extends to the

whole property and to all the lots it is not justifiable to retain the efficacy of the sale with respect to some of the plots only in which the sale price obtained cannot be shown to be inadequate in view of the advertised sale value. 12 P. 181=144 I.C. 62=14 Pat.L.T. 493=1933 P. 223.

WHAT ARE NOT IRREGULARITIES.—The absence of attachment prior to the sale of immovable property in execution of a decree amounts to no more than an irregularity and is not sufficient to vitiate the sale in the absence of any substantial loss resulting from such want of attachment. (A.I.R. 1930 Lah. 685, Foll.). I.L.R. (1938) Lah. 582. See also 21 All. 311; 10 All. 506. Conducting a sale from day to day and fixing a date for bringing the sale to an end does not necessarily amount to material irregularity. 37 L.W. 188=1933 M. 226=56 M. 356=144 I.C. 414=64 M.L.J. 439. There is no irregularity in the conduct of sale in case the officer conducting the sale sells the property twice over. 2 A. 111. Where the date for sale is not mentioned, see 40 C.L.J. 311=84 I.C. 700=1925 C. 201. Where a sale was under hammer on the 18th, but in fact was held on the 20th, a day which was not fixed for the sale, it is not illegality but only an irregularity. 177 I.C. 138=4 B.R. 793. The use at a sale, of language by an intending bidder in disparagement of the property, is a "material irregularity". 5 C. 308; 7 C. 346; but such remarks made by by-standers or by purchasers other than the decree-holder do not constitute such an irregularity. 17 C. 152. See also 23 M. 227 (P.C.). As to the purchase of property by the decree-holder without the permission of the Court, see 11 C. 732. As to omission to give notice to the judgment-debtor under O. 21, R. 22, see 3 A. 426; 6 M. 237; 15 I.C. 506=40 C. 45; also 37 I.C. 387=20 M.L.T. 479; 17 I.C. 126; 1938 N.L.J. 303=1938 Nag. 525. Effect of a guardian of a minor judgment-debtor not having been appointed, see 89 I. C. 765. Appointment of an officer as guardian *ad litem* of minor son of deceased and omission to bring on record another minor son. 1933 M. 179=145 I.C. 394. Sale cannot be set aside at the instance of the judgment-debtor on the ground that the Official Receiver was not impleaded in the mortgage suit. 130 I.C. 485=1931 A. 159. A sale is not invalid if the attachment has been under a wrong section. 18 A. 469. Judgment-debtor who did not object at the time either to the procedure of the attachment or to the order for sale or the procedure after the order for sale cannot impugn them afterwards. 1931 P. 63. See also 58 B. 564=36 Bom.L.R. 681=1934 B. 348. The holding of the sale between 12-30 and 2 p.m. on a Friday when the sitting of Court is suspended under sub-R. (4) of R. 1 of Chap. 1 of the civil rules and orders issued by the Calcutta High Court, does not amount



## NOTES.

to material irregularity in the conduct of the sale. I.L.R. (1940) 1 Cal. 1=44 C.W.N. 109=71 C.L.J. 88=A.I.R. 1940 Cal. 265. See also 1940 Mad. 206=(1940) 1 M.L.J. 568 (Sale held on a day not advertised); 1939 N.L.J. 319=1939 Nag. 258 (Sale held before the hour fixed—Not proper—Can be set aside). See also 18 Pat.L.T. 326. The sale on a closed holiday is not always an irregularity. 3 A. 333. Nor when on account of holiday, sale was held on the next day. 144 I.C. 779=37 C.W.N. 146=1933 C. 486. Nor conclusion of sale before time advertised in the proclamation. 58 B. 564=36 Bom.L.R. 681=1934 B. 348. Nor where officer conducting the sale did not wait for bidders on intimation by a person that he was going to fetch bidders. 17 N.L.J. 91=1934 N. 250. When a Court sells property without having jurisdiction to sell it, this does not amount to an irregularity in publishing or conducting the sale. 18 A. 144. Omission to state value of property is not material irregularity. 1927 M. 1009 (1). Though there was an under-valuation, yet if the price fetched was adequate, the sale cannot be set aside on the ground of under-valuation. 57 I.C. 892; 16 I.C. 394; see 10 I.C. 475=15 C.W.N. 577. See also (1937) 2 M.L.J. 936 (Mere inadequacy of price not sufficient to set aside sale); 20 M. 159; 30 Cal. 1; 31 Cal. 815 Ref.) Where in a sale proclamation a certain property was included in a wrong lot by mistake, it is not such an irregularity as to entitle the sale to be set aside. 32 I.C. 990. The practice in the Madras Presidency in execution sales is to sell the lots in the order in which they appear in the sale proclamation. A departure from that order may amount to a material irregularity, and if substantial injury is occasioned by such irregularity, the sale is liable to be set aside. I.L.R. (1939) Mad. 216=49 L.W. 502=A.I.R. 1939 Mad. 303=(1939) 1 M.L.J. 38. If the Nazir sells properties in a different order than that indicated in the list prepared by the District Judge under R. 233 of the Civil Rules and Circular Orders issued by the Calcutta High Court, there is only an irregularity in conducting the sale, and the sale is not void but voidable if that irregularity has resulted in loss to the judgment-debtor or the decree-holder. I.L.R. (1939) 1 Cal. 530=43 C.W.N. 539=70 C.L.J. 97=A.I.R. 1939 Cal. 369. There is no doubt that where the sale proclamation stated that the entire house would be sold but in fact only a portion of it was sold, it does constitute an irregularity and perhaps even a material irregularity; but whether substantial injury would flow from that, is another matter. The tracing of the injury to the irregularity must depend on facts of each case. 1939 N.L.J. 344=A.I.R. 1939 Nag. 241. See also 1937 A.L.J. 288=1937 All. 407. Where an entire holding is sold, the giving of wrong numbers

of lots is not a sufficient irregularity. 41 I.C. 282=2 P.L.J. 623. A compromise, in which all persons affected by the sale, are not parties, and which is not recorded by the Court, does not result in setting the sale aside. 85 I.C. 529 (2)=1925 C. 779. Failure by prior mortgagee-decree-holder to implead third party purchaser in execution of a decree (obtained by a puisne mortgagee) and subject to the prior mortgage is no irregularity or fraud in conducting the sale. 1933 M.W.N. 77. Purchaser of one of mortgaged properties made defendant—Preliminary decree not specifying order of sale—No objection by purchaser to preliminary or final decree—No irregularity in selling them in any order. 150 I.C. 733=1934 P. 329. Failure to follow the order entered in the list by the sale officer is not such an irregularity. 1931 A.L.J. 62=1931 A. 159; 55 A. 519=1933 A.L.J. 1273. The sale of property consisting of numerous plots of land situated in various villages in one lot does not by itself constitute a gross irregularity. 107 I.C. 295; 37 L.W. 188=1933 M. 225.

GROUND FOR SETTING ASIDE SALE — WHAT ARE NOT.—Waiver of irregularities, see 91 I.C. 407=1926 C. 577. Mere suspicious circumstances about sale and low price in the absence of fraud. 20 L.W. 736=1925 M. 202. See also 154 I.C. 721=16 Pat.L.T. 216. An objection that the attachment and sale was time-barred. 2 P.L.J. 157=38 I.C. 876. Dissuading bids. 102 P.L.R. 1911=9 I.C. 816. Where the price fetched is below that fixed by consent in sale proclamation. 1 P. 214=1922 P. 550; also 21 L.W. 521=1925 M. 729. Also where the property is sold for a price which subsequently appears to be too low. 8 B. 424. Irregularity without loss is not. 4 P. 696. Fraud of decree-holder in bringing to sale property after satisfaction of decree, is not. 10 I.C. 625. Irregularities in proclamation of sale not objected to, cannot be grounds for setting aside sale. 49 A. 788. Also gross under-valuation if not objected to by judgment-debtor after due notice. 37 C.W.N. 1054. See also 147 I.C. 629=1934 P. 186. But see 143 I.C. 284=56 C.L.J. 570=1933 C. 339. Where it was due to fraud of decree-holder. Failure to implead purchaser *pendente lite* is no fraud or irregularity in conducting sale. 146 I.C. 528=38 L.W. 728=1933 M. 838. As to want of notice under O. 21, R. 22, see 60 C.L.J. 584=39 C.W.N. 510.

FRAUD.—Fraud is different from irregularity. As to what amounts to fraud, see 85 I.C. 622=1925 P. 521; also 1926 C. 229. Fraud antecedent to sale proceedings—Evidence of. See 93 I.C. 870=1926 C. 829. A person alleging fraud must prove that the existence of his right to set aside the sale was concealed by fraud. 87 I.C. 555. Low price does not raise a presumption of fraud. 89 I.C. 107=1926 O. 45. Purchase by decree-holder's *vakil's* clerk without informing the



## NOTES.

decree-holder amounts to fraud. 2 O.W.N. 297=1925 O. 381. Auction-purchaser must be a party to the fraud, and the fraud must come to the judgment-debtor's knowledge subsequent to the confirmation of the sale. 20 M. 10; 8 C.W.N. 230; 5 C.L.J. 328; 23 M. 227 (P.C.); 24 C. 546. See 30 C. at 153. It is not necessary that purchaser should be a party to the fraud. 4 Pat.L.T. 306=72 I.C. 625. Also 18 I.C. 715; 99 I.C. 946=44 C.L.J. 565; 108 I.C. 899. Mere want of diligence is not fraud. Facts must be stated. 2 P.L.T. 401=6 P.L.J. 319. Mis-statement of value in a sale proclamation does not necessarily amount to fraud; but in particular circumstances may justify the inference of fraud. 2 Pat.L.T. 501=2 P. 65. See also 56 C.L.J. 570=1933 C. 339. Where decree-holder colludes with strangers in purchasing the property for much less than the decretal sum, it amounts to fraud. 15 I.C. 888=16 O. C. 86.

**INJURY.**—The word "injury" means loss which is wrongful. When a man loses what he had been in the habit of wrongfully gaining it is not substantial injury. 7 C.W.N. 439. Substantial injury is essentially necessary. 83 I.C. 1028=1924 A. 698. See also 20 C. 599; 7 C. 730; 12 M. 19; 18 A. 37; 7 C. 466; 20 M. 159; 24 C. at 295; 30 C. at 9; 104 I.C. 196=1927 C. 873; 7 Pat.L.T. 468=93 I.C. 935=1926 P. 202; 96 I.C. 196=1926 L. 587; 50 L.W. 867. Party must prove such an irregularity as resulted in substantial injury. 25 I.C. 18; 45 I.C. 212; 5 L.L.J. 30=1923 L. 213; 37 I.C. 964=1917 M.W.N. 89; 33 I.C. 692=(1916) 1 M.W.N. 256; 32 I.C. 990; 70 I.C. 900=1 Bur.L.J. 234. See also 39 C. 26=38 I.A. 200=16 C.W.N. 1 (P.C.). A denial of opportunity to purchase the property put up for sale by auction constitutes a "substantial injury" within the meaning of R. 90. 1933 A.L.J. 92=1933 A. 161. Unless otherwise prescribed, a sale under the Code is a public sale to be held at a public place and after notice to the public. Where a sale in which the bid of the decree-holder was the highest was not concluded and subsequently the Court accepted a private offer by another person and concluded the sale in the absence of the decree-holder, held, that there was material irregularity resulting in substantial injury and that the sale should be set aside. 1933 A.L.J. 92=1933 A. 161; 36 P.L.R. 183. Although the price realised is grossly inadequate, the Court must be "satisfied upon the facts proved" that it was caused by material irregularity in publishing or conducting the sale. See 20 M. 159; 30 C. at 9; 18 A. 37; 18 A. 141. But see also 31 C. 815 (818). See also 24 L.W. 406=97 I.C. 574=1926 M. 959 and 6 C.W.N. 836. An adjournment of sale by bailiff without Court's sanction and the absence of a fresh proclamation is not a sufficient ground in the absence of substantial injury. 20 I.C. 192=6 Bur.L.T. 65. Absence of publication of sale

is not a sufficient ground without proof of loss. 5 Pat.L.W. 15=46 I.C. 84. Mere omission of publication in the Gazette is not ground to set aside sale in the absence of proof of substantial injury. 53 I.C. 794. Where only a part of the property advertised was sold without a fresh proclamation, proof of substantial loss is necessary to set aside the sale. 11 L.W. 477. Mere omission to state value is not a serious irregularity. Proof of substantial loss in addition is necessary. 4 Lah.L.J. 441=1922 L. 35. The circumstance that the decree-holders offered to return the properties to judgment-debtor at the price for which they brought the offer not being accepted may be taken into consideration in judging whether judgment-debtor has suffered injury by the sale. 32 C.W.N. 309=1928 C. 328.

**PROOF OF INJURY.**—Injury can be proved not necessarily by direct evidence but by circumstantial evidence also. 144 I.C. 414=56 M. 356=64 M.L.J. 439. Gross undervaluation must deter intending purchasers from bidding at the sale and offering reasonable value. When such under-valuation is proved and the properties are actually sold for a very low price, it must be held that substantial injury has occurred and the sale should be set aside. 157 I.C. 251=41 L.W. 309=1935 M. 459. From the failure at complying with even the elements of the prescribed procedure an irresistible presumption of substantial injury would arise sufficient to justify the cancellation of the sale, even without any affirmative proof of substantial injury, *e.g.*, where the notice required under O. 21, R. 22, has not been served, no proclamation of sale issued at all, sale was held within 30 days of the order, less property was put up for sale than was contained in the application and the sole bidder was the decree-holder. 144 I. C. 14=1933 Pesh. 41.

**SUIT TO SET ASIDE SALE.**—A suit does not lie to have an execution sale set aside on the ground of any fraud in the conduct and proclamation of sale. The remedy is under O. 21 only, 159 I.C. 299=60 C.L.J. 584=39 C.W.N. 510=1935 C. 356. When an application under this rule is dismissed, no suit under R. 92 will lie. 5 R. 606=105 I.C. 706; 1929 N. 130. When a person seeks to set aside a sale by reason of a title adverse to that of the judgment-debtor at the date of attachment the proper remedy is a regular suit. 16 M. 476. A sale after proclamation notifying a decree giving prior charge, can be set aside only by a regular suit, if the decree giving prior charge was set aside subsequent to sale. 1925 M. 325. The rule does not apply when the fraud alleged is that a minor defendant was represented as major. A regular suit three years after his majority is the only remedy. 38 M. 1076=28 M.L.J. 525. When fraud is alleged, this rule applies before confirmation of sale. After confirmation a suit is the only remedy. 51



LOC. AMS.—[ALLAHABAD.] *Substitute* the following for the original proviso in O. 21, r. 90 :—

“ Provided that—

(a) no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud ;

(b) no such application shall be entertained upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up.”

[CALCUTTA.] (a) *Add* the following words to R. 90 (1), “ or on the ground of failure to issue notice to him as required by r. 22 of this Order.”

#### NOTES.

I.C. 447. *See also* 1926 O. 45. But *see* 44 M. 351=40 M.L.J. 55. *See also* 70 I.C. 675=1922 P. 422. Applicability—Fraudulent sale—Suit to set aside—Maintainability. 113 I.C. 873=1928 M. 1138. In a suit to set aside sale, fraud need not be specifically alleged; an inference or suggestion is sufficient. 63 I.C. 425=19 A.L.J. 530. A member of a family not bound by a decree against some other members can file a separate suit to set aside the sale of the family properties and need not apply under this rule. 2 P. 386. *Also* 6 Pat.L.T. 742=85 I.C. 1014. A suit lies in a Civil Court to declare that a sale held by a Collector is valid, and that an order passed by him under this rule setting aside the sale is inoperative. 25 A. 355. Question relating to execution—When can be raised in independent suit—Execution proceedings as the proper stage. 33 C.W.N. 165.

DISMISSAL FOR DEFAULT.—O. 9, R. 9, applies to an order of dismissal for default of an application under this rule. 59 I.C. 575=23 O.C. 349. *See also* 26 A.L.J. 382. But *see* 83 I.C. 749. *See also* 45 C.L.J. 60; 1931 A.L.J. 622=1931 A. 594.

APPEAL.—An order dismissing an application under R. 90 for default is appealable under O. 43, R. 1 (f). The fact that a distinct order confirming the sale was not passed is no ground for refusing to entertain the appeal. 56 C. 969=33 C.W.N. 392=1929 C. 407 (2); 1931 P. 97. An appeal lies from an order refusing to set aside a dismissal for default of an application under this rule. 33 I.C. 581=20 C.W.N. 1203; 131 I.C. 533=1931 P. 97; 27 N.L.R. 339. *See also* 38 C. 622=15 C.W.N. 875. When appeal lies from an order under this rule, 40 C. 635=40 I. A. 140=25 M.L.J. 140 (P.C.) But *see* 16 I.C. 690=22 C.L.J. 266; 4 Pat.L.T. 735=74 I. C. 594. *See also* 46 C.L.J. 172=104 I.C. 825=1927 C. 833. If property is purchased by a third person and an application is made by judgment-debtor against decree-holder to set aside the sale on the ground of irregularity or fraud in conducting the sale, the application would still be treated as one under S. 47, if purchaser is not formally made a party to such an application. 150 I.C. 611=1934 N. 21. An appeal lies from an order of dismissal on the ground that the application was time-barred. There is no second appeal even when the purchaser is the decree-holder and the applicant is the judgment-debtor. 6 L. 250=1925 L. 624; 152 I.C. 776=1934 P. 627. But want of notice of sale pro-

clamation and under-valuation are objections under S. 47 and therefore a second appeal lies. 87 I.C. 413=1925 M. 1142. Mere defect in notice and publication does not give room for second appeal. 145 I.C. 731=1933 A. 654. *See also* 60 C.L.J. 584=39 C.W. N. 510. Objections based on the ground of non-compliance with R. 66, such as defects in mentioning the value of the property, the encumbrances on the property and the description of the property proclaimed for sale, must be raised before the sale is held; when they have not been so raised or even mentioned in the lower Court, they cannot be considered as grounds for setting aside the sale in appeal. 19 N.L.J. 282.

SECOND APPEAL.—No second appeal lies in view of the provisions of S. 104 (2), from an order passed in appeal dismissing the application of the judgment-debtor under R. 90, even where the purchaser is the decree-holder himself. 165 I.C. 654=1936 A.L.J. 959=1936 A. 763=17 Pat.L.T. 712; 1935 L. 962; 1935 R. 521; 163 I.C. 765=38 P.L.R. 839=1936 L. 969; 18 C. 422 (F. B.); 21 C. 799; 27 C. 414. *See also* 11 M. 319; 40 A. 122=43 I.C. 522; 15 I.C. 679=16 C.W.N. 1015; 9 I.C. 135; 2 P. 916=4 Pat.L.T. 721; 56 I.C. 646=1 Pat. L.T. 267; 39 I.C. 374=11 Bur.L.T. 26; 62 I.C. 986; 94 I.C. 521=1925 L. 624; 87 I.C. 555; 30 C.W.N. 586=96 I.C. 669=1926 C. 790; 1926 C. 229; 117 I.C. 727=1929 M. 624; 1930 N. 58.

REVISION.—Where application under this rule is rejected wrongly on the ground that the applicant had no *locus standi* to apply, that amounts to a failure to exercise a jurisdiction vested in the Court by law, and the High Court will interfere in revision under S. 115. 40 C.W.N. 1338=63 C.L.J. 560.

O. 21, R. 90, proviso.—Construction—Substantial injury due to under-valuation—Proof of. 1935 M.W.N. 258=41 L.W. 309.

REVISION.—*See* 9 M. 145; 130 I.C. 265=1931 P. 63. Revision by High Court is not generally possible because revision of a dismissal order will be confirmation, and as such, that will be open to appeal under R. 92. 41 C.L.J. 286=1925 C. 510. But *see* 48 A. 286. Confirmation of a sale in execution of a decree before decision of application under this section is a material irregularity which adversely affects the judgment-debtor and High Court can interfere in revision. 1933 A. 137=145 I.C. 732. S. 144 prescribes a separate and independent remedy and when the application under



(b) *Cancel* the proviso to r. 90 (1) and *substitute* the following :—

“ Provided—(i) that no sale shall be set aside on the ground of such irregularity, fraud or failure unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity, fraud or failure;

(ii) that no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person who after notice did not attend at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up, unless objection was made by him at the time in respect of the defect relied upon.”

[LAHORE AND N.-W.F.P.] *Add* the following proviso :—

“ Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted.”

[MADRAS.] *Substitute* the following for the existing rule :—

“ 90. Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets or whose interests are affected by the sale, may apply to the Court to set the sale aside on the ground of material irregularity or fraud in publishing or conducting it:—

Provided that the Court may, before admitting the application, call upon the applicant either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or that realised by the sale, whichever is less; or to deposit such amount in Court :

Provided also that the security furnished or the deposit made as aforesaid, shall be liable to be proceeded against only to the extent of the deficit on a re-sale of the property already brought to sale :

Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

[NAGPUR.] Rule 90.—*After* the proviso to sub-rule (1) of r. 90, *insert* the following further proviso :—

“ Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been, but was not put forward by the applicant before the commencement of the sale.”

[ODDH.] *Add* the following as proviso to r. 90, O. 21 :—

“ Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been, but was not put forward by the applicant before the commencement of the sale.”

[PATNA.] O. 21, r. 90. *Substitute* the following for the proviso to r. 90 (1) :—

(i) Provided that no application to set aside a sale shall be admitted unless—

(a) it discloses a ground which could not have been put forward by the applicant before the sale was conducted; and

#### NOTES.

R. 90 is dismissed and sale confirmed the aggrieved party can apply under S. 144. 133 I.C. 622=1931 A. 655.

CALCUTTA.—Per *Mukherjea, J.*—O. 21, R. 90, Proviso (ii), C. P. Code, is inapplicable if the particular defect in the sale proclamation that is complained of is no part of the order of the Court in drawing up the sale proclamation and it finds a place in the sale proclamation that is actually issued despite the direction of the Court to the contrary. 42 C.W.N. 661.

O. 21, R. 90 (Madras Amendment).—Under the first proviso to R. 90 of O. 21 as amended in Madras, the power of the Court to call upon the applicant to furnish security is confined to a time anterior to admitting the application to set aside. The Court has no power to do so after the admission, i.e., after notice is given to the opposite side. The proviso specifically excludes the right of a decree-holder to apply to the Court for an order calling for security, although such order may be for the protection of the decree-holder. 191 I.C. 29=1940 M.W.N. 121=51 L.W. 256=A.I.R. 1940 Mad. 624=(1940) 1 M.L.J. 350. See also 53 L.W. 719. The first proviso to O. 21, R. 90, added by the Madras High Court by the amendment of 1937, must be

held to be *intra vires* the rule-making powers of the High Court under S. 122, C.P. Code. An applicant seeking to set aside a sale under O. 21, R. 90, C.P. Code, as amended in 1937, on the ground of material irregularity or fraud, must be given an opportunity of showing cause before an order is made, against him requiring security before admitting the application. The subsequent amendment of the rule and the re-framing of the first proviso put this beyond all controversy. 1940 M.W.N. 1260=1941 Mad. 28=(1940) 2 M.L.J. 972 (F.B.).

O. 21, R. 90 (Allahabad), Prov. (b).—Object of—No objection by debtor at the time of settlement of proclamation—Estoppel. 55 A. 519=1933 A.L.J. 1273=1933 A. 546.

O. 21, R. 90, Proviso (Oudh).—Where a judgment-debtor did not, before the commencement of the sale, raise any objection to the sale proclamation in that it did not specify the estimated value of the property sought to be sold in execution, it is not open to him to raise this plea, after the sale had been completed, in an application by him under R. 90. 154 I.C. 1103=1935 O.W.N. 435=1935 Oudh 336.

O. 21, R. 90 (as amended in C.P.).—Sale by Collector—Sale proclamation—



(b) the applicant deposits such amount not exceeding  $12\frac{1}{2}$  per cent. of the sum realised by the sale or such other security as the Court may, in its discretion, fix unless the Court for reasons to be recorded dispenses with the deposit.

(ii) Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

See 193 I.C. 124.

and add the following as sub-r. (2) :—

"(2) In case the application is unsuccessful the costs of the opposite party shall be a first charge upon the deposit referred to in proviso (i) (b), if any."

[RANGOON.] R. 90.—Substitute the following proviso :—

"Provided that no application to set aside a sale shall be admitted unless—

(a) it discloses a ground which could not have been put forward by the applicant before the sale was conducted, and

(b) the applicant deposits with his application the amount mentioned in the sale warrant or an amount equal to the amount realised by the sale whichever is less; and in case the application is unsuccessful the costs of the opposite parties shall be a first charge on the amount so deposited:

Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."

#### NOTES.

Omission of details in—Omission to publish in Collector's office and Tahsil—If ground for setting aside sale. 19 N.L.J. 312. The amendment made in the Central Provinces to R. 90, govern all the proceedings in Collector's cases in those Provinces. The Collector under the rules contained in the Revenue Book Circular is merely undertaking the execution of the decrees of the Civil Courts as the agent of the Civil Courts and has to observe the provisions of O. 21, including R. 90. 19 N.L.J. 282. See also 19 N.L.J. 318.

O. 21, R. 90 (as amended in Patna).—The amended rule applies only to applications made after date of coming into force of the rule and not to applications which have been already admitted. The rule, therefore, forbids a Court to admit an application but cannot have the effect of setting aside the previous admission of an application. 1937 P. 260. Proviso 1 (b) which has been added by the Patna High Court to O. 21, R. 90 in exercise of its rule-making powers under S. 122, is not *ultra vires*. The amended proviso added by the Patna High Court is only a rule of procedure and does not take away any substantive right. It is nothing more than putting the party on terms and is not an obstacle in the way of the applicant. 19 Pat. 531=21 Pat.L.T. 294=1940 Pat. 264 (F.B.).

Under O. 21, R. 90 (1), C.P. Code, as amended in Patna, the Court in an application to set aside an execution sale, has a discretion to accept landed property as security instead of a cash deposit in a proper case. If the Court refuses to dispense with cash deposit and to accept landed property as security and then dismisses the application for failure to make the deposit, the latter order is appealable under O. 43, R. (1) (j), C.P. Code, though the order refusing to accept security is not appealable. But the order refusing to accept security can be set aside in revision, if it does not apply its mind to the facts of the case and does not judicially determine the application for permission to give landed property as

security. 17 Pat. 107=19 Pat.L.T. 402=A.I.R. 1938 Pat. 240. Proviso (1) (a) and (1) (b), substituted to O. 21, R. 90 (1), C.P. Code, by the Patna High Court only contemplates that after an application to set aside sale has been presented an inquiry must be made by the Court by admitting it, to see whether the requirements of the proviso has been satisfied. The proviso places conditions not upon the presentation of an application to set aside a sale, but upon its admission. The application cannot be admitted unless the provisions of Cls. (a) and (b) of proviso (1) are complied with. There is nothing in the rule to suggest that the admission of the application must take place within the period of limitation of thirty days prescribed by Art. 166 of the Limitation Act. All that the proviso requires is that before admission the necessary sum of money or security, unless dispensed with, must be deposited. The applicant can then be said to have deposited with his application such deposit or security within the meaning of the proviso. The date of admission is not governed by the Limitation Act. Where no deposit accompanies an application to set aside a sale, the Court has no power to reject such application forthwith. It must give the applicant an opportunity to urge that the deposit should be dispensed with or to deposit the full or lesser amount or other security before some date fixed for admission. If the orders of the Court are complied with the application must be admitted and heard on the merits provided that it complies with proviso (1) (a) as well. 18 Pat. 327. *Quaere*: Whether the amendment made by the Patna High Court to O. 21, R. 90, C.P. Code, is *ultra vires* the rule-making powers of the Court. 18 Pat. 327=1939 P.W.N. 232=20 P.L.T. 275=A.I.R. 1939 Pat. 248 (F.B.). See also 1940 Pat. 264. Where before the conclusion of a sale the Bihar Money Lenders Act of 1938 had come into force but no application was made to the Court under Ss. 16 and 17 of that Act and no objection was taken to the sale proceeding on the old proclamation of sale, an application under O. 21,



Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest.

91. The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold.

#### NOTES.

R. 90, C.P. Code, cannot be admitted on the ground that the Court did not proceed with the sale as directed by Ss. 16 and 17 of the Bihar Act, as such a ground could have been put forward before the sale. When it is not open to the judgment-debtor to raise the matter in the Court below he cannot raise it in appeal before the High Court. 193 I.C. 124.

**O. 21, R. 90 (Lahore Amendment).**—Where an objection to a sale of immovable property is taken under S. 60 (1) (c) after sale, but before sale is confirmed, objection falls under O. 21, R. 90, as amended by the Lahore High Court and is not entertainable. 1937 Lah. 309. See also 1939 Lah. 113. Proviso 2 to O. 21, R. 90 only precludes objection to a sale being entertained at a later stage if it could have been put forward earlier, but if the judgment-debtors were never served with a notice as regards sale it is obvious that the objection could not have been preferred earlier and hence the Proviso does not apply. 41 P.L.R. 553=A.I.R. 1939 Lah. 222. Proviso 2 to O. 21, R. 90 only relates to what lies within O. 21, R. 90, that is, to matters in connexion with publishing or conducting the sale. It has and can have no application to a question raised under S. 47. Where, therefore, an objection under S. 60 (1) (c) which falls under S. 47, is raised after the sale and before its confirmation, it is the duty of the Court to decide it and to see if it has jurisdiction to sell the property. If it has no jurisdiction, it is its duty to end the execution proceedings by refusing to confirm the sale which so far has not become absolute. I.L.R. (1939) Lah. 103=41 P.L.R. 436=A.I.R. 1939 Lah. 113. Objections to a sale on the ground that the value or the rent of the houses which were to be sold was not given in the proclamation of sale and that the dimensions of the houses were not stated in the proclamation and the houses were not otherwise sufficiently described, ought to be raised before the sale and cannot be considered after the sale under the proviso to R. 90 of O. 21, added by the Lahore High Court. Even according to the law as it stood before the amendment, a sale could not be set aside merely because of the omission to give the approximate value or rental of the properties. 177 I.C. 558=11 R.L. 336=40 P.L.R. 201=A.I.R. 1938 Lah. 508.

**O. 21, R. 90, Proviso (b) (Rangoon):** *If ultra vires.*—O. 21, R. 90, proviso (b), which has been cancelled by an order of the Rule Committee dated 27th January, 1937, is *ultra vires* the Rule-making Committee of the High Court. The only valid rules which can be made by the High Courts under the

provisions of S. 122, must regulate the mode of proceeding to enforce a legal right and cannot stray beyond it. Proviso (b) to R. 90 does not regulate procedure but lays down an indispensable preliminary before any proceedings take place at all. It seeks to take away an existing right, namely, the right of being heard to impeach a sale in execution subsisting in a person whose interests are affected by it, unless he is able and willing to deposit with his application the amount mentioned in the sale warrant or an amount equal to that realized by the sale whichever is less. 1937 Rang.L.R. 268=A.I.R. 1937 Rang. 419 (F.B.). See also (1940) 2 M.L.J. 972. Scheduled Notification No. 44 of 27th January, 1937, has removed the necessity of a deposit under O. 21, R. 90, C.P. Code. 1938 Rang. 292.

**O. 21, R. 90, Proviso (N.W.F.P.).**—Execution against legal representative of judgment-debtor—Notice under O. 21, R. 66 served on agent of widow of judgment-debtor—Agent not appearing owing to illness—Objection by widow after sale. Maintainability. 1938 Pesh. 52.

**O. 21, Rr. 91 to 93.**—Whatever may have been the position under the Code of 1882, the law is now clear that a purchaser at a regular execution sale cannot obtain a refund of his purchase money on the ground that the judgment-debtor has no saleable interest unless the sale is set aside. The purchaser is restricted to his remedy by an application under O. 21, R. 91, which must be made within thirty days from the date of the sale, followed by an application under R. 93. He cannot maintain a suit, nor an application under S. 151, C.P. Code, especially when the sale has been properly held in regular execution proceedings in connection with which no fraud on the part of the decree-holder or judgment-debtor has been established. I.L.R. (1939) 1 Cal. 452=43 C.W.N. 383=69 C.L.J. 138=A.I.R. 1939 Cal. 310. See also 1938 All. 593.

**O. 21, R. 91.**—This rule is the only exception to the doctrine of *caveat emptor*. 6 L. 283=1925 L. 467. The rule applies to the purchaser and its scope is limited to the case of a person whose property is purported to be sold, and who had no saleable interest therein. 20 C. 8 (P.C.); 27 A. 537; 9 C. 626; 3 A. 527. See 1 A. 568 (F.B.); 9 C. 217. R. 91 is for the protection of persons who innocently and ignorantly purchase valueless property and cannot be invoked by a person who has abused process of the Court for a fraudulent purpose. 145 I.C. 929=1933 P. 684. Auction-purchaser is not entitled to have the sale set aside on the ground of any misapprehension or mistake on his part when he is not misled by anything done or said by the officer



LOC. AM.—[BOMBAY.] The following rule shall be added as r. 91-A :—

“91-A. Where the execution of a decree has been transferred to the Collector, and the sale has been conducted by the Collector or by an officer subordinate to the Collector, an application under rr. 89, 90 or 91, and in the case of an application under r. 89, the deposit required by that rule if made to the Collector or the officer to whom the decree is referred for execution in accordance with any rule framed by the Local Government under S. 70 of the Code, shall be deemed to have been made to or in the Court within the meaning of rr. 89, 90 and 91.”

#### NOTES.

conducting the sale. An *unilateral* mistake cannot avoid a contract or Court sale. 1932 A.L.J. 392=1932 A. 403; much less a suit against decree-holder lies for refund of purchase-money to the auction-purchaser when the latter was aware of the possession by a third person of the property put to sale and failed to make inquiry thereunto before sale, and allowed it to be confirmed. 20 N.L.J. 111=1937 N. 140. There is no implied warranty of title either by the decree-holder or the Court in execution sales and the statutory right recognized by R. 93 is confined to the case where the sale of the property is set aside under R. 92. 134 I.C. 269=1931 N. 116. Where decree-holder purchased and after entering satisfaction discovered defect in judgment-debtor's title, the only remedy of the purchaser was to set aside the sale under this rule within limitation time under Art. 166. Limitation Act. He cannot take further execution of his decree. 104 I.C. 614=1927 M. 835=53 M.L.J. 255; 15 P. 308=16 Pat.L.T. 908=1936 P. 97 (F.B.). See also 41 L.W. 422=1935 M. 340. Nor can he invoke S. 47 for realizing the auction-purchase money in execution of the original decree. 157 I.C. 343=1935 A.L.J. 474=1935 All. 910. The rights conferred by the rule are not exhaustive. The dispossessed purchaser can sue for recovery of his money. 4 L. 354=1924 L. 115. But see 61 I.C. 805=13 Bur.L.T. 152; 1925 L. 199. To set aside a sale under this rule the real owner is not a necessary party. The proper course is to proceed against him by suit. 24 I.C. 44=1 L.W. 412. A suit for recovery of purchase money does not lie. 1925 L. 199. Knowledge of want of title in judgment-debtor will bar an application by purchaser under this rule. 23 I.C. 383=7 Bur.L.T. 18. When a decree has been transferred to Collector for execution a purchaser at a sale held by him can apply. 9 A. 43. Concealment of encumbrances by decree-holder is no ground for setting aside the sale. 74 I.C. 134. Setting aside sale by decree-holder, grounds for. 7 Pat.L.T. 25=1925 P. 702. A decree-holder is not entitled to set aside sale on the ground of any adjustment between the parties after sale. 88 I.C. 537=1925 P. 702.

SALEABLE INTEREST.—It is complete absence of any amount of saleable interest alone, not smallness of interest that this rule contemplates. 21 I.C. 774=19 C.W. N. 1291. Also 46 I.C. 614=3 P.L.J. 516; 24 I.C. 64=18 C.W.N. 947; 10 C. 368. Property not belonging to judgment-debtor—Attachment and sale—Void or valid—Limitation to set aside sale. 52 M.L.J.

148. Where a whole piece of land is sold, Court is precluded from severing a parcel of land on the ground that judgment-debtor has a saleable interest in one lot. 15 I.C. 109=23 M.L.J. 108. Fraud or neglect of duty on the part of decree-holder entitles auction-purchaser to a suit for refund of purchase-money. 134 I.C. 269=1931 N. 116 (Erroneous description of judgment-debtor's interest in the property). 16 P. 196=18 Pat.L.T. 32=1937 Pat. 532 (Auction-purchaser unable to obtain possession of the property purchased by him owing to the fraud and collusion of the decree-holder and the judgment-debtor). The fact that the purchaser does not implead the judgment-debtor as a party defendant to the suit cannot defeat his suit. The judgment-debtor and the decree-holder, who have acted fraudulently and in collusion with each other are jointly and severally liable for damages; and a decree can therefore be passed for the entire damages against the decree-holder alone who has been impleaded. (*Ibid.*) Auction-purchaser losing part of property under decree obtained by third party—Right to sue decree-holder for refund of purchase-money. 1937 O.W.N. 83. A property was sold by auction-sale in execution of a decree and the sale was confirmed. The property was in possession of a third person having a good title thereto. The auction-purchaser was already aware of the possession of the property by such person. The decree-holder had filed with the sale statement *parcha* containing the entry of title of such person to the property. The purchaser being unable to get possession of the property from such a person, sued the decree-holder for the refund of the purchase-money on the ground that the judgment-debtor had no saleable interest in the property. *Held*, that the sale having been confirmed, the suit was barred under R. 92 (3), and no suit could be brought on the ground that the judgment-debtor had no saleable interest in the property sold. *Held also*, that the auction-purchaser being already aware of the possession of third party could not claim refund. 20 N.L.J. 111=1937 Nag. 140. Where the same property has been sold twice over, purchaser can sue for refund of purchase-money from the creditors to whom it was paid. 40 A. 411=44 I.C. 697. But see *contra* in 28 C. W.N. 20=1924 C. 172. Also 68 I.C. 126=25 C.W.N. 756. When purchaser was the executor of the judgment-debtor in his personal capacity, he will not be debarred from applying to set aside the sale. 28 I. C. 898=19 C.W.N. 152. See also 2 P. 829. There is no provision in the Code empowering Court to hold a second sale on



92. (1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.
- Sale when to become absolute or be set aside.

## NOTES.

the ground that decree-holder having applied to set-off the purchase-money against the decree, eventually realised that he had to pay out of his own pocket-money for rateable distribution to the other decree-holders, a contingency not expected by him when he applied for permission. 133 I.C. 737=33 Bom.L.R. 503=1931 B. 252.

**O. 21, R. 91-A (Bom.).**—Scope and effect of—Application to set aside Collector's sale to be made to the Court not Collector—Jurisdiction of Court—S. 4, Limitation Act, applies. 1938 Bom. 209=40 Bom.L.R. 152.

**O. 21, Rr. 91 and 92.**—Application under R. 91 should be made before Court confirms sale under R. 92. 156 I.C. 389=1935 A. L.J. 940=1935 A. 889. There is no provision in O. 21, which entitles auction-purchaser to re-open the question of the sale being set aside or not, ignoring the order confirming the sale, unless the latter order is reviewed or set aside on appeal. (*Ibid.*) He cannot bring a suit to challenge the same or apply under R. 91, except in the case of fraud or misrepresentation, in which case it may be open to him to apply for review or such relief by a separate suit. (*Ibid.*) Before the objection application of the judgment-debtor under O. 21, R. 92 is adjudicated upon it is mandatory on the execution Judge to send notice to the auction-purchaser and his omission to do so makes the order illegal. 174 I.C. 233=A. I. R. 1938 Pesh. 14. There is at present no right either in law or in equity for an auction-purchaser to recover by suit, from the decree-holder, the purchase price paid, in case of the property sold turning out to be not the property of the judgment-debtor. As regards the decree-holder auction-purchaser his rights are limited to those granted by C. P. Code, O. 21, Rr. 91 and 92, and if the auction-sale is confirmed that becomes *res judicata* between him and the judgment-debtor and hence he cannot re-open the matter by an application for further execution or by any other means unless he can get the order confirming the sale set aside. I.L.R. (1938) All. 922=1938 A.L.J. 955=A.I.R. 1938 All. 593 (F.B.). See also 1939 Cal. 310.

**O. 21, Rr. 91 and 93.**—Scope—If exhaustive—Execution sale—Delivery of possession—Subsequent claim by dispossessed person under O. 21, R. 100—Order holding judgment-debtor had no saleable interest—Application by purchaser for refund of purchase-money. Held, that the appellant (auction-purchaser) had only one remedy under the present Code, namely, by way of an application under O. 21, R. 91, and after getting the sale set aside by such application, to apply for repayment of his purchase-

money under O. 21, R. 93. 19 Pat. L. T. 80=1938 Pat. 150.

**O. 21, R. 92.**—"Court," meaning of. 38 C.W.N. 924=152 I.C. 1059=1934 C. 822. Issue of certificate cures irregularities. 97 I. C. 757 (2)=1927 C. 82. This rule does not apply where the property concerned was not sold at all, but was wrongly taken by the auction-purchaser. 6 P.L.T. 473=1925 P. 376. Does not apply to confirmation of irregular sale. 1929 A. 671. Settlement between decree-holder and judgment-debtor before confirmation. No order of confirmation can be passed. 100 I. C. 565. This rule does not oust the inherent power of the Court to cancel a sale of its own motion. 46 M. 583=44 M.L.J. 680. As to applicability to proceedings under the Madras Estates Land Act, see 22 L.W. 794. O. 21, R. 92 is not controlled or overridden by S. 11, C. P. Money-Lenders Act. 1938 N.L.J. 15. O. 21, R. 92 is not controlled by C. P. Debt Conciliation Act, S. 21. 1938 N. L. J. 60. An order under this rule decides a question of title to the land in dispute between the parties. 16 C.L.J. 542=17 C.W.N. 84. Court has inherent power to stay confirmation of sale. 1930 L. 793 (2).

**CONFIRMING SALE.**—Once a sale has taken place the Court has no jurisdiction to refuse to confirm it unless the specified objections are taken and sustained. 161 I.C. 752=1936 Lah. 191. O. 21, R. 92 applies to a sale, that is, a sale held in accordance with the provisions of O. 21. But a 'sale' that consists merely of the receipt of an offer by post in the absence of any bidders and its acceptance, is not a sale at all. Such 'sale' proceedings could not be confirmed. 1939 N.L.J. 226. There is no provision in the Code of Civil Procedure for an application by the auction-purchaser for confirmation of the sale; confirmation follows automatically under R. 92 (1) and the setting aside follows automatically under R. 92 (2) of O. 21. 1938 M.W.N. 656=47 L.W. 51=A.I.R. 1938 Mad. 307. Even after the execution sale, judgment-debtor still retains his interest in the properties till the sale is confirmed. So an attachment of those properties, after the sale in another execution proceeding but before the sale was confirmed, is effective to confer rights on the attaching creditor when that auction sale is set aside under R. 89, as against a subsequent transferee from the judgment-debtor. 131 I.C. 14=34 L.W. 531=1931 M. 511. Court has no power to stay the confirmation of sale on the basis of a payment or adjustment of the decree which has not been recorded or certified under O. 21, R. 2. 9 R. 104=132 I.C. 713=1931 R. 148. Confirmation of sale—Right of purchaser—Issue of certificate by Debt Conciliation Board



## NOTES.

after sale—If ground for refusal of confirmation. 19 N.L.J. 296. Where no application is made under R. 89, 90 or 92 to set aside a valid sale, the Court is bound to confirm the sale and cannot refuse to do so on the ground that there was no subsisting decree at the time of the confirmation, because the reversal of the decree is not mentioned in the rule as one of the grounds for refusing to confirm the sale. [60 M.L.J. 423 (P.C.), Rel. on.] 56 M. 808=1933 M. 598=65 M.L.J. 253. Sale when becomes absolute—Order of confirmation—If necessary to be passed—Expiry of 30 days from sale—If automatically confirms sale. (1937) 1 M.L.J. 569. See also 1935 O.W.N. 1153; 20 N.L.J. 222. Absence of formal order of confirmation where in substance and effect Court did confirm the sale is immaterial. 104 I.C. 384=1927 C. 881. It is the actual sale which Court confirms and not any transactions which by inadvertence, fraud or collusion may have been described in any reference to the sale made in a document subsequent thereto. 27 B. 341. A suit to set aside a sale on the ground of fraud and irregularity in the matter of publishing and conducting the sale is barred by the provisions of O. 21, R. 92. The proper remedy is to institute a proceeding under O. 21, R. 90. 68 C.L.J. 431. A confirmation in entirety cannot be made when the sale has been set aside as regards one of the judgment-debtors. 61 I.C. 571. If satisfaction is reported before confirmation, a sale cannot be confirmed. 18 N.L.R. 134=1922 N. 248. Where an adjustment is alleged to have taken place before the sale, the mere fact that it was applied to be recorded after the sale does not make the adjustment invalid for the purpose of setting aside the sale. The proper order to pass is to stay confirmation of the sale and decide the question of fact as to whether there had been an adjustment or not. If it is found that there had been such an adjustment, the sale should be set aside on this ground. 41 P.L.R. 220=A.I.R. 1939 Lah. 326. Auction-purchaser has no absolute right for confirmation if there is any irregularity, though it may not be his. 38 M. 387=25 M.L.J. 198. When a wrong property has been attached and sold, the confirmation in respect of properties not attached is invalid. 41 C. 590=41 I.A. 38=26 M.L.J. 89 (P.C.). Court may refuse confirmation when the decree debt was paid to the decree-holder after sale. 27 I.C. 601. Destruction of property after sale by act of God is no ground for refusing to confirm sale. 88 I.C. 693=1926 N. 17. Sale can be set aside as regards a portion of the properties sold. 24 I.C. 64=18 C.W.N. 947. Declaratory suit under O. 21, R. 93 by third party—Application by auction-purchaser for not paying balance of deposit—Not sustainable. 134 I.C. 496=1931 L. 244.

SHALL BECOME ABSOLUTE.—See 7 M. 512;

17 C. 719; 21 B. 434. Also 12 M.L.T. 311=17 I.C. 242. Certificate cures irregularities. 1927 C. 82. See also 97 I.C. 757. A sale is final on confirmation. Its finality, in the absence of confirmation, may also be inferred by conduct of the executing Court. 81 P.R. 1915=31 I.C. 254. See also 20 N.L.J. 222; 1938 N.L.J. 10. A sale cannot be said to be automatically conferred merely because no application had been made under R. 89, 90 or 91 of O. 21, or such application had been made and disallowed. Something had to be done by the Court, namely, to make an order confirming the sale and unless it is done the sale cannot be said to be confirmed. 1938 A.W.R. (C.C.) 119=A.I.R. 1938 Oudh 221. Order dismissing application to set aside sale merely on default of appearance of parties cannot be regarded as confirmation of sale. 53 C. 679=96 I.C. 705=1926 C. 773. See also 29 O.C. 86=1925 O. 622. But order confirming sale should automatically be passed. 13 L. 761=142 I.C. 686=1933 L. 99. An order against a pre-emptor in confirmation as he did not appear before Collector, in a sale held by him, is final. 45 A. 203=21 A.L.J. 53 (F.B.). The legal effect of a sale depends on the decree-holder's status at the commencement of proceedings and not at the time of sale. 45 C. 294=21 C.W.N. 847. The title of purchaser dates only from confirmation and not from sale. 9 I.C. 25=8 A.L.J. 32. But where delay in confirmation is due to quarrel between rival bidders, interests should be paid up to confirmation on the sale amount. 22 I.C. 946=19 C.L.J. 358. Absence of decree-holder on the day fixed for confirmation of execution sale—Duty of Court to confirm sale—Dismissal for default—Inherent power to restore. 120 I.C. 405. In construing the meaning of words "*when the sale becomes absolute*" in Art. 180, Limitation Act, regard must be had not only to the provisions of R. 92 (1) but also to the other material sections and orders of the Code including those which relate to appeals from orders made under R. 92 (1). Where, therefore, there is an appeal from an order of Judge disallowing the application to set aside the sale, the sale will not become absolute within the meaning of Art. 180 until the disposal of the appeal, even though the Subordinate Judge may have confirmed the sale, as he was bound to do when he decided to disallow the abovementioned application. (1932 C. 75, Reversed; 56 C. 608, Overruled; 56 C.L.J. 520=1933 C. 311, Appr.; 43 M. 185, Ref.) 61 C. 945=61 I.A. 248=38 C.W.N. 901=67 M.L.J. 79 (P.C.) [Reversing 56 C.L.J. 574]. There is no provision in the Code of Civil Procedure for the cancellation of a sale in execution merely because of the cancellation of the decree in execution of which it has been held, and though it be in accordance with justice that a person who has succeeded in appeal should get from the opposite party such restitution,



(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale :

### NOTES.

as is possible, there is no principle of justice whereby an innocent third party who has purchased in a valid auction held by the Court should be deprived of his property merely because the decree under which the sale was held has been cancelled in appeal. Consequently the executing Court has power to confirm the sale notwithstanding that on the date of the confirmation the decree had been set aside on appeal and had ceased to have a judicial existence. 53 L.W. 167= (1941) 1 M.L.J. 193.

**Sub-R. (2).**—The provisions of this rule are mandatory. The deposit should be made within 30 days from the date of sale. 33 I.C. 998=3 L.W. 271. *See also* 1938 N.L.J. 10. Proceedings under sub-R. (2) are not final and a third party is not bound by it. 24 I.C. 44=1 L.W. 412. The proviso to cl. (2) of R. 92 only lays down that a sale should not be ordered to be set aside unless notice is given to the persons affected thereby. It is not necessary that they should be made parties to the application and arrayed in the categories of plaintiffs and defendants. 62 Cal. 286=39 C. W.N. 186=1935 C. 502. Sale in execution of a decree cannot be set aside merely on the ground that after the date of the sale in fact more than thirty days after the date of the sale but before its confirmation the judgment-debtor was declared to be a member of an agricultural tribe whose land cannot be sold. (1931 P.C. 33 and 1933 L. 99, Rel. on.) 161 I.C. 752=1936 L. 191. Where a final mortgage-decree was passed pending an appeal from a preliminary decree and a sale is held, the fact that in the appeal the preliminary decree was varied cannot be a ground for setting aside a sale to a third party. Further under O. 21, R. 92 (1) the Court is bound to confirm a sale unless there is a successful or effective application under R. 89, 90 or 91 of O. 21. It is quite clear that the proviso to R. 92 (2) does not relate to R. 92 (1). 1938 N.L.J. 303= I.L.R. (1940) Nag. 302=A.I.R. 1938 Nag. 525.

**PROVISO—NOTICE.**—The only three classes of persons affected by a petition under R. 89 are the judgment-debtor, the creditor executing the decree and the purchaser who has advanced cash. The other decree-holders who have applied for rateable distribution of the sale proceeds have no such direct or proximate interest as to make them affected thereby, and therefore not entitled to notice under R. 92. 132 I.C. 141=1931 M. 465= 61 M.L.J. 909. Where the judgment-debtor is dead, notice must issue to his representative. 7 B. 424. *Sec. contra* 98 I.C. 69=1927 O. 23. Formal notice is not necessary if there is actual notice otherwise. 1925 C. 157; 1928 C. 267=107 I.C. 476.

Notice itself need not be served within 30 days. 37 B. 387=19 I.C. 475; 68 I.C. 238=1922 O. 129; 69 I.C. 745=1922 A. 282; 107 I.C. 494. Service of notice under this rule on all persons affected by the sale is not compulsory. 67 I.C. 286; 37 C. W. N. 84=144 I.C. 814=1933 C. 464. But any order passed behind the back of persons who had obtained orders for rateable distribution will not bind them as they are affected by the application to set aside the sale. 35 M. L. J. 604=48 I.C. 38. But *see* 132 I.C. 141=1931 M. 465=61 M.L.J. 909. Notice to purchaser before setting aside sale is necessary. 10 I.C. 148=15 C.W.N. 685; 104 I.C. 148=1927 L. 681. Otherwise the order is one without jurisdiction. 32 I.C. 891. *See also* 111 I.C. 895=1929 L. 778 (1). Auction-purchaser is not a necessary party in the sense that in the application he should be described as one of the parties. 104 I.C. 148=1927 L. 681.

**LIMITATION.**—The thirty days under sub-rule (2) is to be computed from the date of deposit under R. 84. 50 I.C. 914. An execution sale of immovable property is not complete until the officer conducting the sale has accepted the final bid. Consequently, the period of 30 days prescribed by R. 92 does not begin to run against a person applying to set aside the sale if, for any reason, the final bid remains for a time unaccepted by the officer conducting the sale. 118 I.C. 900. It is not legal to pass an order confirming the sale under R. 92 of O. 21, till 30 days have elapsed from the date of the sale, and if the 30th day is a holiday, the confirmation could only be made at the end of the next day. 1939 N.L.J. 598. Suit setting aside sale—Starting point of limitation—Date when sale becomes absolute as the material point of time—Period during which application was pending—Whether can be excluded. 56 C. 608. [*See* 61 I.A. 248, disapproving the above case.]

**ILLUSTRATIVE CASES.**—As to the effect on a sale by the death of the judgment-debtor after the sale is held and before it is confirmed, *see* 3 A. 765 (F.B.); 9 A. 411; 10 A. 83; 29 B. 435. *See also* 98 I.C. 69. An order dismissing an application under R. 90 is not equivalent to confirmation of the sale under R. 92; under R. 92, Court has to pass an order confirming the sale after dismissal of the application under R. 90. 152 I.C. 1059=38 C.W.N. 924=1934 C. 822. Where objection to confirmation is raised before Collector who held the sale he must refer it to a Civil Court. If he confirms the sale, a suit will lie to declare the sale void. 44 B. 551=22 Bom.L.R. 759. Where there is no sale within the meaning of the Code, as to whether suit lies, *see* 16 C. 794 (798). The rejection of an application under this rule is no bar to a regular



Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

#### NOTES.

suit for the same purpose. 11 M. 269; 5 Lah.L.J. 9=1923 L. 224; 104 P.L.R. 1916=36 I.C. 212. See also 151 I.C. 150=1934 L. 400. But see 3 Bom.L.R. 463; 1930 A. 550. Suit to set aside sale on the ground of fraud, after it is confirmed, does not lie. 89 I.C. 107. (But see next case.) A suit will lie when the purchaser has been misled by any fraud or misrepresentation. 20 C. 8 (P.C.); 29 C. 370. See 47 A. 217=84 I.C. 1031. See also 37 C.W.N. 706=143 I.C. 575=1933 C. 454. A judgment-debtor cannot file such a suit. 26 B. 40. Nor a suit for damages. 17 N.L.J. 227. The plaint in such a suit must be stamped as if it were a suit for the recovery of the property. 9 C.L.R. 231. As to whether the rule applies to proceedings in execution of certificates under Bengal Act I of 1895, see 33 C. 451; 34 C. 787. Sale in execution—Confirmation—Sale subsequently set aside by consent of both parties—Application for execution—Objection by judgment-holder—Sustainability. 38 L.W. 337=1933 M. 753.

APPEAL AND REVISION.—No appeal lies against an order refusing to confirm sale. 98 I.C. 866=1927 L. 71 (2); 1929 L. 438. See also 131 I.C. 533=1931 P. 97; 27 N.L.R. 339. No appeal against an order of confirmation. 98 I.C. 69=1927 O. 23. Where an appellate Court reverses an order of execution Court confirming a sale no appeal lies against the appellate order. 115 I.C. 636. But the matter may be taken up under the revisional jurisdiction. 1933 A. 137; 13 L. 761. No second appeal lies from an order refusing to set aside a sale. I.L.R. (1938) Nag. 436=A.I.R. 1938 Nag. 107. An order setting aside sale is appealable by the purchaser. 40 A. 425=45 I.C. 773; 104 I.C. 148=1927 L. 681; but not by a party to the suit under S. 47. 33 I.C. 235=3 L.W. 105. See also 1939 Lah. 210. A judgment-debtor who was declared insolvent during the sale proceedings has no *locus standi* to appeal from an order confirming the sale. 162 I.C. 299=38 P.L.R. 108=1936 L. 368. The auction-purchaser may not be a party in the execution proceedings until the confirmation of the sale but on the date of the confirmation he acquires a title in the property purchased by him and if it is sought in appeal to obtain an order to his detriment by having the sale set aside, he must be made a party to the appeal before such an order can be obtained. Failure to make him a respondent would entail dismissal of appeal. 1935 L. 802; 167 I.C. 166 (Lah.). See also I.L.R. (1939) Kar. 417=1939 S. 62. The amendment of pleadings or of the memorandum of appeal at a late stage,

when valuable rights have already accrued to the auction-purchaser, would result in very serious hardship to him and should not, therefore, be allowed. 167 I.C. 166. On 11th August, 1927, the judgment-debtor submitted an application under R. 92 to have the sale set aside and the 26th October, 1927, was fixed for hearing it. Meanwhile on 1st September, 1927, the judgment-debtor and the decree-holder informed the Court that they had come to a settlement and the Court, without issuing notices to the auction-purchaser or passing any order about the sale which was awaiting confirmation ordered the execution proceedings to be sent to the record room treating the decree as satisfied. On 28th October an application was made for confirmation of the sale but the same was rejected. An appeal against the order was dismissed. Held, in further appeal that the order dated 28th October, 1928, was one under R. 92 and was appealable under O. 43, R. 1 (j). Held, further, that the order dated 1st September, 1927, had no effect on the auction-purchaser's right and the fact that it was not appealed against did not preclude the later appeal. 149 I.C. 445=35 P.L.R. 375=1934 L. 508. Where a party did not apply to have the order refusing to stay sale revised, nor applied to have the sale set aside, the appellate Court cannot stay proceedings relating to confirmation. 3 R. 132=89 I.C. 300. See also 29 C. 584. No second appeal lies from an order setting aside a sale. 22 C. 802; 28 C. 4; 41 I.C. 753; also 4 L. 243=1923 L. 592; 72 I.C. 788=1923 L. 287; 25 O.C. 78=1922 O. 146; 90 I.C. 228 (1)=42 C.L.J. 176; 2 O.W.N. 376=1925 O. 622; 101 I.C. 520=28 Punj.L.R. 130; 1926 C. 400; 145 I.C. 732=1933 A. 137; 29 N.L.R. 92=142 I.C. 162=1933 N. 72; 1936 P. 119. Nor against an appellate order upholding an order rejecting an application to set aside sale under R. 92. 160 I.C. 468=1936 O.W.N. 137=1936 O. 172. An order setting aside sale *suo motu* falls under S. 151 and not under this rule. The order is not appealable but revisable. 18 S.L.R. 130=1915 S. 253. See also 1930 A. 843. A revision lies on an order setting aside sale on the ground that the decree was amended after sale. 85 I.C. 660=1925 C. 157. Where executing Court in disregard of the imperative rule of procedure laid down in R. 92, declines to confirm the sale, the order is liable to be set aside on revision by the High Court. 13 L. 761=142 I.C. 686=34 P.L.R. 70=1933 L. 99.

Sub-R. (3).—See 1926 L. 165; I.L.R. (1940) Kar. 447. R. 92 (3) bars a suit for setting aside an order by which a sale is set aside under sub-rule (2) or an order confirming a sale under sub-rule (1) irrespec-



LOC. AMS.—[ALLAHABAD AND OUDH.] In O. 21, r. 92 (1) after the words "the Court shall make" add "subject to the provisions of r. 58 (2)."

[MADRAS.] R. 92 (2).—Insert the following between the words "from the date of sale" and "the Court shall make an order."

and in case where the amount deposited has been diminished owing to any cause not within the control of the depositor such deficiency has been made good within such time as may be fixed by the Court.

[NAGPUR.] Rule 92.—In sub-r. (1) of r. 92, after the words "make" insert the words "subject to the provisions of r. 58 (2)."

[PATNA.] O. 21, r. 92.—In sub-r. (1) of r. 92 after the words "the Court shall" insert the words "subject to the provisions of r. 58 (2)."

93. Where a sale of immovable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid.

#### NOTES.

tive of the question whether an application for setting the sale aside has been made or not. The sub-rule however has no application to a case where what is prayed for in the suit is not the setting aside of the order confirming the sale but certain declarations and injunction as regards the taking of possession. 35 C.W.N. 877. Unsuccessful applicant under R. 90, even if neither party to suit or to execution proceedings, is debarred from bringing suit. Even if suit by unsuccessful applicant under R. 90 is held unentertainable, Court must consider, if there is such prayer, whether he alone is entitled to surplus sale-proceeds—Practice. 119 I.C. 431=1929 L. 618. Applicability and scope—Suit to recover property sold in excess—Maintainability. 119 I.C. 852=1929 A. 673. No suit lies to set aside order under this rule on the ground that judgment-debtor had no saleable interest. It is immaterial that the judgment-debtor did not apply at all under R. 91, or applied and failed. 157 I.C. 33=1935 A.L.J. 261=1935 A. 470. But where a decree in execution of which the sale took place is itself found to be invalid, or where it is found that the sale officer had no authority to sell the property, the remedy of a separate suit would not be barred. (*Ibid.*)

O. 21, Rr. 92 and 93.—Where a purchaser had withdrawn the price on the sale being set aside, but the sale was confirmed by the appellate Court, and where the judgment-debtor's application for re-sale on the ground of the absence of the deposit under O. 21, R. 85 was negatived, he cannot in appeal from that order agitate the question as to the absence of a deposit, for it is a matter which ought to have been raised and fought out before the Court which confirmed the sale. 1938 N.L.J. 207.

O. 21, R. 93: SCOPE OF RULE.—A right to claim refund in restitution is recognized against the decree-holder in R. 93. In principle there is no difference in this liability of the decree-holder whether the sale is set aside under R. 92 or under S. 47. 1936 L. 497. See also 1938 Pesh. 66=177 I.C. 906; 1938 Cal. 203. The rule clearly implies

that the purchase-money may be paid to the decree-holder before the date of the confirmation of sale. 12 C. 255; 8 M. 101; 1 A. 568 (F.B.); 6 W.R. 147; also 28 O.C. 136=1925 O. 404; 3 P. 947=88 I.C. 219. Under the old Code a suit will lie for the refund of purchase-money when the judgment-debtor had no saleable interest in the property. Under the present Code, the only remedy is under this rule. See 42 I.C. 453; also 65 I.C. 230; 37 I.C. 763; 1920 M.W.N. 736=60 I.C. 66. But see 1926 C. 297; 53 C. 758=96 I.C. 64=1926 C. 971. Compare 41 I.C. 924; 36 A. 529=26 I.C. 59 with 43 A. 60=58 I.C. 105. See also 27 C.W.N. 183=50 C. 115; 23 M.L.J. 487=17 I.C. 437; 64 I.C. 628; 46 I.C. 783=22 C.W.N. 760; 39 M. 803=29 M.L.J. 467. To such a suit Art. 120 of the Limitation Act will apply. 35 A. 419=19 I.C. 986. See also 30 C.W.N. 79=91 I.C. 768=1926 C. 297. O. 21, R. 93 is intended to arm the Court with power to order the return of the money to the purchaser in case the same has been paid to any person in the meantime. It should not be read as containing an implication that the decree-holder is entitled to withdraw the purchase money before confirmation of sale, during the execution proceedings in the executing Court. I.L.R. (1938) Nag. 456=A.I.R. 1938 Nag. 54.

Per B. K. Mukherjea, J.—A suit for refund of purchase money on the ground that there is no saleable interest of the judgment-debtor in the property sold, does not lie at the instance of the auction-purchaser. The auction-purchaser has now got under the C. P. Code to set aside the sale under O. 21, R. 91, by an application made within 30 days from the date of sale, before he can apply for refund under O. 21, R. 93. Where however the invalidity of the proceeding is due to fraud, carelessness, or neglect of duty on the part of the decree-holder, the auction-purchaser can sue to recover the purchase money on the ground of failure of consideration and such right is unaffected by any provision of the C.P. Code. I.L.R. (1938) 1 Cal. 512=67 C.L.J. 16=A.I.R. 1938 Cal. 263. Where the Court-sale is not vitiated by



## NOTES.

fraud, the only extent to which the purchaser can claim relief is that indicated by this rule. 17 M. 231. As to whether the purchaser is entitled to a refund only when he is unable to obtain possession or is dispossessed, *see* 8 M. 99; *also* 46 I.C. 103=16 A.L.J. 511; 52 I.C. 818=15 N.L.R. 140. But *see* 22 O.C. 42=51 I.C. 95; 41 I.C. 200; 53 A. 496=132 I.C. 417=1931 A. 377 (sale rendered invalid in part—Proportionate refund of purchase-money). *See also* 50 M. 639; 50 M.L.J. 232; 51 I.C. 595. The money is returnable only on the sale being set aside. 39 A. 114=37 I.C. 9. There is no implied warranty of title in Court sales. 46 I.C. 783=22 C.W.N. 760; 49 I.C. 359=1918 M.W.N. 655; 29 I.C. 392=2 L.W. 517; 42 I.C. 440; 39 I.C. 763=2 P.L.J. 361; 52 I.C. 174=12 Bur.L.T. 211. *See also* 1932 A.L.J. 1007. The auction-purchaser is only entitled to a refund when the sale is set aside under R. 92. There is no warranty of title as regards Court-sales and therefore the purchaser cannot, when he loses the property under a decree passed in favour of a third party, claim refund of the purchase-money. 1932 A.L.J. 1007=54 A. 948. A suit for refund of the amount deposited by the plaintiff in Court as auction-purchaser of certain properties against the defendants who as attaching creditors of the judgment-debtors had taken the surplus of the decretal amount which remained to the credit of the judgment-debtors, on the ground that the judgment-debtors had no title is not maintainable when in fact there is not warranty of title in respect of a Court-sale. 1935 A.L.J. 261=1935 A.W.R. 162=157 I.C. 33=1935 A. 470. As to setting aside mortgage sale, *see* 58 C. 510=133 I.C. 587=1931 C. 688. Court-sale of two properties in single lot—Title of judgment-debtor to one item subsequently found against—Application by purchaser for the proportionate refund of price paid does not lie. 50 M.L.J. 232. *See also* 58 A. 496=132 I.C. 417=1931 A. 377.

**PARTIES.**—Judgment-debtor is a necessary party to an application under this rule. 6 M. 197. *See also* 7 B. 424. When sale is set aside it is doubtful whether judgment-debtor or decree-holder has to pay the poundage which a third party purchaser had to pay. 33 I.C. 235=3 L.W. 105. But *see* 39 M. 803=29 M.L.J. 467. Sale set aside because of material irregularity in publishing it—Decree-holder after keeping price money with him for nine months refunding it to purchaser—Decree-holder must pay interest to purchaser for that whole period. 30 Punj.L.R. 439=116 I.C. 715=1929 L. 617. No more than 6 per cent. interest should be allowed on the money to be returned. 45 I.C. 109=40 M. 1009. An order for refund can be executed as if it were a decree. 47 I.C. 630=23 M.L.T. 355.

**SUIT.**—An auction-purchaser at Court sale is not entitled to maintain a suit for the C. C. M.—138

recovery of purchase-money in the event of the judgment-debtor being proved not to have any title to the property sold. His remedy is confined within the limits of O. 21, R. 93. A.I.R. 1941 Pesh. 41. *See also* 1939 Rang.L.R. 649. Purchaser of immovable property in an auction held by the Court in execution of a decree is entitled to maintain a suit for recovery of the price paid by him if he is deprived of the property subsequent to the confirmation of the sale in his favour on the ground that judgment-debtor had no saleable interest in it. In every case where the property of a third person in which judgment-debtor had no saleable interest, has been sold at the instance of the decree-holder, both the parties, *i.e.*, the auction-purchaser and the decree-holder must at least be deemed to be labouring under a mistake on an essential fact and therefore the suit would lie to recover the purchase price on the auction-purchaser being deprived of the property by the rightful owner as for recovery of money had and received on total failure of consideration. The right to maintain such action has been given to the purchaser on equitable grounds; he must therefore bring his case within the rules of equity and his right to recover would be subject to any equitable defence that the decree-holder might be able to advance on the ground of laches, knowledge of true state of affairs, fraud, etc., on the part of the purchaser. Object of R. 93 stated. 13 L. 618=138 I.C. 47=1932 L. 401 (F.B.). After purchase-money has been returned by order of Court, a separate suit lies for interest on the purchase-money and the expenses of sale. 5 A. 364. Judgment-debtor is a necessary party to the suit. 10 C.W.N. 274. If purchaser was misled by carelessness of Court in permitting a mistake in sale proclamation, he can either sue for refund of proportionate part of purchase-money or can set aside the sale. 9 Bur.L.T. 169=33 I.C. 1003. Purchaser can sue the judgment-debtor in cases of fraud. 46 B. 833=1922 B. 205. If sale is not set aside, purchaser who finds that judgment-debtor had no title to a portion of the property cannot sue to recover a proportionate part of the purchase-money. 51 I.C. 595=52 P.R. 1919. But *see* 79 P.L.R. 1913=18 I.C. 795; 50 M.L.J. 232; 50 M. 639; 53 A. 496. Where an execution sale turns out to be futile by a finding in another suit, in which the decree and the sale in execution are declared void, the auction-purchaser has a right of action to get his purchase-money back under the general law, though not under the Code. But his remedy is not an application under R. 93 but a regular suit. 159 I.C. 625=42 L.W. 866=69 M.L.J. 750 (F.B.). *See also* 1930 O. 148 (F.B.).

**LIMITATION.**—*See* 16 M. 361; 11 A. 372. *See also* 30 C.W.N. 79=91 I.C. 768=1926 C. 297; (1941) 2 M.L.J. 121; 35 A. 419=19 I.C. 986. An application under O. 21, R. 93, is governed for purposes of limitation



94. Where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute.

## NOTES.

by Art. 181 of the Limitation Act; and time begins to run from the date of the passing of the original order setting aside the sale, and not from the order of the final Court of appeal, confirming the order setting aside the sale. The right to make the application accrues immediately the order setting aside the sale is made. Art. 182 has no application to an application under O. 21, R. 93. 46 L.W. 280=1937 M.W.N. 749=A.I.R. 1937 Mad. 779.

APPEAL.—No appeal lies from an order refusing a refund. 12 A. 397; 14 A. 201. But see 16 C. 535; 42 Bom.L.R. 367.

REVISION.—See 9 M. 437 and 17 M. 228.

O. 21, R. 94: SCOPE OF SECTION.—See 4 M. 172. The grant of certificate is ministerial, not judicial. 4 P. 760=90 I.C. 501. A sale certificate is only a formal document confirming what was purchased in the Court auction and cannot confer title on the purchaser to property which was never included in the proclamation of sale or put up for sale, though included in the sale certificate. The purchaser can only base his title to the property by virtue of his purchases and not on the certificate of sale. 1937 M.W.N. 1267=A.I.R. 1938 Mad. 232. See also 1940 A. 121. The rule imperatively requires the Court to grant a certificate and does not impose on the purchaser the duty of making an application, as a condition precedent. 4 M. 172. Also 1 P.L.J. 446=38 I.C. 576. It is the purchaser's duty to bring in a proper stamp for sale certificate. Judge after issuing sale certificate becomes *functus officio* and cannot order deficiency of stamp to be supplied later on. 32 Bom. L.R. 1084=1930 B. 392 (F.B.). A sale certificate is not a title-deed. It is merely evidence of title. 24 C.W.N. 1011=47 C. 1108. Under the Code a sale certificate should bear the date of confirmation of sale. 1936 M. 733. The sale certificate is the document of title in cases of sales in execution, and as such it cannot be lightly ignored by reference back to other documents and it cannot be argued that the property could not have been sold and so must be taken not to have been sold. 1939 A. L.J. 1079=1939 A.W.R. (H.C.) 920=A.I.R. 1940 All. 121. See also 1938 Mad. 232. The law recognizes only the method under which a man can sell his property to another and that is by a registered sale deed. There is, however, one exception and that is about transfers created by operation of law. In case where property is purchased by a person at a Court sale, no sale deed is necessary. The sale certificate which the Court will issue will show

that the purchaser got a title and the property vested in him from the date of the sale. The sale certificate will not be a title deed but would be statutory evidence of transfer in place of the mode of transfer by a registered sale deed. Having regard to the provisions of R. 94 of O. 21, the Court will issue the sale certificate only in the name of auction-purchaser or if he dies in the name of his legal representative. But the Court is incompetent to recognize any transfer or arrangements made by the auction-purchaser with a third person. 1938 A.L.J. 625=A.I.R. 1938 All. 471.

TO WHOM CERTIFICATE IS GRANTED.—The certificate is to be issued in the name of the actual purchaser. 54 I.C. 726=24 C.W.N. 27. If the purchaser is dead, the certificate may be granted to his legal representative. 24 B. 120; 11 C.W.N. 158. There is nothing whatever in R. 94 to prevent an assignee from the auction-purchaser applying for the sale certificate, nor to prevent the Court granting it to him. 161 I.C. 740=38 Bom.L.R. 104=1936 B. 137. Where in a mortgage suit an interim Receiver was appointed and the properties were sold in execution, sale made absolute and certificate granted to the purchaser, it is the purchaser and not the Receiver who is entitled subsequently to sue for possession of the property. 9 R. 565. The purchaser so long as he is not in possession of the property will be open to objections as to his title to the property. 45 B. 1186=23 Bom.L.R. 514. The purchaser gets only the rights of the vendor. 21 C.W.N. 854=41 I.C. 511. Also 29 I.C. 17; 12 I.C. 831=4 Bur.L.T. 135. See also 32 P.L.R. 759. The vendee even in the absence of a deed has a good title. 41 I.C. 850=22 C.W.N. 522. A certificate of sale issued in respect of property not attached is invalid. It cannot be treated as a misdescription of the property. The proper procedure is to commence execution proceedings over again. 41 C. 590=41 I.A. 38=26 M.L.J. 89 (P.C.). If certain items in the joint family property of a coparcener are sold and if subsequently at a partition other items are allotted to the coparcener, the purchaser cannot ask for a substitution of the properties. 37 M.L.J. 620=54 I.C. 515. An application for a sale certificate need not be in writing, and, if in writing, need not be stamped. 13 B. 670. Undisclosed principal of auction-purchaser—Right to sale certificate. 105 I.C. 880 (1).

SALE CERTIFICATE—CONTENTS AND EFFECT OF.—See 21 W.R. 93; 18 B. 175; 27 B. 339; 28 B. 162. See also 27 M. 142 (P.C.). The certificate completes the title of the purchaser. 12 I.C. 360=7 N.L.R. 134.



LOC. AMS.—[NAGPUR.] R. 94.—In r. 94 add a comma after the word "sold" and insert the words "the amount of the purchase-money" between the word "sold" and the word "and".

[RANGOON.] In O. 21, the following shall be inserted as rr. 94-A and 94-B:—

"94-A. A copy of every sale certificate issued under r. 94 shall be sent forthwith to the Sub-Registrar within whose sub-district the land sold or any part thereof is situate.

94-B. If in execution of a decree any interest in land is sold, the names and addresses of the purchaser or purchasers and the interest thereby acquired shall be certified to the Superintendent of Land Records as soon as the sale has been confirmed under r. 92 (1)."

95. Where the immovable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall,

#### NOTES.

Sale passes what is contained in the proclamation and what is attached. Certificate is not conclusive as to what is sold by its recital. 4 P. 760=90 I.C. 501=7 Pat.L. T. 280=1925 P. 615. Entries in sale certificates are not binding on strangers. 20 I.C. 753. Parties to sale cannot question title of the purchaser. 50 I.C. 157=21 O.C. 400. When the certificate recites that the right of redemption is sold, the right to redeem of any other coparcener of the defendant is also barred. 41 B. 357=19 Bom. L.R. 75.

CONSTRUCTION OF.—Mere inaccuracy of language or misdescription will not vitiate a sale certificate. 7 W.R. 245; 15 W.R. 490. In certificates, boundaries prevail over areas, mentioned therein. 22 I.C. 26=18 C.L.J. 541. But area as detailed by survey and *paimash* numbers prevail over a sweeping general boundary. 11 M.L.T. 15. A purchaser is not bound by a wrong description regarding situation of land. 52 I.C. 739. Also 11 I.C. 395=13 C.L.J. 660. Extraneous evidence might be received to identify the property comprised in the sale certificate. 25 W.R. 401. Sale certificate—Identity of property in doubt—Prior mortgage bond can be referred to. 33 C.W.N. 1211. Evidence to counteract terms of a certificate is inadmissible. 22 I.C. 280=19 C.L.J. 182. Evidence cannot be adduced to prove that more than what the certificate actually gives was purchased. 26 W.R. 104.

AMENDMENT OF.—A certificate granted by Court can be amended on an application for review under S. 114. 26 C. 530. Amendment cannot be made *ex parte*. 23 W.R. 301. See also 23 I.C. 811=19 C.L.J. 209; 20 I.C. 588. An amendment showing a larger purchase is without jurisdiction. 18 I.C. 725. Notice to judgment-debtor is necessary. When an amendment is asked for, without notice, it is an irregularity. 16 L.W. 760=1925 M. 63. Where a plaintiff claims after an interval just short of 12 years to take a technical advantage of mistake in the number of the house sold and entered in the sale certificate and to insist that he is now entitled to have the property of the exact description which he bought, irrespective of what the real intention of the

parties may have been and of any equities between them, Courts in India, in their application of principles of justice, equity and good conscience, would refuse to give him the relief prayed for. 1940 A.W.R. (H.C.) 539=1941 All. 9=1940 A.L.J. 762.

CANCELLATION OF CERTIFICATE.—When certificate issued on a rent sale is cancelled, the decree for rent remains unaffected. 35 I.C. 339=20 C.W.N. 819. The auction-purchaser derives his title from the Court's act. Where the Court's act is induced by mistake it may be set aside. 38 M. 387=26 M.L.J. 198. The onus of proving fraud is on the judgment-debtor when the certificate is sought to be cancelled. 34 I.C. 911.

REGISTRATION.—A sale certificate requires registration. 4 B. 155; 3 M. 37. See 7 M. 248; 7 M. 418; 11 B. 588.

GRANT OF FRESH CERTIFICATE.—See 9 B. 526.

DATE OF CERTIFICATE.—5 A. 84. When the mortgage decree-holder is the purchaser the title relates back to the date of the mortgage. 9 I.C. 840. A certificate issued during the pendency of a maintenance suit begun after sale is not affected by *lis pendens* and is complete. 1915 M.W.N. 15=28 M.L.J. 666.

LIMITATION.—The provisions of the Limitation Act relating to applications do not extend to applications to obtain a sale certificate. 4 M. 172. See also 6 B. 586.

APPEAL.—No appeal lies against an order refusing to amend a certificate. 23 A. 476. Also against an order granting an amendment. 26 C. 529. An application for delivery of possession by an auction-purchaser under R. 95, has to be made within three years of the date of confirmation of the sale and not from any later date such as the date of the issue of the sale certificate. 54 C. L.J. 241=134 I.C. 1188.

O. 21, R. 95: SCOPE.—A purchaser of Nankar rights need not apply for possession. 36 I.C. 768=3 O.L.J. 436. In execution, delivery must be either under this or the next rule. 55 I.C. 946. Any person claiming under the "purchaser" can also apply. See S. 146. See 28 M. 89; also 38 I.C. 338. A decree-holder entitled to possession cannot forcibly remove judgment-debtor from possession. 5 Bom.L.R. 977. An order for delivery of possession



on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

#### NOTES.

is not a mere general order to be worked in subsequent execution proceedings. 43 I.C. 155=7 L.W. 16. Delivery of possession need not be taken through Court—If auction-purchaser is let into possession by judgment-debtor amicably, application to Court under this rule is unnecessary. 34 C.W.N. 1059=1930 C. 586. R. 95 has no application to a case in which the property sold in execution is claimed by a person in his own right and independently of the judgment-debtor. 1936 M.W.N. 1369=44 L.W. 698=71 M.L.J. 725. Where purchase was under a mortgage decree passed against executors in their representative capacity, application cannot be made for possession under this rule against the beneficiaries. The beneficiaries do not claim under executors, and they are not "judgment-debtors" or some persons on their behalf under R. 95 or any person bound by a decree under R. 35. 1937 C. 301. Auction-purchasers who are decree-holders do not cease to be parties to a suit, and even if they ask relief as auction-purchasers they are still decree-holders coming under the provisions of S. 47. Therefore an application under Rr. 95 and 97 by decree-holder auction-purchaser is an application in execution of a decree and the removal of obstruction to the decree-holder auction-purchaser is in execution of the decree even though the decree be only for sale. 30 S. L.R. 290=161 I.C. 524=1936 S. 11. Property in Karachi Court's jurisdiction sold in execution by Bombay High Court—Decree-holder auction-purchaser obstructed from obtaining possession—Decree sent for execution to Karachi Court—Power of Karachi Court to remove obstruction. (*Ibid.*)

"POSSESSION".—Means such possession as the nature of the property is capable of. 5 O.W.N. 372=1927 O. 251 (F.B.). Under the law there are two modes of delivery of possession of a property both when there is a decree for possession and when the auction-purchaser is to be given possession. These two modes do not depend upon the discretion of the Court but depend upon the nature of the property of which possession is to be given. If the property is in occupation of the judgment-debtor or of some person on his behalf, etc., the possession is to be given under one mode, namely, by removing the judgment-debtor and putting the auction-purchaser or decree-holder in possession of it; *vide* O. 21, Rr. 35 and 95. On the other hand, if the delivery of possession is of a property which is not in occupation of the judgment-debtor, but it is in occupation of a tenant or other person entitled to occupy the same, delivery of possession is to be given by proclaiming the

possession of the decree-holder or auction-purchaser; *vide* O. 21, R. 36 or R. 96. 148 I.C. 905=15 P.L.T. 615=1934 P. 119. House purchased by auction-purchaser locked—Power of Court to direct breaking open lock. (*Ibid.*) Even though a writ under R. 95 does not particularly mention delivery of huts or removal of huts, still the auction-purchaser is entitled to get the property after the removal of the huts. 57 C.L.J. 41=144 I.C. 817=1933 C. 469. *See also* 100 I.C. 301=1927 R. 82. Delivery of possession—Demolition of structure on land covered by decree—Not necessary. 152 I.C. 433=38 C.W.N. 1051=1934 C. 751. When actual possession is applied for under this rule, it may be granted or refused, but the Court has no jurisdiction to order symbolical delivery under R. 96 in such a case. 156 I.C. 551=1935 R. 159. As to effect of delivery of vacant site under this rule, when objected to by tenants, *see* 1936 M. 733. Where there was no opposition by the judgment-debtors and the obstruction was only by a third person to a limited extent, the portion as to which there was no obstruction by the third person and no opposition by the judgment-debtor should be delivered. 58 M. 893=42 L.W. 375=1935 M. 803=69 M.L.J. 821 (F.B.). As to different effects as to limitation and adverse possession created by formal and actual delivery, *see* 27 C.W.N. 24=1923 C. 138. *Also* 23 I.C. 811=19 C.L.J. 209; 43 A. 520=19 A.L.J. 469; 39 A. 460=15 A.L.J. 361; 24 Bom.L.R. 232=46 B. 710; 43 B. 559=21 Bom.L.R. 357. But *see* 43 I.C. 268=34 M.L.J. 97 (P.C.), which decides that symbolical possession will interrupt title by adverse possession. As between the purchaser and judgment-debtor, the property vests in the purchaser. 34 C. 199. Where possession is delivered under R. 95 there is no necessity for making a proclamation which is only prescribed in cases where delivery of immovable property in possession of a tenant is made by symbolical possession under R. 96. So where the possession was given by beat of drum and the process-server's report showed that possession was given without crops. *Held*, that only symbolical possession was given. 150 I.C. 1028=1934 N. 172. As to right of purchaser to cut crops on land delivered under this rule, *see* 1936 C. 157. A purchase of right, title and interest of a co-sharer, passes title to what was in exclusive possession of the co-sharer. 38 I.C. 338. When an application under R. 97 is dismissed, it does not bar a fresh application under this rule. 16 I.C. 432=1913 M.W.N. 179. *See also* 25 L.W. 108. Bailiff purporting to give possession of wrong property is without effect. 1929 P. 391. The pur-



## NOTES.

chaser of an usufructuary mortgage debt, whether or not he be also the decree-holder, cannot get anything more from the executing Court than his sale certificate. He cannot apply for delivery of possession under R. 95, the mode of delivery contemplated in such a case being that prescribed by R. 79 (3). 138 I.C. 819=1932 M. 283. Mortgage with possession—Decree for sale—Suit by purchaser for possession—Right of mortgagor's heir to resist. 122 I.C. 475. Where it is decided in a suit for partition by Hindu sons against their father, that a mortgage executed by the father on the footing of which the mortgagee has obtained a decree, was executed for legal necessity and for purposes binding on the family and that the father fully represented the family in the said transaction, and that the sons are bound by the decree passed thereon, it must be taken that the sons as members of the family were also parties to the mortgage decree, and not "persons other than the judgment-debtor" within the meaning of O. 21, R. 99. The decree-holder may in such a case apply for possession under O. 21, R. 95 and need not file a suit for possession. A.I.R. 1937 Mad. 582=45 L.W. 568= (1937) 1 M.L.J. 667.

AFTER GRANT OF SALE CERTIFICATE it is not incumbent on Court to put a purchaser into possession until he has obtained a sale certificate. 5 B. 206. The right of a purchaser to apply for possession accrues when certificate has been granted, that is to say, when it has been issued to him. 17 B. 228.

LIMITATION.—An order under this rule on an application by decree-holder auction-purchaser is an order under S. 47 and is governed by Art. 182 of the Limitation Act. 103 I.C. 335=1927 N. 294. See also 54 C.L.J. 241=134 I.C. 1188. A second application for delivery of possession under O. 21, R. 95, can be made by the auction-purchaser, if it is otherwise within time. The period of 30 days under Art. 167 of the Limitation Act is to be counted from the date of the resistance or obstruction of which complaint is made and not from the date of the first resistance in respect of which an application for delivery of possession was made and dismissed for default. 42 C.W.N. 478=A.I.R. 1938 Cal. 352.

SUIT.—It is not necessary in every case where an application for delivery under R. 95 is made that a complete inquiry is necessary. Where the questions raised are questions for decision in a regular suit and not in summary proceedings, the proper course is to leave the aggrieved party to his remedy by way of a regular suit. 156 I.C. 551=1935 R. 159. Auction-purchaser may sue for possession without proceeding under this rule and R. 96. 9 C. 602; 14 C. 644; 10 M. 55; also 89 I.C. 134. A suit brought by decree-holder auction-purchaser for recovery of possession of the property purchased in execution of his decree is not

barred by the provisions of S. 47, the question relating to the delivery of the property purchased by him, not being a question relating to the execution, discharge or satisfaction of the decree. 140 I.C. 683=1932 N. 140. A suit will lie when an attempt by auction-purchaser to obtain possession in execution proceeding has proved unsuccessful. 12 C. 169. Also when possession given under the rule has been infructuous. 10 C. 402. He can also file a suit when his application under this rule is rejected as being beyond time. 29 A. 463; 19 A. 499; 7 C. 418; 4 A. 184; 8 M.L.J. 193; 18 A. 36. But see 90 I.C. 952=1925 M. 1198. If possession may be obtained by purchaser of joint interest except in the case of purchaser of interest of an undivided coparcener, see 102 I.C. 311=1927 S. 199. When a person other than judgment-debtor resists purchaser from getting possession, he cannot again apply under this rule. He can only apply under R. 97 or file a suit. 26 A. 365. But see 13 M. 504 and also 24 I.C. 512. When once possession is given, decree cannot be re-executed on plaintiff being dispossessed. 6 W.R. 108. Judgment-debtor's possession after delivery of possession to purchaser is trespass. 3 Pat. L.T. 335=66 I.C. 817. Subsequent ouster gives rise to a fresh cause of action. 5 B. 387; and a fresh start for computation of limitation. 43 A. 520=19 A.L.J. 469. Delivery of symbolical possession when actual possession should have been delivered puts an end to adverse possession. 1930 L. 823. But see 35 C.W.N. 12. Several mortgage suits—Execution sales—Priority. As between competing auction-purchasers the principles governing priority are the same as those which regulate the claims of priority among the mortgagees. 32 Bom.L.R. 431=1930 B. 221. The puisne mortgagee's right, when he is not a party to the first mortgagee's suit, is limited to a right of redemption or sale of the mortgaged properties subject to the lien of the first mortgagee or auction-purchaser on a decree by the latter and he cannot in execution of his decree under R. 95 compel the first mortgagee to part with possession without redeeming the first mortgage. 1934 Pat. 215.

APPEAL.—No appeal lies from an order allowing auction-purchaser's application. 29 A. 207. See 18 A. 36; 6 C.L.J. 749; 40 A. 216=16 A.L.J. 150; 20 C.W.N. 829; 1 Pat.L.J. 232. An application under R. 95 or 97, will not be a proceeding relating to the execution, discharge, or satisfaction of the decree and the order passed thereon is not appealable. 11 Pat.L.T. 331=1930 P. 311 (F.B.). An appeal under S. 47 and no suit lies from an order rejecting an application under this rule. 90 I.C. 952=1925 M. 1198. On this, see 53 C. 781=95 I.C. 494=1926 C. 798 (F.B.).

O. 21, Rr. 95 to 99 and S. 47—RELATIVE SCOPE OF.—O. 21, R. 95 and the subsequent rules in O. 21, relating to delivery of posses-



96. Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

*Resistance to delivery of possession to decree-holder or purchaser.*

97. (1) Where the holder of a decree for the possession of immovable property

#### NOTES.

sion to the decree-holder or auction-purchaser fall under an order relating to the execution of decrees and orders. When a question arises as to the kind of possession to be delivered, it is a question relating to the execution of the decree. I.L.R. (1938) Nag. 583=A.I.R. 1938 Nag. 212.

O. 21, Rr. 95 and 96: SCOPE OF.—The summary procedure for obtaining possession under Rr. 95 and 96 does not bar a suit by a purchaser to obtain possession of the property. The two remedies are concurrent. Purchaser can at his option avail himself of the one or the other. For this purpose there is no distinction between a decree-holder purchaser and a third party purchaser. 10 P. 670=133 I.C. 337=1931 P. 241 (F.B.).

O. 21, Rr. 95 and 97.—R. 97 of O. 21 merely gives the auction-purchaser the right to complain to the Court of the resistance offered to him. If he does so, he must do so within 30 days from the time of such resistance under Art. 167, Limitation Act; but if he fails to so apply, that does not take away his right to apply again under R. 95 for delivery of the property, in which case he must apply within three years of the date of sale becoming absolute, under Art. 181. Art. 167 cannot take away the right to apply under R. 95 of O. 21. 1941 N.L.J. 494.

O. 21, R. 96.—21 A. 269; 17 M.L.J. 598. This rule will not apply to property in the hands of a Receiver, and he can be sued only with leave of Court. 63 I.C. 685=14 S.L.R. 137. As to distinction between symbolical and paper delivery, see 44 I.C. 839. An order under this rule is a judicial order. 45 I.C. 608. And thereafter the warrant for delivery cannot be stopped. 103 I.C. 695 (1)=1927 O. 304. Symbolical possession does not of itself effect a transfer of possession by a person not a party to the decree. 42 I.C. 449=3 P.L.W. 133. A formal possession under this rule does not affect strangers at all. 45 I.C. 606=20 O. C. 70. When such third person is in actual possession, he, not being dispossessed at all, is not bound or entitled to start proceedings under R. 100; when the purchaser who has got symbolical possession therefore removes crops grown on the land by the third person in actual possession, he is guilty of theft under S. 379, I. P. Code. The fact of symbolical possession to the purchaser is no answer to the charge. Nor can the act be

said to have been done under a *bona fide* claim of right. 39 C.W.N. 1306. The remedy of purchaser of an undivided share is a suit for partition, when he is obstructed by one entitled to possession of the whole. 25 M.L.T. 153=49 I.C. 629. Formal delivery gives right to demand possession of share by metes and bounds—Right lost by inaction for 12 years. 129 I.C. 767. But see also 40 I.C. 605. Purchaser buying with knowledge of subsisting tenancy will be deemed to know of its duration as well. 100 I.C. 1014 (1)=1927 R. 127 (2). There is no period of limitation under this rule for an application for delivery of possession after confirmation. 40 I.C. 605. But see also 129 I.C. 767.

O. 21, Rr. 96 and 97: PRACTICE.—O. 21, R. 58 does not contemplate the investigation of a claim by a tenant of the judgment-debtor to occupancy rights in the property advertised for sale and an order on that claim directing it to be notified and stating that the sale shall not prejudice the rights of the claimant is not conclusive under R. 63. When the purchaser applies under R. 97 for delivery of the property sold to him in execution the Court should investigate the merits of the claim and even if it finds the claim of the tenant to be *bona fide*, it should at least order symbolical delivery under R. 96. 41 L. W. 550=68 M.L.J. 518.

O. 21, R. 97: SCOPE OF RULE.—R. 97 applies only where the decree-holder, having obtained a general order of the character specified in R. 96, meets with resistance from any particular person. Merely because an amicable delivery of the property is refused, the summary procedure under R. 97 cannot be resorted to. 36 C.W.N. 965. See also 35 C.W.N. 1132. R. 97, O. 21 would apply equally to a person who was entitled to an order for possession in the same way as it, in terms, applies to the holder of a decree for possession. An order which has been made for a receiver to obtain possession is in effect, and for the purpose of execution, the same as a decree for possession, and application under O. 21, R. 97, though not made by the receiver in person is proper if it has been made on behalf of the receiver. A.I.R. 1939 Cal. 494. Proceedings under this rule whether execution proceedings. See 1926 M. 412=92 I.C. 533=50 M.L.J. 200. It is only the decree-holder or auction-purchaser who can make an application under R. 97, regard-



Resistance or obstruction to possession of immovable property.

or obstruction.

or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance

#### NOTES.

ing obstruction to possession. 132 I.C. 844 = 1931 L. 686. Where decree-holder's counsel was present when report of the bailiff complaining of the obstruction by the petitioner was placed before the Court, it is reasonable to hold that the further proceedings were taken at the instance of the decree-holder. 149 I.C. 1059 = 36 P.L.R. 89 = 1934 L. 193 (2). Oral application for action under this rule is sufficient. 1931 L. 13 = 130 I.C. 520. Person obstructing need not be physically present. 23 L.W. 157 = 92 I.C. 61 = 1926 M. 359. The executing Court has no jurisdiction to start upon an inquiry under R. 97 either *suo motu* or upon the application of a prospective objector in absence of a complaint by the decree-holder under R. 97 about resistance or obstruction of delivery of possession to him. [1931 L. 686; 60 C. 8 and 1924 A. 495 (F.B.), Foll.; 1925 R. 374; 1923 L. 145 and 1934 L. 193, Dist.] 31 N.L.R. 408 = 159 I.C. 584 = 1935 N. 212. A decree-holder is not bound to pursue his remedies under this rule. 8 B. 602; 10 M. 53. Application by decree-holder auction-purchaser for possession—Obstruction by judgment-debtor—Application was one under R. 97 and not under R. 95. 32 Bom.L.R. 619. This rule is solely for the benefit of a purchaser at a sale in execution. 13 M. 506. But see 26 A. 365. Also 1926 M. 353. The enquiry into objections is not confined to cases where the order is for possession only but also where the order is for demolition as well. 4 Bur. L.J. 178 = 1925 R. 374. See also 1932 A. L.J. 1036. When the decree is silent regarding the building, the executing Court cannot order its demolition. 5 Bur.L.J. 201 = 100 I.C. 301 (1) = 1927 R. 82. See also 92 I.C. 667 (1) = 1925 R. 374; 57 C.L.J. 41. O. 9 of the Code does not apply to such proceedings under R. 93 or 100 as do not also fall within S. 47; and the Court has no inherent power to set aside, on sufficient cause being shown, either an order dismissing for default an application under R. 97 or 100, or an order allowing such an application *ex parte*. 30 L.W. 424 = 1929 M. 757 = 57 M.L.J. 381 (F.B.). The action of the Court in entertaining an application made by the obstructor for stay of proceedings on the ground that he was prosecuting a suit or appeal with respect to property in dispute, cannot be justified under S. 151. 119 I.C. 488 = 1929 L. 694. If the judgment-debtor and a third party both obstruct, the decree-holder purchaser has to complain against the judgment-debtor and, if he chooses, against the third party also under R. 97 and the complaint can then be disposed of. But if the judgment-debtor is quiescent, raises no objection and makes no opposition either be-

fore the Amin or before the Court, but a third party objects and on account of the third party's objection physical possession of the property cannot be given, it is the duty of the Court to note the fact and to order delivery of such possession as the matter may then be capable of so far as the judgment-debtor is concerned. 58 M. 893 = 42 L.W. 375 = 1935 M. 803 = 69 M.L.J. 821 (F.B.). Scope—Comparison with Rr. 58 to 63 of O. 21—Principles applicable to one whether applicable to proceeding under other set of rules. 53 B. 668 = 31 Bom.L.R. 765 = 1929 B. 379.

DECREE FOR POSSESSION OF PROPERTY.—A decree for partition is a decree for possession of property. 16 M. 127. The rule applies to a decree for possession under S. 2 of the Specific Relief Act. 23 L.W. 157 = 92 I.C. 61 = 1926 M. 353. A sub-tenant cannot resist. He is not in possession on his own account. 23 Bom.L.R. 1316 = 1922 B. 449 (2). Neither can a sub-lessee of a sub-tenant of the judgment-debtor. 23 Bom.L.R. 1251 = 46 B. 526. As to when symbolical delivery is effective, see 1925 M. 1140 = 49 M.L.J. 303. The first mortgagee of certain property was appointed a receiver and obtained possession in execution of her decree to which the second mortgagee was not a party. The second mortgagee brought a suit on his mortgage without impleading the prior mortgagee and the property was sold in execution of the decree in that suit. In an application by the auction-purchaser for possession which was resisted by the earlier mortgagee, the first mortgagee was held to be a *bona fide* claimant and as he was in possession prior to the purchase by the auction-purchaser, he was entitled to be maintained in possession. 56 M. 846 = 1933 M. 583 = 65 M.L.J. 108 (F.B.).

FRESH APPLICATION.—When an application by an auction-purchaser not being the decree-holder is rendered infructuous on account of obstruction, he need not apply under this rule but can put in another application if within time fixed by Art. 167 of the Limitation Act. 4 Pat.L.J. 94 = 49 I.C. 150 (F.B.). See also 1928 M.W.N. 236; 1933 A. L. J. 113 = 1933 A. 201 = 55 A. 235; 1933 N. 369 = 147 I. C. 582; 146 I. C. 11 = 35 Bom.L.R. 1033 = 1933 B. 457 (F. B.). When once a delivery has been complete, a second application is not maintainable. 43 M.L.J. 179 = 1923 M. 25. After resistance a fresh application for possession can be made under R. 95. 13 M. 504. But see 26 A. 365. Obstruction to decree-holder getting possession—Application taking objection not filed—Subsequent obstruction—Fresh application lies. 1928 M. W. N. 236. When once delivery is given, any subsequent act of resistance cannot be the sub-



(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

LOC. AM.—[PATNA.] O. 21, r. 97.—*Add* the following sub-rule to r. 97 :—

“(3) The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to the applications under this rule.”

98. Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining pos-

#### NOTES.

ject of a complaint under this rule. 13 W. R. 418.

**LIMITATION.**—There is no limitation for applying for delivery of possession after confirmation of sale. 40 I.C. 605. A minor is to apply within a month after coming of age. 11 B. 173. See 13 M. 504. As to effect of order upholding claim of sons of judgment-debtor in their own right, see 83 I.C. 923=1924 A. 495. An application under R. 97 for delivery of possession by an auction-purchaser may be treated as an application in an execution proceeding, but it cannot be treated, as an application for execution. S. 15 of the Limitation Act does not therefore apply to such an application. 62 C. 66=158 I.C. 191=1935 C. 333.

**SUIT.**—In execution of a decree for possession against lessee in favour of lessor, if the sub-lessee obstructs, the remedy is by suit. 60 I.C. 969=47 C. 907. When obstruction is by members of an undivided family to whom the property belonged but who were not parties to the suit, the remedy is by suit only. 14 I.C. 282. Where decree-holder was resisted in trying to obtain possession by the wife of the judgment-debtor who claimed in good faith to be in possession of the property on behalf of her minor son not bound by the decree obtained against the father, an order passed under R. 99 dismissing the application of the decree-holder is not one falling within the scope of S. 47 and so not appealable. The remedy of decree-holder in such a case is that indicated in R. 103. 58 C. 808=133 I.C. 335=35 C.W.N. 286=1931 C. 574. A suit by auction-purchaser for possession is maintainable even if the express words are absent in the decree. 57 I.C. 177. When an application under this rule is rejected, the applicant can file a regular suit. 8 B. 481. When an application by mortgagee decree-holder under this rule is dismissed, the remedy is by suit and not an appeal against the order of dismissal. 53 I.C. 923. A purchaser of immovable property sold for arrears of Abkari revenue is entitled to be put in possession by the Civil Court by removal of obstruction if any. 1 M.L.J. 594; 13 W.R. 467.

**APPEAL.**—Property subject to charge—Charge under surety bond—Independent suits to enforce mortgage and charge—Rival purchasers—Application by purchaser in

surety proceeding against the other purchaser—Order of dismissal—*Held*, that the order against the surety was appealable, even though it was made by the Court not under S. 145, but under its general powers. 56 M. 909=145 I.C. 871=1933 M. 780=65 M.L.J. 407. Where the decree for restoration is resisted by a third person and the decree-holder applies under R. 97, the mere fact that the application is dismissed and is unappealable does not make the order of dismissal the less a refusal of restitution under S. 144 and as such it is appealable. 13 P. 108=15 P.L.T. 491=146 I.C. 1045=1934 P. 109. An order made under R. 97 between the decree-holder-auction-purchaser and another person who had been impleaded as a defendant in the suit is appealable, because the dispute comes under S. 47. [53 C. 781 (F.B.), Rel. on.] 150 I.C. 313=38 C. W.N. 497=1934 C. 541.

O. 21, Rr. 97 and 98: SCOPE OF.—See 1932 A.L.J. 1036.

O. 21, Rr. 97, 98, 99 and 123.—Scope—Order on investigation—Application allowed in part as unopposed and rejected in part as no evidence adduced—If one in default—Suit to set aside—Limitation. 39 C. W.N. 164=1935 C. 267. See also 1940 A. W.R. (H.C.) 515.

O. 21, Rr. 97 and 103: DISMISSAL OF APPLICATION UNDER R. 97 OF O. 21—APPEALABILITY—SCOPE OF R. 103 OF O. 21.—An order dismissing an application as barred by time is not an ‘order made under R. 98, 99 or 101’ of O. 21, within the meaning of R. 103 of O. 21, but it is a decree within the meaning of S. 2 (2) and is hence appealable. What R. 103 prevents is an appeal, not from ‘an order on an application under O. 21, R. 97’ but from ‘an order . . . under R. 98, R. 99 or R. 101 . . .’ 1940 A.L.J. 785=A.I.R. 1940 All. 525.

O. 21, R. 98: SCOPE.—The rule applies only to obstruction by judgment-debtor or some other person at his instigation. 31 I. C. 799. The condition precedent to the Court putting the decree-holder into possession in the exercise of its power under O. 21, R. 98, is that the resistance or obstruction should have been occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf. The word “judgment-debtor” in R. 98 must be interpreted in the light of



session, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days.

LOC. AMS.—[ALLAHABAD.] In O. 21, r. 98, *after* the words "or by some other person at his instigation" *add* "or on his behalf"; *after* "or any person acting at his instigation" *add* "or on his behalf"; *after* "for a term which may extend to thirty days" *add* "and may order the person or persons whom it holds responsible for such resistance or obstructions to pay jointly or severally in addition to costs, reasonable compensation to the decree-holder for the delay and expense caused to him in obtaining possession. The order to pay costs and compensation [*vide* Court's Notification No. 6376/35 (a), dated the 12th November, 1926] made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

[CALCUTTA.] O. 21, r. 98.—*Insert* the words "or on his behalf" *after* the words "at his instigation" occurring twice in r. 98, O. 21.

[LAHORE.]<sup>1</sup> O. 21, r. 98.—*After* the words "at his instigation" where they occur first *add* the following words:—

"or on his behalf."

*Add* the following proviso:—

"Such detention shall be at the public expense and the person at whose instance the detention is ordered shall not be required to pay subsistence allowance.

[NAGPUR.] Rule 98. In r. 98—

(a) *after* the word "instigation," in both places where it occurs, *insert* the words "or on his behalf"; and

(b) *after* the words "thirty days" *insert* the words—

"and may order the person or persons whom it holds responsible for such resistance or obstruction to pay jointly or severally, in addition to costs, reasonable compensation to the decree-holder or the purchaser, as the case may be, for the delay and expense caused to him in obtaining possession. The order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

[N.-W.F.P.] *After* the words "at his instigation" wherever they occur, *add* the words "or on his behalf," and *after* the words "in the civil prison" *add* the words "at the expense of the Crown."

[OUDH.] In r. 98, *after* the words "at his instigation," wherever they occur, *insert* the words "or on his behalf" and *after* the words "thirty days" at the end of the rule, *add* the words "and

#### NOTES.

the definition of the term as given in S. 2 (10). 1939 A.W.R. (H.C.) 817=I.L.R. (1940) All. 87=1940 A.L.J. 1160. "Person other than the judgment-debtor"—Suit on mortgage against legitimate son of mortgagor—Plaintiff not aware of existence of illegitimate son and not impleading him as defendant—Effect—Illegitimate son cannot be regarded as person other than the judgment-debtor. 49 L. W. 103=1939 Mad. 477=(1939) 1 M.L.J. 416. *See also* (1937) 1 M.L.J. 667. Where there was litigation going on between *Agraharamdars* and tenants regarding occupancy rights, and obstruction was caused by tenants against person claiming delivery against *Agraharamdars*, it cannot be said that the obstruction was not *bona fide* or was at the instigation of the judgment-debtors. 1936 M. 733. Only to persons who have rights of their own and who are not bound by the decree for possession sought to be executed, does O. 21, R. 98 apply. The provisions of that and succeeding rules cannot help tenants of judgment-debtors who have no occupancy rights and who are, therefore, bound by a decree for possession against judgment-debtor. 132 I.C. 301=1931 M. 534. (Case-law discussed.) But *see also* 47 C. 907. A purchaser *pendente lite* comes within the definition of a judgment-debtor. 85 I.C. 1004=1925 C. 1243. Auction-purchaser is a representative of judgment-debtor and proceedings can be

taken against him under S. 146. 12 L.W. 350=59 I.C. 894. Provincial Small Cause Court can order ejectment where the obstruction is offered by the judgment-debtor. 45 M.L.J. 66=1924 M. 74. The words "at the instance of the applicant" have been inserted to give effect to the ruling in 26 M. 494. In case possession is ordered, it should be given in one of the ways prescribed by the Code. 8 W.R. 79. Acquiescence in the obstruction in a prior attempt for possession does not prevent another application to remove second obstruction. 66 I.C. 722=1921 M.W.N. 698. A Court has no jurisdiction to proceed with an enquiry which results in an order under R. 98 without giving notice to the objector. 106 I.C. 491 (1). Court can resist auction-purchaser's application on the ground of agreement between auction-purchaser and judgment-debtor—Order dismissing application is final subject to suit under O. 21, R. 103. 32 Bom. L.R. 619.

APPEAL.—No appeal lies against an order made under this rule. 3 M. 81. *See* 21 B. 392; 13 M. 504; 14 C. 235. *See also* 51 B. 158=101 I.C. 40=1927 B. 184. But *see contra* 66 I.C. 722=1921 M.W.N. 698. When the purchaser is decree-holder, and the obstructor is the judgment-debtor, an order under this rule is appealable as a decree. 4 P. 726=6 P.L.T. 351. But *see* 92 I.C. 544=1926 C. 985.



may order the person or persons whom it holds responsible for such resistance or objections to pay jointly or severally in addition to costs, reasonable compensation to the decree-holder for the delay and expense caused to him in obtaining possession. The order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

[RANGOON.] The following shall be *substituted*, namely:—

"98. Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession the Court may also, at the instance of the applicant or of its own motion, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison at the cost of Government for a term which may extend to thirty days."

99. Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application.

LOC. AMS.—[ALLAHABAD AND OUDH.] R. 99.—For the words in brackets "(other than the judgment-debtor)" read the words in brackets "(other than the persons mentioned in rr. 95 and 98 hereof)."

[CALCUTTA.] O. 21, r. 99.—Insert the words "to have a right" after the words "in good faith."

[MADRAS.] Substitute the following for the existing rule:—

"99. Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than those mentioned in r. 98) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application."

[NAGPUR.] R. 99.—In r. 99, for the word "judgment-debtor" where it occurs in brackets, substitute the words "persons mentioned in rule 95 or 98."

[N.-W.F.P.] For the words "(other than the judgment-debtor)" substitute the words "(other than the persons mentioned in rules 95 and 98)."

[PATNA.] O. 21, r. 99.—In r. 99 for the brackets and words "(other than the judgment-debtor)" substitute the brackets and words "(other than the persons mentioned in rules 95 and 98)."

[RANGOON.] Substitute the following:—

"99. Where the Court is not satisfied it shall make an order dismissing the application."

100. (1) Where any person other than the judgment-debtor is dispossessed

#### NOTES.

O. 21, R. 99.—The decision under this rule is final so far as possession is concerned subject to a suit under R. 103. 51 I.C. 787=51 P.W.R. 1919. See also 99 I.C. 219=2 Luck. 269=1926 O. 610.

"POSSESSION" is not limited to actual physical possession but includes also constructive possession. 25 B. 478. Court should satisfy itself as to whether the person obstructing was in possession of the property in question on his own account. 27 B. 302. Investigation of claims under this rule is not limited to the fact of possession. Any question of title in connection with the right to possession may also be determined. 14 B. 627. See also 27 A. 453 (Applicability of the doctrine of *lis pendens*). "Person other than the judgment-debtor"—Meaning of—Decree on mortgage by Hindu father—Suit by sons for partition—Decision that mortgage and decree thereon binding on sons—Effect of—Sons, if persons "other than the judgment-debtor"—Remedy of purchaser for possession—Application under R. 95 lies—Suit not, if necessary. 1937 Mad. 582=45 L.W. 568=(1937) 1 M.L.J. 667. See also 49 L.W. 103=1939 Mad. 477=(1939) 1 M.L.J. 416.

"ON THEIR OWN ACCOUNT".—Unmarried sisters under Hindu Law have a right of residence until they are married in the family dwelling-house and cannot be ousted. 43 M. 635=38 M.L.J. 433. The onus of proving a better title than the plaintiffs rests with the persons obstructing and they may prove their title as a defence. 22 B. 967. See also 10 C. 50; 26 M. 517; 14 B. 627; 18 B. 40.

LIMITATION.—Where an application for possession was dismissed for default, limitation for suit to establish right does not start from this date under Art. 11 of the Limitation Act. 39 I.C. 797=15 A.L.J. 420.

APPEAL.—No appeal lies from an order under this rule. 9 Bom.L.R. 936=1926 O. 610.

REVISION.—Revision lies. 9 Bom.L.R. 936.

O. 21, Rr. 99 and 100.—See 132 I.C. 844=1931 L. 686.

O. 21, R. 100: MEANING OF TERMS.—"Dispossessed", meaning of. 20 B. 353 (F.B.). See also 30 C. 710. "Judgment-debtor." 17 A. 222 (F.B.). Includes his representatives. 42 I.C. 526=2 P.L.J. 478.



Dispossession by decree-holder or purchaser. of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

## NOTES.

SCOPE.—The rule cannot apply where S. 47 is applicable. 17 A. at 481. See also 70 C.L.J. 111. Nor where the execution has been transferred to the Collector. 37 B. 488=15 Bom.L.R. 389. As to applicability to proceedings under the Agra Tenancy Act, see 23 A.L.J. 23. See also 36 C.W.N. 790. An application under O. 21, R. 100, by a private purchaser from the recorded tenant of a non-transferable holding, in the course of execution of a rent decree obtained by the landlord against the recorded tenant, is incompetent when such purchase has not been recognized by the landlord. 189 I.C. 240=A.I.R. 1940 Pat. 670. A tenant who has been wrongfully dispossessed in execution of a decree obtained by his landlord against another person has a right to apply for restoration of possession to the Revenue Court under R. 100, and such a right is not barred on account of his alternative remedy by a suit under S. 108, Cl. (10) of the Oudh Rent Act. 155 I.C. 1082=1935 R.D. 346=1935 O.W.N. 698=1935 Oudh 462. No declaratory order can be made under this rule. 103 I.C. 231=1927 N. 300. Questions such as validity or collusiveness of the decree, *lis pendens*, whether opposite party derives title by *kabala* or compromise decree, are outside the scope of proceedings under R. 100. 1930 P. 416. The scope of enquiry under R. 100 is the same as that of an enquiry under R. 58. 36 C.W.N. 1034=56 C.L.J. 250; 157 I.C. 86=16 Pat.L.T. 220=1935 P. 230. The judgment-debtor has no right to apply under R. 100. A.I.R. 1932 L. 658. An unsuccessful applicant under R. 58 is not competent to apply under R. 100. His only remedy is by way of suit under R. 63. 35 C.W.N. 1034=56 C.L.J. 250; 148 I.C. 334; 17 Pat.L.T. 812 (F.B.); 1937 O.W.N. 690=1937 Oudh 400. But see also 98 I.C. 541=1927 C. 339. It is only when a person has been dispossessed that he can apply under R. 100; when no possession has been given to the decree-holder or purchaser, there is no dispossession as contemplated by the rule. The Court, therefore, has no jurisdiction to determine the matter in the form of an anticipatory application or make an order under R. 101. 155 I.C. 93=1935 P. 253.

APPLICABILITY.—A representative of the judgment-debtor under S. 47 cannot apply under this rule. 65 I.C. 476. The sons of a judgment-debtor are *prima facie* bound by the decree made against their father and cannot be regarded as persons other than the judgment-debtor within the meaning of R. 100. 155 I.C. 93=1935 P. 253. A co-owner who is only entitled to joint possession can invoke the provisions of O. 21, R. 100 and claim restoration of

possession. 1938 N.L.J. 223=A.I.R. 1938 Nag. 442. Joint possession is not a sufficient ground to maintain an application under this rule. 83 I.C. 599=1924 P. 1198. But see *contra* 58 C. 55=132 I.C. 631=1931 C. 385; 144 I.C. 147=1933 P. 132. Rule only applies where there is actual dispossession and a person whether holding under a judgment-debtor or any one else is not entitled to apply under this rule in a case where there has been only symbolical delivery of possession. 142 I.C. 152 (1)=1933 C. 144; 18 C.L.J. 138=18 C.W.N. 695; 68 I.C. 394=1923 N. 52. Where an applicant under O. 21, R. 100 contended that he was in possession in spite of a symbolical delivery and in the alternative prayed that if it was found that he was not in possession, he should be restored to possession, such an application is not improper, for when a party is in doubt as to his legal right to apply under O. 21, R. 100 he can well invite the Court to pronounce its opinion and his competency to apply would depend upon the nature of the Court's opinion. 1938 N.L.J. 223=A.I.R. 1938 Nag. 442. A usufructuary mortgagee in possession can apply under this rule. 70 I.C. 306=1 P. 159. See also 1941 Rang. 298. Where an applicant under O. 21, R. 100 had been found to be in possession, but subject to the mortgage right of the decree-holder to whose mortgage suit the applicant had not been a party, the application should be allowed, as it is immaterial in an application under O. 21, R. 100 whether or not his possession was subject to the mortgage right of the decree-holder. 177 I.C. 382=A.I.R. 1938 Pat. 90. The purchaser of a holding not transferable by custom cannot claim under this rule. 43 I.C. 969. See also 95 I.C. 146=1926 C. 956; 10 Pat.L.T. 242=117 I.C. 308=1929 P. 227; 171 I.C. 665=1937 Pat. 562. But see *contra* 53 C. 913=99 I.C. 718=1927 C. 156. See also 132 I.C. 301=1931 M. 534. Mortgagee objecting to attachment under R. 58 and failing—Omission to sue under R. 63—Subsequent application under R. 100 after delivery of possession to decree-holder purchaser—If barred. 17 Pat.L.T. 812 (F.B.). See also 1939 Pat. 263. A purchaser of a part of a transferable holding of a judgment-debtor is not the representative of the judgment-debtor, and therefore *prima facie* has a right to apply under O. 21, R. 100. A.I.R. 1939 Pat. 253. Transferee of property from a person against whom an order under O. 21, R. 58 has been made can apply under this rule. 98 I.C. 541=1927 C. 339. See also 36 C.W.N. 1034=56 C.L.J. 250. In case of excessive execution proper remedy of judgment-debtor is to apply for restoration under S. 47 and not under this rule. 38 A.



(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

101. Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

*Bona fide* claimant to be restored to possession.

#### NOTES.

339=34 I.C. 231. In a claim of an exonerated party enquiry should be confined to possession only and not extended to title. 40 M. 964=38 I.C. 297=32 M.L.J. 532. On this rule, *see also* 58 C. 55=132 I.C. 631=1931 C. 385. Rr. 100 and 101 are not confined to cases of exclusive possession alone, but are applicable to joint possession also. (*Ibid.*) (*See also* 17 B. 718, Diss.; 18 C.W.N. 695, Ref. But *see* 83 I.C. 599=1924 P. 506; 1933 P. 132. *See also* 20 I.C. 253 and 1924 P. 506, Ref.). Where an application under O. 21, R. 100 has been dismissed for default, the party aggrieved has a direct remedy by way of regular suit under O. 21, R. 103 and the *ex parte* order cannot be set aside and the application restored under S. 151. (47 C.L.J. 87, Dist.; 31 C.W.N. 576 and 45 C.L.J. 557, Ref.) 152 I.C. 24=59 C.L.J. 218=1934 C. 653. *Alternative reliefs.*—In a petition deliberately filed under R. 100, the alternative prayer for relief under S. 47 cannot be entertained. 145 I.C. 174=1933 M. 482. R. 101 is applicable to proceedings under the Madras Estates Land Act by reason of S. 192 of the Estates Land Act. 157 I.C. 1066=1935 M.W.N. 633=41 L.W. 623=1935 M. 309=68 M.L.J. 324.

*Suit.*—A person can file a regular suit without proceeding under this rule. 10 M. 53. A person dispossessed in execution of a decree against another is not bound to institute proceedings under this. 27 M. 262. *See also* 5 M.L.J. 252. When dispossessed under this rule a mortgagee decree-holder purchaser cannot claim compensation. 63 I.C. 126=25 C.W.N. 756. Equities in favour of purchaser could be considered in the suit and not under this rule. 24 L.W. 389=97 I.C. 605=1926 M. 1127.

*Appeal.*—No appeal lies from an order under this rule. 41 I.C. 891=57 P.R. 1917. But where the question is between the parties to the suit or their representatives, an appeal lies. 41 M.L.J. 54=63 I.C. 730; 144 I.C. 472=38 L.W. 199=1933 M. 569; 60 C. 832=37 C.W.N. 671=1933 C. 680.

*Practice and procedure.*—In a petition under R. 100 it is a serious irregularity to ask decree-holder to begin his case and examine his witnesses and then to examine the witnesses of the claimant. It justifies interference in revision. 1931 M. 534=132 I.C. 301. An order on an application under R. 100 without allowing any oral evidence to be led by the parties, on the ground that there was sufficient documentary evidence on record, is illegal and is liable to be set

aside in revision. Court should dispose of the matter only after allowing the parties to produce whatever evidence they desire, oral or documentary. 1935 A. 457=1935 A. L.J. 419=158 I.C. 33=1935 A.W.R. 328. Subsequent events after application can be taken notice of by Court and relief granted on the basis of such events. 37 C.W.N. 339=60 C. 685=145 I.C. 663=1933 C. 534. Mortgage suit—Third party impleaded—Omission to raise available plea—Plea whether cannot be raised in execution. 60 C. 832=37 C.W.N. 671=1933 C. 680.

*Limitation.*—*See* 58 C. 55=132 I.C. 631=1931 C. 385.

**O. 21, R. 101.**—An order under this rule is conclusive until displaced by a suit. 27 I.C. 29=1914 M.W.N. 897. But it does not affect a party's right to possession upon redemption. 54 I.C. 276=17 N.L.R. 33. When the execution is transferred to Collector, the Court has no power to act under this rule. But when Collector's power is exhausted, the Court which made the decree should act. 38 B. 673=26 I.C. 266. No question of title can be investigated under this rule. 22 I.C. 707=19 C. L.J. 13. R. 101 is applicable to proceedings under the Madras Estates Land Act by reason of S. 192 of Act. 68 M.L.J. 324.

*On his own account.*—A claimant in possession on his own account though without title is entitled to succeed under this rule. 98 I.C. 541=1927 C. 339. *See also* 65 C.L.J. 416. A mortgagee in possession is in possession on his own account. 2 A. 94. A member of a joint Hindu family cannot say that he is in possession of any particular portion of the joint property on his own account. 17 B. at 721. Possession by enjoyment and receipt of rent is enough. 15 W.R. 70. But *see* 33 C. 487; 14 Pat. L.T. 573=1933 P. 581.

*Limitation.*—An order dismissing a claim must be challenged within one year. 45 M. L.J. 690=47 M. 160. *See also* 58 C. 55=132 I.C. 631=1931 C. 385.

*Appeal.*—S. 104 of the Code read with O. 43 shows that no appeal lies against an order under R. 101. Such an order may however be made the subject of revision. 16 R.D. 160.

*Revision.*—An order under this rule cannot be rectified in revision as a remedy lies under R. 103. 129 P.L.R. 1911=10 I.C. 183. But *see* 58 C. 55, *infra*; 34 C.W.N. 577. *See also* 16 R.D. 160; 65 C.L.J. 416. The power conferred upon any party by R. 103 to institute a suit does not restrict the High Court from using its revisional



102. Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

Rules not applicable to transferee *pendente lite*.

103. Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property, but, subject to the result of such suit (if any), the order shall be conclusive.

Orders conclusive subject to regular suit.

#### NOTES.

powers to correct the errors or illegalities of subordinate Courts in proceedings under R. 101. See 58 C. 55=132 I.C. 631=1931 C. 385. An investigation under Rr. 100 and 101 of O. 21 is restricted to the question of possession only and even though the applicant may not have good title to the property, if he can show that he was not in possession on behalf of the judgment-debtor but on his own account, he must, under R. 101, be put in possession of the property. 1937 O.W.N. 690=A.I.R. 1937 Oudh 400. O. 21, R. 102.—See 42 I.C. 523=6 L.W. 568; 1926 M. 963=51 M.L.J. 256. The rule of *lis pendens* is expressly recognised in O. 21, R. 102, as regards transfers in the course of execution proceedings. The language of the rule is sufficiently wide to cover both voluntary alienations on the part of a judgment-debtor and transfers by a Court sale or a sale under the Public Demands Recovery Act. I.L.R. (1939) 2 Cal. 63=43 C.W.N. 692=A.I.R. 1939 Cal. 709. R. 102 does not in terms apply to an involuntary sale. 157 I.C. 86=16 Pat.L.T. 220=1935 P. 230. When a party raises the question of *lis pendens* before the Court and wants the Court to decide the matter not upon the plain language of R. 102, but upon the general doctrine of *lis pendens*, the Court has to find out whether the decree is collusive or not. And if the Court decides that the decree was collusive, it cannot be interfered with in revision as being without jurisdiction. 157 I.C. 86=16 Pat.L.T. 220=1935 P. 230.

O. 21, R. 103.—The rule is intended to deprive the claimant of his remedy by way of an appeal or application for revision to a higher Court, and to declare that the adverse order shall be conclusive against the claimant, subject however to the result of any suit which he may file to establish his claim to the 'present possession of the property' which is the subject-matter of the order passed against him. The rule goes no further than that and the claimant is not required to file a suit for setting aside the adverse order passed against him, but to establish his right. 156 I.C. 702=1935 S. 129. The object of O. 21, R. 103 is to have a speedy settlement of questions of title raised in execution sales. But the institution of a suit by the unsuccessful party is not the only remedy for getting the adverse order super-

seded. What is contemplated as necessary to supersede the order is the establishment of a right to the property. Consequently if the unsuccessful party is able to get his right declared or established within a year, though in a suit instituted not by him but against him, the order under R. 103 must be held to have been superseded by the later adjudication. What makes the order conclusive is not the failure to institute a suit but the failure to have the right established. If therefore the unsuccessful party's title is declared or established within a year of the adverse order in a suit wherein he is a defendant, it is not obligatory on him to institute a suit within a year to establish his title to the property. 1937 M.W.N. 258=A.I.R. 1937 Mad. 582=45 L.W. 568=(1937) 1 M.L.J. 667. It is not correct to hold that in a suit under O. 21, R. 103, the Court has merely to ascertain whether the plaintiff was in possession at the date of the order against him, which has given rise to the suit. The rule requires the plaintiff to establish the rights which he claims to the present possession of the property. 17 Pat. 164=A.I.R. 1938 Pat. 433. This rule applies only where an order under R. 98, 99 or 101 has been passed. 69 I.C. 557=1923 L. 145. See also 132 I.C. 844=1931 L. 686. The orders referred to do not refer to those passed without investigation and not on the merits. 23 N.L.R. 94=97 I.C. 178=1926 N. 423. The rule is confined to suits for possession by purchaser under his purchase. It does not bar suits based on other causes of action. 30 C.W.N. 163=42 C.L.J. 578. But see 53 B. 668=31 Bom.L.R. 765=1929 B. 379. This rule applies where strangers are involved and S. 47 where the parties in the suit are involved. 41 M.L.J. 54=63 I.C. 730. See also 39 M.L.T. 281. The word "party" means party to the petition and to the execution. 43 M. 696=39 M.L.J. 456. See also 102 I.C. 446=8 Pat.L.T. 654. Where the manager of a joint Hindu family obstructs delivery of property to a purchaser, and the obstruction is ordered to be removed, the Court holding that the manager was not in possession, it must be taken that the manager is acting on behalf of the entire family. If no suit is filed to set aside that order within one year, it becomes final and conclusive not only as against the manager but against all the members of the family.



## NOTES.

1940 M.W.N. 144=51 L.W. 386=A.I.R. 1940 Mad. 636. See also 1937 O.W.N. 822=1937 Oudh 401. Right of suit—Plaintiff purchasing property during pendency of partition suit—Defendants subsequently purchasing same property from party to whom it is allotted by final decree—Dismissal of plaintiff's objection under R. 100 in execution proceedings by defendants. *Held*, in suit by plaintiff under R. 103, that his proper course was to proceed under S. 47, and the plaintiff had no *locus standi* to maintain an application under R. 100 and his suit under R. 103 was also not maintainable. 148 I.C. 731=1934 L. 457. Symbolical delivery does not amount to dispossession. 1 L.W. 31=24 I.C. 771. A transfer by vendee from the defendant is valid in the absence of an order preventing the vendee from disposing of the property pending the suit. 89 I.C. 990=1925 B. 413. Where during the pendency of a suit under O. 21, R. 103, the plaintiff loses possession of the property, an order for restoration of possession would be justified, if the suit is ultimately decreed. 1939 O.W.N. 876=1939 A.W.R. (C.C.) 193.

SUIT.—The scope of a suit under R. 103 is not the determination of merely the question of possession, but the establishment of the right or title by which the plaintiff claims present possession of the property. 36 Bom.L.R. 1074. See also 1939 Pat. 7. In a suit under this rule the claimant is not confined to a mere declaration of his right it is open to him to seek consequential relief by way of possession. 156 I.C. 702=1935 Sind 129. See also 1939 Pat. 7. A person who, claiming through the judgment-debtor, resists the decree-holder purchaser in taking possession cannot be heard to say that the decree on which the suit under R. 103 is based was without jurisdiction. 64 C.L.J. 115=41 C.W.N. 396=1937 Cal. 88. A person whose application under R. 100 is dismissed has a statutory right of suit under R. 103, and it makes no difference that he did not prefer an objection under R. 58. 132 I.C. 201=1931 L. 598. In a suit under this rule the plaintiff's title alone and not the mode in which or the point of time at which the ouster took place is material. 16 I.C. 741=18 C.W.N. 473. Where a claim was not treated as a suit, but the question was treated as an interlocutory proceeding, an order will not operate as *res judicata* in any subsequent proceeding. 44 M.L.J. 443=72 I.C. 582=1923 M. 514. Suit under O. 21, R. 103—If continuation of claim under O. 21, R. 11—Special oath in claim not necessarily conclusive in suit under S. 103. 51 L.W. 449=1940 Mad. 627=(1940) 1 M.L.J. 685. Where the decree-holder sells his own property by mistake, his only remedy is by suit. 15 L.W. 272=1922 M. 63. On this rule see also 132 I.C. 844=1931 L. 686; 18 Pat.L.T. 833=1938 Pat. 615; 19 Pat.L.T. 80.

PARTIES.—R. 103 does not purport to lay

down what may or may not be included in a suit filed for the purpose indicated therein, or what persons may be impleaded as parties to such a suit. 156 I.C. 702=1935 Sind 129; judgment-debtor is not a necessary party to a suit under this rule (*Ibid.*). As it is essential for the plaintiffs in a suit under O. 21, R. 103, to establish their right not only against the decree-holder, but also against the judgment-debtor, in such cases, the judgment-debtor would be a proper if not a necessary party. 1938 N.L.J. 107=A.I.R. 1938 Nag. 300.

FORUM.—The suit can be instituted only in the Court within whose jurisdiction the property lies. 6 Bom.L.R. 301. The proof required in the suit is not that of actual present possession merely, but includes a right to present possession as well. 44 M. 227=39 M.L.J. 626.

MATTERS TO BE DETERMINED IN SUIT.—In a suit by the execution purchaser for partition and separate possession of the property purchased by him, the defendant resister is precluded from re-agitating the questions which he has put forward and which have been adjudicated upon in the obstruction proceedings. So far as the conclusiveness enacted in the final part of R. 103 is concerned, it makes no difference whether the questions are sought to be re-agitated by a person as plaintiff or as defendant. But it will be going too far if it were held that every issue sought to be raised must be taken to be precluded by R. 103. Issues which could not be raised in the obstruction proceedings such as one which attacks the validity of the decree in execution of which the proceedings arose, can be raised in the suit and are not precluded by R. 103. 45 L.W. 91=1937 Mad. 366=(1937) 1 M.L.J. 122. See also 41 C.W.N. 396=1937 Cal. 88; 1938 P.W.N. 455=1938 Pat. 558=19 Pat.L.T. 916; 1939 Pat. 7.

PROPERTY ATTACHED AND SOLD JOINTLY OWNED BY JUDGMENT-DEBTOR AND HIS WIFE—PURCHASER'S RIGHT TO POSSESSION.—The property attached was joint property of the judgment-debtor and his wife and only the judgment-debtor's interest therein was attached and sold in execution proceedings and the extent of that interest was not determined. *Held*, it was not possible to hand over any portion of the property to the decree-holder-purchaser as being the share of the judgment-debtor. The judgment-debtor's interest must first be divided off. 1935 R. 11=154 I.C. 1045.

APPEAL.—In a suit under R. 103, C. P. Code, against the Official Receiver representing the estate of an insolvent, a decree was passed in favour of the plaintiff. The Official Receiver did not prefer an appeal. The appellant, who was one of the creditors of the insolvent, represented by the Official Receiver in the trial Court, presented an appeal against the decree in so far as it related to the Official Receiver and in applica-



LOC. AM.—[ALLAHABAD.] Add the following Rules to O. 21 :—

104. When the certificate prescribed by S. 41 is received by the Court which sent the decree for execution, it shall cause the necessary details as to the results of execution to be entered in its register of Civil Suits before the papers are transmitted to the record room.

105. Every attachment of movable property under r. 43, of Negotiable Instruments under r. 51 and of immovable property under r. 54, shall be made through a Civil Court Amin, or Bailiff, unless special reasons render it necessary that any other agency should be employed ; in which case those reasons shall be stated in the handwriting of the presiding Judge himself in the order for attachment.

106. When the property which it is sought to bring to sale is immovable property within the definition of the same contained in the law for the time being in force relating to the registration of documents, the decree-holder shall file with his application for an order for sale a certificate from the Sub-Registrar within whose sub-district such property is situated, showing that the Sub-Registrar has searched his Book Nos. I and II and their indices for the past twelve years preceding the mortgage or the attachment as the case may be and stating the encumbrances, if any, which he has found on the property.

107. Where an application is made for the sale of land or of any interest in land, the Court shall, before ordering sale thereof, call upon the parties to state whether such land is or is not ancestral land within the meaning of Notification No. 1887-I—238-10, dated 7th October, 1911, of the Local Government, and shall fix a date for determining the said question. On the day so fixed, or on any date to which the enquiry may have been adjourned, the Court may take such evidence by affidavit or otherwise, as it may deem necessary, and may also call for a report from the Collector of the District as to whether such land or any portion thereof is ancestral land. After considering the evidence and

#### NOTES.

on behalf of himself and the general body of creditors of the insolvent. *Held*, that appeal was not competent, nor was it a proper case for grant of leave. 57 M. 670=150 I.C. 538=39 L.W. 624=1934 M. 360=66 M.L. J. 532.

REVISION.—Order on application under R. 100—Revision—Competency — Grounds for interference. 44 L.W. 703; 18 Pat.L. T. 833=1937 Pat. 615. If an appeal is wrongly entertained against an order under this rule the appellate Court acts without jurisdiction, and the case is clearly one for revision by High Court, which has power to interfere either under the appellate jurisdiction or revisional jurisdiction. Even if a second appeal is not competent, High Court will interfere in revision. 165 I.C. 986=17 Pat.L.T. 815=1937 Pat. 136.

LIMITATION.—The suit must be filed within one year from the date of the order. Art. 11, Limitation Act, applies. *See* 9 M. L.J. 131; 44 A. 607; 10 B. 604; 26 B. 730; 19 Pat.L.T. 781=1938 P.W.N. 836; 1 L. 57; 34 C. 491; 27 M. 23; 103 P.L.R. 1916=36 I.C. 211. Not only is a suit barred, but defence will also be barred after the prescribed time. 38 I.C. 216. But if an order for delivery was not enforced, the defence can be raised at any time to such a suit. 45 I.C. 24=23 M.L.T. 233. A mortgagee whose claim has been rejected can sue after the lapse of one year. 29 C. 25. Dismissal for default of an application under R. 101 is not an order on merits and so limitation for suit does not start from the date of the dismissal. 45 I.C. 102=14 N.L.R. 66. As to appeal, *see* 90 I.C. 952=1925 M. 1198.

PRACTICE AND PROCEDURE—AMENDMENT OF PLAINT.—The suit to establish the right to possession contemplated by R. 103 is not one under S. 9 of the Specific Relief Act. Where suit is erroneously framed under the latter provision, the Court may in a proper case

permit the party to amend the plaint so as to convert it into an ordinary suit for possession. 1932 A.L.J. 812=139 I.C. 366=1932 A. 703. The proviso to S. 42 Specific Relief Act, does not take away special right conferred by this rule. Plaintiff suing under this rule for declaration of his title need not ask for possession also. 151 I.C. 59=17 N.L. J. 24=1934 N. 169. Suit by a vendee under O. 21, R. 103—Nature of—Plaintiff can claim rights under S. 53-A, T.P. Act, under principle of part-performance. 1939 O.W.N. 876=1940 Oudh 1.

COURT-FEE.—O. 21, R. 103 enables a suit to be filed on a Court-fee of Rs. 20 for possession, by a person who has been dispossessed in execution of a decree to which he is not a party, and whose application under R. 100 has been disallowed. Though the plaint does not purport to be filed under R. 103, when the plaint contains the necessary allegations the suit can be held to be one under the rule. It is the substance rather than the form of the suit which should be considered in determining the nature of the suit. 1935 A.M.L.J. 107. *See also* 1938 N.L.J. 107. The view that in a suit under O. 21, R. 103 the plaintiffs would have to pay Court-fees on that part of the claim which amounts to a prayer for recovery of possession is erroneous. 174 I.C. 630=1938 P.W.N. 307=19 Pat.L.T. 250=1938 Pat. 321.

O. 21, R. 105 (All.).—The provision in R. 105 for recording the reasons for employing an agency other than an amin or bailiff for making an attachment is not mandatory but directory. An order, therefore, for the appointment of a vakil to make an attachment is a good order and the attachment is not illegal or without jurisdiction, notwithstanding the fact that the Court has omitted to record the reasons in the order appointing him. 154 I.C. 631=1935 A.L.J. 367=1935 A.W.R. 206=1935 A. 490.



the report, if any, the Court shall determine whether such land, or any, and what part of it, is ancestral land. The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own handwriting.

108. When the property which it is sought to bring to sale is revenue paying or revenue free land or any interest in such land, and the decree is not sent to the Collector for execution under S. 68, the Court, before ordering a sale, shall also call upon the Collector in whose district such property is situate to report whether the property is subject to any (and, if so, to what) outstanding claims on the part of Government.

109. The certificate of the Sub-Registrar and the report of the Collector shall be open to the inspection of the parties or their pleaders, free of charge, between the time of the receipt by the Court and the declaration of the result of the enquiry. No fees are payable in respect of the report by the Collector.

110. The result of the enquiry under r. 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting. The Court may in its discretion adjourn the inquiry, provided that the reasons for the adjournment are stated in writing, and that no more adjournments are made than are necessary for the purposes of the enquiry.

111. If after proclamation of the intended sale has been made any matter is brought to the notice of the Court which it considers material for purchasers to know, the Court shall cause the same to be notified to intending purchasers when the property is put up for sale.

112. The costs of the proceedings under rr. 66, 106 and 108 shall be paid in the first instance by the decree-holder; but they shall be charged as part of the costs of the execution unless the Court, for reasons to be specified in writing, shall consider that they shall either wholly or in part be omitted therefrom.

113. Whenever any Civil Court has sold, in execution of a decree or other order, any house or other building situated within the limits of a Military cantonment or station, it shall, as soon as the sale has been confirmed, forward to the Commanding Officer of such cantonment or station for his information and for record in the brigade or other proper office, a written notice that such sale has taken place, and such notice shall contain full particulars of the property sold and of the name and address of the purchaser.

114. Whenever guns or other arms in respect of which licences have to be taken by purchaser under the Indian Arms Act (XI of 1878) are sold by public auction in execution of decrees by order of a Civil Court, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act.

115. When an application is made for the attachment of livestock or other movable property, the decree-holder shall pay into Court in cash such sums as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period of fifteen days, the amount of such costs for such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

116. Livestock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment-debtor on his furnishing security, or in that of some landholder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the Court.

117. If the custody of livestock cannot be provided for in the manner described in the last preceding rule, the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act, 1871, and committed to the custody of the pound-keeper, who shall enter in a register—(a) the number and description of the animals; (b) the day and hour on and at which they were committed to his custody; (c) the name of the attaching officer or his subordinate by whom they were committed to his custody and shall give such attaching officer or subordinate a copy of the entry.

118. For every animal committed to the custody of the pound-keeper as aforesaid, a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continues according to the scale prescribed under S. 12 of Act I of 1871. And the sums so levied shall be sent to the Treasury for credit to the Municipal or District Board, as the case may be, under whose jurisdiction the pound is. All such sums shall be applied in the same manner as fines levied under S. 12 of the said Cattle Trespass Act.

119. The pound-keeper shall take charge of, feed and water animals attached and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be, from time to time, prescribed under proper authority. Such rates shall, for animals specified in the section mentioned in the last preceding rule, not exceed the rates for the time being fixed under S. 5 of the same Act. In any case for special reasons to be recorded in writing the Court may require payment to be made for maintenance at higher rates than those prescribed.

120. The charges herein authorised for the maintenance of livestock shall be paid to the pound-keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and thereafter for such further period as the Court may direct, at the commencement of such period. Payments for such maintenance so made in excess of the sum due for the number of



days during which the animals may be in the custody of the pound-keeper shall be refunded by him to the attaching officer.

121. Animals attached and committed as aforesaid shall not be released from custody by the pound-keeper except on the written order of the Court, or of the attaching officer, or of the officer appointed to conduct the sale; the person receiving the animals, on their being so released, shall sign a receipt for them in the register mentioned in r. 118. [See 134 I.C. 836=1931 A.L.J. 865=1931 A. 567 (F.B.).]

122. For the safe custody of movable property other than livestock while under attachment, the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical.

123. With the permission of the Court the attaching officer may place one or more persons in special charge of such property.

124. The fee for the services of each such persons shall be payable in the manner prescribed in r. 116. It shall not be less than four annas, and shall ordinarily not be more than six annas per diem. The Court may, at its discretion, allow a higher fee; but if it does so, it shall state in writing its reasons for allowing an exceptional rate.

125. When the services of such person are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him and on the presentation of such certificate to the Court which ordered the attachment, the amount shall be paid to him in the presence of the presiding Judge: Provided that, where the amount does not exceed Rs. 5, it may be paid to the *sahna* by money order on requisition by the Amin, and the presentation of the certificate may be dispensed with.

126. When in consequence of an order of attachment being withdrawn or for some other reason, the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be.

127. Fees paid into Court under the foregoing rules shall be entered in the Register of Petty Receipts and Re-payments.

128. When any sum levied under r. 119 is remitted to the Treasury, it shall be accompanied by an order in triplicate (in the form given as Form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury Officials to the District or Municipal Board, as the case may be. A note that the same has been paid into the Treasury as rent for the use of the pound, will be recorded on the extract from the pass-book.

129. The cost of repairing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree-holder to the attaching officer. In the event of the decree-holder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

130. Nothing in these rules shall be deemed to prevent the Court from issuing and serving on the judgment-debtor simultaneously the notice required by O. 21, rr. 22, 66 and 107.

#### Garnishee Orders.

131. The Court may, in the case of any debt due to the judgment-debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument, or a debt recoverable only in a

#### NOTES.

O. 21, R. 122 (Allahabad).—Where a Commissioner appoints a *supurdar* and entrusts him with custody of movable property and the action taken by the Commissioner meets with the approval of the Court, the responsibility for the safe custody of the property shifts on to the *supurdar*, notwithstanding the fact that the Commissioner did not obtain the previous permission of the Court to appoint him. 154 I.C. 711=1935 A.L.J. 824=1935 A. 737.

O. 21, R. 124 (Allahabad).—An order by the executing Court calling upon the decree-holder to pay a certain sum of money to a custodian or *supurdar* by way of fees payable under R. 124, as amended by the Allahabad High Court, is not without jurisdiction. It is the execution Court only which can settle the fee which is to be paid to the custodian under the rule, and it is only the decree-holder, as the person who has got the property attached, that can be called upon to pay the fee. 1937 A.W.R. 141=1937 A.L.J. 160.

O. 21, R. 125 (Allahabad): SCOPE.—There is no provision in R. 125 or in any other part of O. 21, authorising the executing Court to adjudicate on a dispute between the decree-holder and his *shahnas*. It has to be decided in a separate suit. 152 I.C. 932=1935 A.L.J. 78=1935 A. 102.

O. 21, R. 131 (Allahabad).—Mortgage money left by the mortgagor with the mortgagee, out of the consideration for a possessory mortgage deed executed by him for payment to his creditor, is not a debt as contemplated in R. 131, and cannot be attached in execution of a decree against the mortgagor. 1934 A.L.J. 893=1934 A. 954. There is nothing in the words of R. 131 of O. 21, or anything in the principle underlying the garnishee orders which would justify a construction restricting the word "charge" in R. 131 to a charge created by act of parties only. A charge created by operation of law is equally within the purview of R. 131. 1940 A.W.R. (H.C.) 470=1940 A.L.J. 744=I.L.R. (1940) All. 881=A.I.R. 1940 All. 500.



Revenue Court) or any movable property not in the possession of the judgment-debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt or to deliver or account for such movable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into Court the debt due from or the property deliverable by him to such judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of the execution.

[For form of notice under this rule, see p. 983.]

132. If the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from or the property deliverable by him to the judgment-debtor, or so much as may be sufficient to satisfy the decree and the cost of execution, and does not dispute his liability to pay such debt or deliver such movable property or if he does not appear in answer to the notice, then the Court may order the garnishee to comply with the terms of such notice and on such order execution may issue as though such order were a decree against him.

133. If the garnishee disputes his liability the Court, instead of making such order, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit; and upon the determination of such issue shall pass such order upon the notice as shall be just.

134. Whenever in any proceedings under these rules it is alleged, or appears to the Court to be probable, that the debt or property attached or sought to be attached belongs to some third person or that any third person has a lien or charge upon, or interest in it, the Court may order such third person to appear and state the nature of his claim, if any upon such debt or property and prove the same, if necessary.

135. After hearing such third person, and any other person who may subsequently be ordered to appear or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as to such Court shall seem just and reasonable.

136. Payment or delivery made by the garnishee whether in execution of an order under these rules or otherwise shall be a valid discharge to him as against the judgment-debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realised although such order or the judgment may be set aside or reversed.

137. Debts owing from a firm carrying on business within the jurisdiction of the Court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction: Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be sufficient appearance by the firm.

138. The costs of any application under these rules, and of any proceedings arising therefrom or incidental thereto, or any order made thereon, shall be in the discretion of the Court.

139. (1) Where the liability of any garnishee has been tried and determined under these rules, the order shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(2) Orders not covered by clause (1) shall be appealable as orders made in execution.

*Illustration.*—An application for a garnishee order is dismissed either on the ground that the debt is secured by charge or that there is no *prima facie* evidence of debt due. This order is appealable as an order in execution.

140. All the rules in this Code relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under O. 7 or O. 8 shall apply to all proceedings taken under O. 21 or S. 47.

#### NOTES.

**O. 21, R. 139 (Allahabad): ORDER AGAINST GARNISHEE—NATURE OF COST—RIGHT TO SET OFF.**—The conjoint effect of Rr. 19, 132, 133 and 139 is that if the garnishee is ordered to pay a certain sum of money to the decree-holder, such order is a decree which virtually becomes part and parcel of the original decree passed in the suit. It cannot be said that the two decrees are decrees in separate suits, because the order against the garnishee which *ex hypothesi* amounts to a decree, has been passed in execution proceedings in the same suit. When an order of payment is passed against a garnishee, such order supplements the decree passed in the original suit. In these circumstances, the garnishee has a right under R. 19 to obtain a set-off in respect of costs awarded to him under the original decree. 152 I.C. 96=1934 A. 1056. Sub-R. (2) of R. 139 of O. 21 is intended to cover the

case where the decision is that the application should be dismissed and sub-R. (1) is intended to cover the case where the application is allowed. The object of the distinction may be to exempt a decree-holder who has already paid court-fee on his plaint from a further *ad valorem* payment, where he has to appeal from a dismissal of a garnishee application. But where the appeal has to be brought by a garnishee when his liability is held to exist, the garnishee may have been intended to pay *ad valorem* court-fee, as he has not paid any court-fee in the lower Court. Where the liability of a garnishee has been held to exist and an appeal is preferred, it is on account of the special provision in O. 21, R. 139 (1). The words refer to those conditions of an appeal as if it were a decree—and one of such conditions of an appeal from a decree for money is the payment of *ad valorem* court-fees. 1938 A.L.J. 232=A.I.R. 1938 All. 254.